

WHEN DAD REACHED ACROSS THE AISLE: HOW MARIO CUOMO CREATED A BIPARTISAN COURT OF APPEALS

*Benjamin Pomerance**

Today, New York State stands at one of the most important judicial crossroads in its history. For only the second time ever, a single individual may have within his grasp the power to control the entire membership of the state's highest judicial institution. If current Governor Andrew Cuomo wins re-election in 2014 and returns to the Governor's Mansion for another four-year term, he will enjoy a virtually unprecedented political opportunity: the chance to appoint all seven of the judges sitting on the New York State Court of Appeals.¹

With mandatory retirement² looming during the next four years for all but two of the judges presently on the Court of Appeals—the exceptions being Judge Jenny Rivera, whom Cuomo appointed to the court in January, and Judge Sheila Abdus-Salaam, whom Cuomo appointed to the court in April³—Andrew Cuomo will truly

* Excelsior Service Fellow, New York State. J.D., Albany Law School, 2013; B.A., SUNY Plattsburgh, 2010. The views expressed here are solely the opinion of the author, and do not necessarily represent the views of the Excelsior Fellow program. Many thanks are owed to Professor Vincent M. Bonventre, whose wisdom about judges and state constitutional adjudication inspired this article, and to my parents, Ron and Doris Pomerance, whose support and encouragement is treasured by me.

¹ See Vincent M. Bonventre, *The Vacancies Are Coming!—The Entire NY Court of Appeals Soon to be [newly/re]Appointed*, N.Y. CT. WATCHER (Sept. 18, 2012), <http://www.newyorkcourtwatcher.com/2012/09/the-vacancies-are-coming-entire-ny.html>; Karen Dewitt, *Governor Andrew Cuomo Has Chance to Remake State's Highest Court*, WRVO PUBLIC MEDIA (Jan. 8, 2013), <http://www.wrvo.info/post/governor-andrew-cuomo-has-chance-remake-states-highest-court>; Sam Favate, *Gov. Cuomo Set to Shape New York's Bench*, WALL ST. J. (Nov. 9, 2011, 12:30 PM), <http://blogs.wsj.com/law/2011/11/09/gov-cuomo-set-to-shape-new-yorks-bench> (“There is ‘huge’ potential [for Cuomo] to ‘remake the Court of Appeals in his image.’”).

² Under the New York State Constitution, judges are required to retire from the Court of Appeals at age seventy, even if they still have years remaining on their fourteen-year term. N.Y. CONST. art. VI, § 2(a); N.Y. CONST. art. VI, § 25(b).

³ Robert Gavin, *Cuomo Names Judge Choice*, TIMES UNION (Albany, N.Y.), Jan. 16, 2013, at A3; Ken Lovett, *Gov. Cuomo Set to Name Judge Shelia Abdus-Salaam to Court of Appeals (UPDATE)*, N.Y. DAILY NEWS (Apr. 5, 2013, 2:00 PM), <http://www.nydailynews.com/blogs/dailypolitics/2013/04/gov-cuomo-set-to-name-judge-sheila-abdus-salaam-to-court-of-appeals>.

hold the future of the state's tribunal of last resort within his grasp.⁴ Through these appointments, he will leave an impact on the state's judiciary—and, concurrently, on the entire population of New York—that will resonate for decades to come. The possibilities of what Governor Cuomo could do seem virtually endless—and, for his political opponents, appear to be downright scary. Indeed, his first appointment to the Court of Appeals, bringing the outspoken liberal scholar Rivera to the bench, rankled enough legislators that her confirmation hearings featured the most dissention seen in these proceedings in several years.⁵ One can only imagine that those legislators who vehemently opposed Rivera are wondering just who else the Governor might have waiting in the wings.⁶ Interestingly though, a much lighter questioning awaited Abdus-Salaam, an Associate Justice of the First Department since 2009⁷—and one with a liberal voting record on most cases⁸—when brought before the Senate Judiciary Committee.⁹

Yet in this act of judicial pottery, Cuomo will have access to a master craftsman if he wishes to seek advice about how to mold the composition of the Court of Appeals. That political artisan is none other than his father, Mario, Governor of the State of New

⁴ See *supra* note 1 and accompanying text.

⁵ See John Caher, Rivera Confirmed for Court of Appeals Seat, N.Y.L.J., Feb. 13, 2013, at 1, col. 3 (“[S]everal Republican members of the Judiciary Committee questioned Rivera’s qualifications and opposed her nomination at the committee level.”); Rick Karlin, *Rivera Cleared for Appeals Court*, TIMES UNION (Albany, N.Y.), Feb. 12, 2013, at A3 (“[T]he Republican-controlled Senate Judiciary Committee . . . spent hours grilling the nominee for what several said was her lack of trial or judicial experience.”); Celeste Katz, *Jenny Rivera On Way To NY Court of Appeals*, N.Y. DAILY NEWS (Feb. 11, 2013, 6:28 PM), <http://www.nydailynews.com/blogs/dailypolitics/2013/02/jenny-rivera-on-way-to-ny-court-of-appeals> (“Rivera’s nomination was approved by a voice vote after Republicans continued to complain that Rivera, who has never served as a judge, lacked the qualifications to serve on the state’s highest court.”).

⁶ Indeed, one can imagine that Republicans were not pleased by the second short list that Cuomo was handed, which contained only registered Democrats. See Vincent M. Bonventre, *NY Court of Appeals: Who’s on the List for the Jones’ Vacancy? (Part 1)*, N.Y. CT. WATCHER (Mar. 18, 2013), <http://www.newyorkcourtwatcher.com/2013/03/ny-court-of-appeals-whos-on-list-for.html>.

⁷ Kenneth Lovett, *Breakthrough In State Courts*, N.Y. DAILY NEWS, Apr. 5, 2013, at 22; Marc Santora, *Cuomo Picks Judge In City To Fill Spot At Top Court*, N.Y. TIMES, Apr. 5, 2013, at A14.

⁸ See also Vincent M. Bonventre, *NYCOA: Who’s on the List for the Jones’ Vacancy? (Part 3: Abdus-Salaam & Renwick)*, N.Y. CT. WATCHER (Apr. 3, 2013), <http://www.newyorkcourtwatcher.com/2013/04/nycoa-whos-on-list-for-jones-vacancy.html> (“[Abdus-Salaam’s] record in close cases . . . indicates that she is at least moderately liberal. Both in criminal and civil matters.”).

⁹ See Casey Seiler, *Appellate Court Nominee Approved*, TIMES UNION (Albany, N.Y.), Apr. 30, 2013, at A3.

York from 1983 to 1994.¹⁰ During those years, Mario Cuomo became New York's first—and, to date, only—governor to completely reshape the Court of Appeals during his tenure.¹¹ By the time he left office, every judge on the court's bench was a Mario Cuomo appointee.¹² And as political observers are doing now with his son, speculation about Mario Cuomo's motivations in choosing Court of Appeals judges raged rampant with every appointment.¹³

In retrospect, though, Mario Cuomo's eleven Court of Appeals appointments have been largely celebrated—not only for the legal acumen of the judges whom he picked, but also for the finesse he displayed over the highly politicized process of selecting high court judges.¹⁴ He transformed the Court of Appeals from an all-white, all-male court into an outwardly more diverse body, appointing the court's first female judge,¹⁵ the court's first Hispanic judge,¹⁶ and the court's first African-American judge to serve a full term.¹⁷ He sensed the palpable fear held by many that the judicial appointment process—still extremely new in New York State—would dissolve into petty partisanship,¹⁸ and created a Court of Appeals that was

¹⁰ For a concise but very informative look at Mario Cuomo's tenure as governor, as well as his political philosophies, see ERIN GOLEMBIEWSKI, *MARIO CUOMO'S PRIVATE AFFAIRS AND PUBLIC RESPONSIBILITY* (2008).

¹¹ See Dewitt, *supra* note 1.

¹² See *infra* Part V.

¹³ See *infra* Part V for a discussion of some—although certainly not all—of the controversies and debates that surrounded Mario Cuomo's picks.

¹⁴ See, e.g., Erik Kriss, *Andy Can Court All New Judges*, N.Y. POST, Jan. 1, 2013, at 3 (“[Mario Cuomo] appointed as many Republicans as Democrats and as many conservatives as liberals.”); Press Release, Puerto Rican Bar Ass'n, PRBA Press Release: Court of Appeals Vacancy (Nov. 13, 2012), <http://www.prba.net/main.cfm?actionId=globalShowStaticContent&screenKey=cmpMedia&htmlID=19100&s=prba> (“Governor Mario Cuomo[']s record on diverse appointments will be lauded for generations to come. It is a legacy he can be proud of.”); Dewitt, *supra* note 1 (“Mario Cuomo drew from both major political parties, including former Chief Judge Sol Wachtler, a Republican.”).

¹⁵ See Judith Friedman Rosen, *Judith S. Kaye*, JEWISH WOMEN'S ARCHIVE (March 1, 2009), <http://jwa.org/encyclopedia/article/kaye-judith> (noting that Mario Cuomo appointed Kaye to the Court of Appeals in part because he was “looking to diversify the court system” in New York).

¹⁶ See James Dao, *Cuomo Choice For Top Court Is Woman*, 51, N.Y. TIMES, Dec. 2, 1993, at B1. Notably, when the time came for Judge Ciparick to retire, Andrew Cuomo replaced her with another Hispanic jurist in Judge Jenny Rivera.

¹⁷ See *Senate Confirms Judge Alexander*, N.Y. TIMES, Jan. 30, 1985, at B2 (discussing the appointment of Fritz Alexander II to the Court of Appeals). By appointing Abdus-Salaam—the first African-American female to serve on the Court of Appeals—Andrew Cuomo seemed to follow in his father's diverse footsteps. See Seiler, *supra* note 9.

¹⁸ See, e.g., SARAH F. LIEBSCHUTZ ET AL., *NEW YORK POLITICS & GOVERNMENT: COMPETITION AND COMPASSION* 128, 129 (1998) (“[O]pponents contended that judicial appointment[s] would favor the ‘economic and social elite’ Shortly after the new system

ideologically balanced: four Democrats, four Republicans, and one avowed Independent.¹⁹ Notably, none of Mario Cuomo's successors have chosen a single Court of Appeals judge from the party opposite of their own.²⁰

Despite this spirit of bipartisanship and diversity, Mario Cuomo still managed to form a Court of Appeals that often voted the way Cuomo wanted on certain key issues, such as the death penalty and due process rights of criminal defendants.²¹ What's more, he established a judicial body that proved largely unafraid to reach conclusions opposite of those reached by the United States Supreme Court on important questions, asserting the state's judicial sovereignty and recognition of its own independent legal values.²²

Thus, it would seem that the son would do well to heed the words of his father on how to manage the power of remodeling the entire Court of Appeals. Certainly, there is every likelihood that Andrew Cuomo would listen to his father, the man who gave him his entrée

came into effect, a member of the state legislature complained, 'I think we have brought more politics into the process than . . . we ever did when judges were elected.'").

¹⁹ See *infra* Part VI.

²⁰ George Pataki, a Republican, appointed only Republican judges: Richard C. Wesley, Albert M. Rosenblatt, Victoria Graffeo, Robert C. Smith, Susan P. Read, and Eugene F. Pigott. Op.-Ed., *Judging Cuomo*, N.Y. DAILY NEWS, July 15, 2012, at 30. Eliot Spitzer, a Democrat, selected a Democrat, Theodore Jones. Sewell Chan, *Spitzer Selects A Black Jurist For Top Court*, N.Y. TIMES, Jan. 15, 2007, at B1. Democrat David Paterson picked a Democrat, Jonathan Lippman, to become Chief Judge of the court. John Eligon, *Paterson Picks Nominee For Top Judge, And Objects That His Choices Included No Women*, N.Y. TIMES, Jan. 14, 2009, at A28. Thus far, Andrew Cuomo's selections to the court, Rivera and Abdus-Salaam, are both Democrats. See Lovett, *supra* note 3.

This recent party-lines-only appointment history has rejuvenated many of the early fears about corruption and blatant partisanship in the judicial appointment process. See, e.g., John Caher, *Model For Selecting Top Court Judges Reveals Its Flaws*, N.Y.L.J., Nov. 13, 2003, at 30, col. 2 ("[Pataki's partisan appointments] reinforced the perception that only friends and contributors have a realistic shot at garnering the support of Mr. Pataki."); see also James A. Gardner, *New York's Inbred Judiciary: Pathologies of Nomination and Appointment of Court of Appeals Judges*, 58 BUFF. L. REV. 15, 18 (2010) ("Although the current method of selecting Court of Appeals judges was designed to be wide open and based entirely on merit, the selection process, as it has actually evolved in practice, is neither."); Vincent M. Bonventre, Public Policy Forum, *Filling Vacancies On The NYS Court of Appeals: Selection Under The "Nonpolitical Merit" Appointment System*, at 3 (Nov. 29, 2006) ("[I]f you believe that politics has been removed from the selection process and that merit is the primary criterion for selecting Court of Appeals judges, you probably believe in *The Wizard of Oz* and flying monkeys.").

²¹ See generally *infra* Parts V & VI.

²² See, e.g., Elizabeth Kolbert, *On Rights, New York Looks To State, Not U.S., Law*, N.Y. TIMES, Jan. 8, 1990, at A1; E.R. Shipp, *New York's High Court Is A Cuomo Production*, N.Y. TIMES, Jan. 18, 1987, at 35 ("In several cases, [the Cuomo appointees have] rejected the United States Supreme Court's interpretations of the Federal Constitution in favor of broader protections in the State Constitution.").

into state politics²³ and the person with whom Andrew, as a law student, would debate legal questions long into the night.²⁴ The question, though, is precisely what advice the father would give.

We will never know the contents of such a conversation—if one even occurs—between former governor and current governor, father and son. This article, however, attempts to speculate on the focal points of such a talk. It begins by briefly recounting the background of Mario Cuomo himself, highlighting characteristics that may have influenced his process in selecting members of New York's high court. Next, it looks at the New York State Court of Appeals as Mario Cuomo inherited it, studying its composition at the time when Cuomo began his first term in office. We then look at the “perfect storm” of factors which allowed Mario Cuomo to instantly enjoy an unprecedented opportunity to re-make the entire court.

From there, we move to an examination of Mario Cuomo's eleven Court of Appeals appointments, studying each of them through the lens of certain criteria that may have been important to Cuomo in making these appointments, and a short study of the judicial records that these judges left during their years on the Court of Appeals. Lastly, we connect the dots to see how “balanced” the Court of Appeals really was after Mario Cuomo had finished shaping it, and look at which of these factors, if any, seemed to have been particularly important to Cuomo in making these judicial selections.

I. THE MAN: A BRIEF PORTRAIT OF MARIO CUOMO

The man who would become the fifty-second governor of New York was born on June 15, 1932, a New York City Depression-era child born into a family of Italian immigrants.²⁵ His parents owned a neighborhood grocery store in Queens,²⁶ a step up from the years that his father had spent digging ditches as a laborer in Jersey City.²⁷ The store was open twenty-four hours a day.²⁸ Cuomo later

²³ See Elizabeth A. Harris, *Cuomo's Housing In Albany, From Old Hotel to Mansion*, N.Y. TIMES, Jan. 2, 2011, at 18.

²⁴ See *id.*

²⁵ MARIO M. CUOMO, DIARIES OF MARIO M. CUOMO: THE CAMPAIGN FOR GOVERNOR 8 (1984) [hereinafter THE CAMPAIGN FOR GOVERNOR].

²⁶ *Id.*

²⁷ Mario Cuomo, *Achieving The American Dream* (1996), available at <https://sites.google.com/site/higginsenglish/%22achievingtheamericandream%22> [hereinafter Cuomo, *Achieving The American Dream*].

²⁸ THE CAMPAIGN FOR GOVERNOR, *supra* note 25, at 8.

stated that watching his parents work in the store—and later helping them with their daily tasks—taught him the importance of a strong work ethic.²⁹ He also said that by observing his family members closely, he grew to understand both the joys and the struggles of immigrant life in America:

Though not an immigrant myself, I saw the hardships Italian immigrants had to endure. I saw their struggle to make themselves understood in an alien language, their struggle to rise out of poverty, and their struggle to overcome the prejudices of people who felt superior because they or their ancestors had arrived earlier on this nation's shores.

As an Italian American, I grew up believing that America is the greatest country on earth, and thankful that I was born here. But at the same time, I have always been intensely proud that I am the son of Italian immigrants and that my Italian heritage helped make me the man I am.³⁰

To this day, Cuomo remains fiercely proud of his Italian-American heritage, frequently speaking about the influence of his Italian upbringing and about the challenges that Italian immigrants have faced in the United States.³¹ His zeal for this topic extends into his stance on immigration policy in general, a strong left-wing viewpoint characterized by objections to what Cuomo considers the “unfair stereotyping” of immigrants in modern-day America.³²

²⁹ *Id.* at 8–9; Cuomo, *Achieving The American Dream*, *supra* note 27.

³⁰ Cuomo, *Achieving The American Dream*, *supra* note 27.

³¹ See, e.g., Richard Stengel, *What to Make of Mario*, TIME, June 2, 1986, at 28, 30. In fact, Cuomo has stated that the greatest speech he ever gave was an address to the National Italian-American Foundation in Washington, D.C., in which he told an audience of Italian-American luminaries—from Hall of Fame quarterback Dan Marino to U.S. Supreme Court Justice Antonin Scalia—to rejoice in their successes, but also to remember the hardships and prejudices that their families faced in America. See Michael Pakenham & Bob Guccione, Jr., *Antihero*, SPIN, July 1992, at 50, 55–56 “Remember when they called you a dago, a wop, a guinea, a greaseball,” he demanded. *Id.* at 56. Then, later in the remarks, he continued by stating “[w]hat I’m saying is, we have a magnificent opportunity. Nobody knows the pain more than we do. . . . Look at the opportunity we have now: to take that lesson and to teach it by behaving toward the new seekers, the new strugglers, showing them a generosity we never got.” *Id.*

³² See Mario M. Cuomo, *Immigration Is Source of Our Strength*, USA TODAY, July 19, 1993, at 11A; Pakenham & Guccione, Jr., *supra* note 31, at 56; Cuomo, *Achieving The American Dream*, *supra* note 27; Richard D. Heffner, “Mario Cuomo . . . Governing Principles,” Part I, THE OPEN MIND, Mar. 7, 1987, <http://www.thirteen.org/openmind/history/mario-cuomo%E2%80%A6governing-principles-part-i/303/> (“In other words, there isn’t all that much difference between growing up Italian in America and growing up Greek or Polish or Jewish. It all has to do with being family-oriented, immigrant and poor.”); Greg Sandoval, *Mario Cuomo’s three wishes for U.S.:*

Cuomo earned his bachelor's degree from St. John's University in 1953.³³ He then entered law school at St. John's, graduating first in his class in 1956.³⁴ From there, he went on to clerk for New York Court of Appeals Judge Adrian P. Burke,³⁵ a liberal Democrat with multiple close ties to New York City political leaders.³⁶ It was Burke who joined with Senator Robert F. Wagner and New York City Mayor Fiorello LaGuardia to successfully advocate for a revolutionary change to the New York State Constitution: an amendment stating that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state."³⁷ Burke may have had a lasting influence on Cuomo with regard to this principle. Throughout his life and political career, Cuomo has emphasized this concept repeatedly, stressing the importance of the state's role in improving conditions for the indigent and the underrepresented.³⁸

In the late 1960s, Cuomo made his first noteworthy impact on New York City's political and legal scene. When the city announced plans to build a new high school in the Queens neighborhood of Corona, Cuomo represented a group of sixty-nine homeowners—later known as the "Corona Fighting 69"—whose properties would have to be destroyed if the school were built.³⁹ After a bitter six-year battle, Cuomo and the homeowners prevailed against City

Education, immigrants, tech, CNET (June 3, 2012, 6:25 AM), http://news.cnet.com/8301-1023_3-57446201-93/mario-cuomos-three-wishes-for-u.s.-education-immigrants-tech ("You can't argue against . . . the need for immigrants.").

³³ See Stengel, *supra* note 31, at 32; *Former New York Governor Mario Cuomo to Speak*, UNLV NEWSCENTER (Mar. 6, 1995), <http://news.unlv.edu/release/former-new-york-governor-mario-cuomo-speak>.

³⁴ See Stengel, *supra* note 31, at 32.

³⁵ Jonathan D. Salant, *Milestones Mark Festivity*, TIMES UNION (Albany, N.Y.), Jan. 2, 1983, at A1. One can only imagine that Cuomo's early introduction to the role of the Court of Appeals instilled him with a certain measure of respect for his state's highest court, something that may have come in handy when the time came to make judicial selections for the Court of Appeals.

³⁶ See Bernard Gegan, *Adrian Paul Burke*, in JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 639, 640 (Albert M. Rosenblatt ed., 2007) [hereinafter JUDGES OF THE NEW YORK COURT OF APPEALS].

³⁷ *Id.* The fact that this guarantee goes beyond any protection promised by the U.S. Constitution *may* have influenced Cuomo's respect for the New York State Constitution's ability to afford New Yorkers protections beyond those guaranteed by the federal Constitution.

³⁸ See, e.g., Heffner, *supra* note 32 ("I see the disparity. I see the incongruity. I see the stupidity. I see the absurdity of it. From Manhattan you can see the towering buildings of the affluent and blocks away, people sleeping on grates, looking for a little heat from the vent outside of Madison Square Garden. Why?").

³⁹ JONATHAN MAHLER, LADIES AND GENTLEMEN, THE BRONX IS BURNING: 1977, BASEBALL, POLITICS, AND THE BATTLE FOR THE SOUL OF A CITY 104–06 (2005).

Hall, avoiding condemnation orders for the vast majority of homes that were targeted for demolition.⁴⁰ Fresh off of that fight, Cuomo entered into another housing battle, appointed by New York City Mayor John Lindsay in 1972 to mediate a dispute over plans to build low-income public housing in the affluent neighborhood of Forest Hills.⁴¹ His work in bringing this conflict to resolution caught the attention of New York City political bosses,⁴² who were impressed both by Cuomo's diplomacy and by his ability to stand firm in the face of intense criticism.⁴³ Some commentators labeled Cuomo's work in the Forest Hills housing dispute as the event that launched the future governor's political career.⁴⁴

In 1974, Cuomo entered his first major race for state office, running for lieutenant governor.⁴⁵ He lost soundly in the Democratic primary.⁴⁶ When Democrat Hugh Carey won the gubernatorial election, however, he appointed Cuomo as New York's Secretary of State, giving Cuomo his first real taste of Albany politics.⁴⁷ Three years later, Cuomo ran for mayor of New York City.⁴⁸ This would prove to be perhaps the worst experience of his entire political career. After narrowly losing the city's Democratic primary to Ed Koch,⁴⁹ Cuomo went against the advice of party

⁴⁰ *Id.* at 105–06; *see also* Thomas L. Waite, *Corona '88: It's Schools Now, Not Homes*, N.Y. TIMES, July 10, 1988, at 9 (discussing Cuomo's involvement with Corona). In the fight with City Hall, Cuomo benefited from the dedicated reportage of New York City journalist Jimmy Breslin, a newspaper reporter who, in the words of his editor, "believed that politicians needed to be beaten every morning in order to keep them attentive to the will of the people." MAHLER, *supra* note 39, at 105. Breslin befriended Cuomo, whom the newspaperman referred to as "talent willing to be tortured," and brokered the meeting at City Hall where Cuomo finally convinced Mayor John Lindsay to accept the residents' compromise proposal. *Id.* at 105–06.

⁴¹ *See* MAHLER, *supra* note 39, at 106.

⁴² *See id.* at 106–08.

⁴³ *See id.* at 108 ("Mario Cuomo had faced down some of the worst impulses of his city with humanism. He had recognized the misguided absolutism of the liberals who considered his compromise plan a betrayal, but he had never wavered in his commitment to the principle of integration obscured by their zealotry.").

⁴⁴ *Id.* ("In the wake of the Forest Hills compromise, [Jimmy] Breslin and a few of Cuomo's other boosters urged him to run for mayor in 1973.").

⁴⁵ *Id.* at 109.

⁴⁶ *Id.* ("It was a humiliating defeat for a man with so much political promise.").

⁴⁷ *Id.*

⁴⁸ *See* Stengel, *supra* note 31, at 28.

⁴⁹ *See* Ken Rudin, *Ed Koch, New York City, And The Politics Of Resentment And Race*, NPR BLOG (Feb. 4, 2013, 11:54 AM), <http://www.npr.org/blogs/politicaljunkie/2013/02/04/170842922/ed-koch-new-york-city-and-the-politics-of-resentment-and-race>. Cuomo was the favorite in this race, securing the strong backing of New York State Governor Hugh Carey. *Id.*; *see also* Doug Ireland, *To Run Or Not To Run*, N.Y. MAG., Mar. 21, 1977, at 8 (demonstrating Governor Carey supported Mario

leaders, including Governor Carey, and threw his name into the general election anyway, running as a third-party candidate.⁵⁰ He engaged in a vigorous smear campaign against Koch, criticizing Koch in multiple attack ads that ran on television and radio.⁵¹ When rumors about Koch's sexual orientation surfaced, someone created placards reading "Vote for Cuomo, Not the Homo"⁵²—an act that Cuomo has consistently denied knowing about until long after the deed was done⁵³—and distributed those signs throughout the city. Koch's supporters, in retaliation, accused Cuomo of being an anti-Semite, and threw eggs at Cuomo campaign signs and vehicles.⁵⁴ In the end, Cuomo lost that election to Koch by a wide margin.⁵⁵ Many commentators believed that he had also lost the trust and support of many of the city's powerful Democratic officials.⁵⁶

By 1978, however, all seemed to be forgiven when Cuomo made his second attempt at a run for lieutenant governor.⁵⁷ This time, he was elected easily.⁵⁸ Four years later, in a rematch with Ed Koch, Cuomo won the Democratic gubernatorial primary, doing so largely on his platform of staunch opposition to the death penalty.⁵⁹ He

Cuomo). However, Koch's "tough on crime" stances greatly appealed to a city that had recently been wrought with a blackout, riots, looting, and other forms of rampant criminal activity. *See Rudin, supra*. In the end, only thirty thousand votes separated the top four candidates in the Democratic primary, with Koch the surprising winner by approximately ten thousand votes over Cuomo. *Id.*

⁵⁰ Stengel, *supra* note 31, at 28.

⁵¹ *See id.* at 33 ("In the campaign debates, he made Congressman Ed Koch appear to be the victim, not an easy thing to accomplish. 'I was too prosecutorial,' [Cuomo] says.")

⁵² *See Rudin, supra* note 49. Apparently, Koch held a grudge for the rest of his life against Mario Cuomo—and Andrew Cuomo, too—for the signs. Bill Hutchinson & Larry McShane, *Ed Koch, who was always private about his sex life, took a shot at former rival Mario Cuomo over 'Homo' ads in an interview released after his death*, N.Y. DAILY NEWS (Feb. 1, 2013, 9:47 AM), <http://www.nydailynews.com/new-york/koch-gay-legacy-article-1.1252984>.

⁵³ *See Celeste Katz, Rabbi Yehuda Levin Resurrects Old Koch/Cuomo Smear At City Hall*, N.Y. DAILY NEWS (Sept. 20, 2010, 6:59 PM), <http://www.nydailynews.com/blogs/dailypolitics/2010/09/rabbi-yehuda-levin-resurrects.html> ("Both Cuomos have long denied any knowledge of the smears.")

⁵⁴ *See MAHLER, supra* note 39, at 313.

⁵⁵ Rudin, *supra* note 49.

⁵⁶ *See MAHLER, supra* note 39, at 316.

⁵⁷ Stengel, *supra* note 31, at 33.

⁵⁸ *Id.*

⁵⁹ *Id.* Remarkably, it was Koch, not Cuomo, who received the backing of outgoing Governor Hugh Carey in the Democratic primary, even though Cuomo was serving as Carey's Lieutenant Governor at the time. *See Jeffrey Schmalz, The Mystery of Mario Cuomo*, N.Y. TIMES, May 15, 1988, at 36; *see also* Stengel, *supra* note 31, at 33 ("Defeating Koch was a catharsis for Cuomo; he had come from way behind to upset the man whom he once thought of as his nemesis.")

then defeated Republican investment banker Lewis Lehrman in the general election, a race that was largely decided along economic lines.⁶⁰ Just six years after his seemingly devastating defeat in the race for Mayor of New York City, Mario Cuomo had reached the highest executive office in New York State.

In 1984, he would take another step forward on the road to national prominence, delivering the keynote address at the Democratic National Convention.⁶¹ The speech would solidify Cuomo's reputation as an advocate for low-income individuals and a staunch supporter of civil rights causes, particularly when he attacked President Ronald Reagan's description of America as a "city on a hill":

[T]he hard truth is that not everyone is sharing in this city's splendor and glory. A shining city is perhaps all the President sees from the portico of the White House and the veranda of his ranch, where everyone seems to be doing well. But there's another city; there's another part to the shining the [sic] city; the part where some people can't pay their mortgages, and most young people can't afford one; where students can't afford the education they need, and middle-class parents watch the dreams they hold for their children evaporate.

In this part of the city there are more poor than ever, more families in trouble, more and more people who need help but can't find it. Even worse: There are elderly people who tremble in the basements of the houses there. And there are people who sleep in the city streets, in the gutter, where the glitter doesn't show. There are ghettos where thousands of young people, without a job or an education, give their lives away to drug dealers every day. There is despair, Mr. President, in the faces that you don't see, in the places that you don't visit in your shining city.

. . . Mr. President you ought to know that this nation is more a "Tale of Two Cities" than it is just a "Shining City on a Hill."⁶²

⁶⁰ See Salant, *supra* note 35; Stengel, *supra* note 31, at 33.

⁶¹ A video of the complete speech delivered by Cuomo in San Francisco is available on YouTube. *Mario Cuomo's 1984 Convention Speech*, YOUTUBE (Apr. 27, 2007), <http://www.youtube.com/watch?v=kOdIqKsv624>.

⁶² Mario M. Cuomo, 1984 Democratic National Convention Keynote Address (July 16, 1984) (transcript available at

The convention speech proved to be the first of several cutting rebukes that Cuomo offered to the Reagan administration, including critiques about Reagan's appointments to the U.S. Supreme Court.⁶³ In 1987, back in the Governor's Mansion for a second term after routing Republican challenger Andrew P. O'Rourke,⁶⁴ Cuomo delivered an address that accused Reagan of dismissing rampant homelessness, poverty, hunger, and other social problems as issues beyond the government's control.⁶⁵ By failing to even acknowledge these needs, Cuomo argued, Reagan had shirked the most basic duties of an elected governmental leader.⁶⁶ "We're about to choose new leadership for this wonderful nation," he stated, "I say: thank goodness."⁶⁷

By this point, many political insiders expected that the "new leadership" would be Cuomo himself. His rise in the Democratic Party and widespread popularity—a reputation which existed far beyond the borders of New York State—left plenty of commentators speculating about a presidential run.⁶⁸ Polls indicated that if he threw his hat into the ring, Cuomo would certainly be the front-runner for the Democratic nomination, and perhaps the most likely person to end up in the White House.⁶⁹ And Cuomo himself, now serving a third term as governor after another landslide win in 1990,⁷⁰ finally agreed to "look at the presidency" in 1991.⁷¹

<http://www.americanrhetoric.com/speeches/mariocuomo1984dnc.htm>).

⁶³ See, e.g., Jeffrey Schmalz, *Cuomo Questions Bork's Objectivity*, N.Y. TIMES, Sept. 13, 1987, at L37 (explaining Cuomo's questioning of Judge Robert H. Bork's appointment to the court).

⁶⁴ See Joseph Berger, *Andrew P. O'Rourke, Rival To Mario Cuomo, Dies at 79*, N.Y. TIMES, Jan. 5, 2013, at B8.

⁶⁵ Kiley Armstrong, *Dukakis, Babbitt Criticize Bork Nomination*, ASSOCIATED PRESS, July 8, 1987, <http://www.apnewsarchive.com/1987/Dukakis-Babbitt-Criticize-Bork-Nomination/id-992321ddac2febe07796b95cd85be5ce>.

⁶⁶ *Id.* (stating that our nation has regressed to "survival of the fittest," Cuomo seems to suggest that the President has failed to care for his citizens basic needs).

⁶⁷ *Id.*

⁶⁸ See Charles C. Mann, *The Prose (And Poetry) of Mario M. Cuomo*, THE ATLANTIC, Dec. 1990, at 90. ("[Cuomo is] a man whom Democrats have longingly invoked as a presidential candidate for six years, and whose every public appearance is dogged by questions about his designs on the White House."); Schmalz, *supra* note 59 (referring to Cuomo as "a potential President."). Ironically, similar rumors now are flying about Andrew Cuomo, who is frequently mentioned as a presidential hopeful for the 2016 election. See Danny Hakim, *Cuomo For President? Who Said That? Well, Dad*, N.Y. TIMES, July 9, 2012, at A1; Kenneth Lovett, *Talks Like President Wanna-Be*, N.Y. DAILY NEWS, Jan. 10, 2013, at 7. Of course, should Andrew Cuomo seek the White House, this could truncate his ability to remake the New York State Court of Appeals.

⁶⁹ See Mann, *supra* note 68, at 90.

⁷⁰ By this time, a gubernatorial race with Cuomo in it was not even considered a race. See *id.* at 92 ("Mario Matthew Cuomo has just been elected overwhelmingly in a contest in which

In the end, though, Cuomo never ran for the White House. On December 20, 1991, while a plane waited on a nearby runway to take him to the site of his campaign announcement, Cuomo decided that he would not seek the presidency.⁷² Later, he stated that entering the presidential race at a time when New York State was facing financial hardships and had not even decided on a budget for the new fiscal year would have been an irresponsible move on his part, one that understandably would have earned him the ire of New Yorkers.⁷³ “If I had left for New Hampshire without a budget, just imagine what the media would have done,” he later told a reporter. “And they would have been right.”⁷⁴

Instead, Cuomo remained in New York, continuing to push for an agenda that included a pro-choice stance on abortion,⁷⁵ (a position for which the Roman Catholic Church apparently considered excommunicating him),⁷⁶ considerable attention to the rights and

the outcome was regarded as so definitely a foregone conclusion that last August a senior editor at a major New York City newspaper was not sure whether his publication would bother with its customary election-year evaluation of the governor’s record.”)

⁷¹ See, e.g., *Cuomo Takes Steps For Presidential Run*, NEWSDAY (Oct. 23, 1991), http://articles.sun-sentinel.com/1991-10-23/news/9102120719_1_democratic-national-committee-party-caucuses-new-york-state. Later, in an interview with *New York Magazine*, Cuomo recalled his decision to look deeper into the possibility of a presidential bid:

I had not even thought of running for president until one day in 1991, at a small fundraiser, completely unanticipated, someone stood up and said, “Hey, Mario, in all the years we’ve supported you, we’ve never heard you talk about the presidency, and we want to know why not.” Matilda was there. I said, “Well, you know, the truth is, Matilda and I have never talked about it. The family and I have never talked about it.”

.....

And they said, ‘You should look at the presidency.’ And with Matilda sitting in the room, I said, ‘You know, I owe it to you. If you say I should look at it, I will.’ I came out of the room; there was a press conference. I said, ‘We’re going to look at the presidency.’

Craig Horowitz, *Mario Cuomo: Keeping the Faith*, N.Y. MAG., Apr. 6, 1998, <http://nymag.com/nymetro/news/people/feature/2426/>.

⁷² See Horowitz, *supra* note 71.

⁷³ See *id.*

⁷⁴ *Id.* Another issue that led to Cuomo’s withdrawal was rumors—unfounded ones—that the Governor had Mafia connections. See *id.* (“The Mafia is a question every time an Italian raises his head.”).

⁷⁵ See Elizabeth Kolbert, *Cuomo Takes Abortion Stance Favoring Women’s Right To Choose*, N.Y. TIMES, Sept. 11, 1989, at B1.

⁷⁶ See Ari L. Goldman, *O’Connor Warns Politicians Risk Excommunication Over Abortion*, N.Y. TIMES, June 15, 1990, at A1; *Cardinal’s Abortion Excommunication Warning Assailed*, DAILY GAZETTE (Schenectady, N.Y.), Jun. 15, 1990, at A1. On September 13, 1984, Cuomo delivered an impassioned speech about the Catholic Church’s stance on abortion, and how he would not be locked into a particular policy viewpoint simply because of his own Catholic faith:

[T]he Catholic who holds political office in a pluralistic democracy—who is elected to serve Jews and Muslims, atheists and Protestants, as well as Catholics—bears special responsibility. He or she undertakes to help create conditions under which all can live

protections of minorities,⁷⁷ and continued opposition to the death penalty.⁷⁸ He turned down another temptation to leave New York for the national stage in 1993, when Bill Clinton offered to nominate Cuomo as the replacement for the retiring Justice Byron White on the U.S. Supreme Court.⁷⁹ “I thought it would be a waste to just . . . limit myself to the very important work of a justice of the Supreme Court. I mean, what I am saying now about America’s condition—if I were a judge, that would be still one more voice quieted on this subject.”⁸⁰

In 1994, Cuomo’s run as governor came to an end with a general election defeat to George Pataki.⁸¹ As with all of his political campaigns, Cuomo’s opposition to the death penalty and his interests in preserving the rights of the accused proved to be a turning point.⁸² With New Yorkers livid over the case of Arthur

with a maximum of dignity and with a reasonable degree of freedom; where everyone who chooses may hold beliefs different from specifically Catholic ones—sometimes contradictory to them; where the laws protect people’s right to divorce, to use birth control and even to choose abortion.

Mario M. Cuomo, Religious Belief and Public Morality: A Catholic Governor’s Perspective (Sept. 13, 1984) (transcript available at <http://archives.nd.edu/research/texts/cuomo.htm>).

⁷⁷ See, e.g., Cuomo, *supra* note 62 (“We speak for the minorities who have not yet entered the mainstream. We speak for ethnics who want to add their culture to the magnificent mosaic that is America. . . . We speak for women who are indignant.”).

⁷⁸ See Elizabeth Kolbert, *Cuomo Vetoes Death Penalty Seventh Time*, N.Y. TIMES, Mar. 21, 1989, at B1; Schmalz, *supra* note 59. Cuomo stated, “The death penalty legitimizes the ultimate act of vengeance in the name of the state, violates fundamental human rights, fuels a mistaken belief by some that justice is being served and demeans those who strive to preserve human life and dignity.” *Cuomo Again Vetoes Bill For Death Penalty*, N.Y. TIMES, June 12, 1991, at B3. Cuomo also stated, “For [twelve] years as governor, I prevented the death penalty from becoming law in New York by my vetoes.” Mario M. Cuomo, *Death penalty is dead wrong: It’s time to outlaw capital punishment in America—completely*, N.Y. DAILY NEWS (Oct. 2, 2011, 4:00 AM), <http://www.nydailynews.com/opinion/death-penalty-dead-wrong-time-outlaw-capital-punishment-america-completely-article-1.961087>. However, Cuomo was *not* somebody who was in favor of “coddling criminals” either. See, e.g., Schmalz, *supra* note 59 (noting that Cuomo had taken a “conservative criminal-justice path” by toughening penalties for many crimes and building more than ten thousand prison cells across the state, more prison cells than any other previous governor had authorized).

⁷⁹ Only recently did Bill Clinton publically acknowledge that he did offer this post to Cuomo, and that Cuomo had declined it. Joanna Molloy, *Mario Nixed Supreme Tap*, N.Y. DAILY NEWS, June 6, 2012, at 12.

⁸⁰ Horowitz, *supra* note 71.

⁸¹ Kevin Sack, *New York Voters End a Democratic Era*, N.Y. TIMES, Nov. 9, 1994, at A1.

⁸² See *id.* (“Mr. Pataki has promised to sign death-penalty legislation early in his term, a move that would restore it as the ultimate punishment for murder in the first degree for the first time since 1965.”). True to his word, Pataki indeed signed the death penalty into law on March 7, 1995. See James Dao, *Death Penalty In New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1; see also William Glaberson, *Division Over Death Penalty*, N.Y. TIMES, Nov. 29, 2003, at B1 (reporting that Governor Pataki fulfilled a campaign promise when he signed the death penalty bill on March 7, 1995).⁸³

Shawcross, a murderer who was paroled by New York State in 1987 and had become a serial killer upon release,⁸³ Pataki's "tough on crime" platforms—including his vows to appoint "tougher" judges⁸⁴—sounded like an appropriate solution to many voters.⁸⁵ His promises of cutting spending and cutting taxes also gained substantial support among New Yorkers.⁸⁶ In a year when Republicans won a historic number of federal and state elections,⁸⁷ these particular issues were just too much for Cuomo to overcome in this race.⁸⁸

Today, Cuomo has returned to the private practice of law, working actively for the Corporate and Financial Services Department of the large New York City law firm Willkie Farr & Gallagher.⁸⁹ Yet he remains a frequent presence in the media and in the public consciousness, outspoken on controversial political topics such as abortion, workers' rights, immigration reform, civil rights, and protections of the accused.⁹⁰ He also is widely regarded as an "informal advisor" to his son in political matters, a view that began when Andrew Cuomo was running for governor and one that persists today.⁹¹

See Editorial, *No More Willie Hortons*, N.Y. TIMES, Dec. 13, 1991, at A38.

⁸³ See Editorial, *No More Willie Hortons*, N.Y. TIMES, Dec. 13, 1991, at A38.

⁸⁴ See, e.g., Richard Pérez-Peña, *Pataki Gets a Decision He Wanted on the State's Highest Court*, N.Y. TIMES, July 7, 2006, at B7 ("From the time he took office, Gov. George E. Pataki vowed to remake the state judiciary, calling it too liberal and too eager to usurp elected officials' powers."); Robert Reno, *If Jails Are Full, How Much Tougher Can Judges Get?*, NEWSDAY, Feb. 8, 1996, at A55 (questioning how Pataki could criticize the New York State Court of Appeals for being "soft" on criminals when the court had ruled in favor of the prosecution in seventy-three percent of the criminal appeals that it decided in the previous term).

⁸⁵ See, e.g., Sack, *supra* note 81.

⁸⁶ *Id.*

⁸⁷ See Joel Connelly, *The 1994 Republican Landslide and Its Aftermath*, CHI. TRIB., June 13, 1996, § 5, at 3.

⁸⁸ Still another factor working against Cuomo in this election was the mere fact that he had been in office for twelve years. See, e.g., *Governor Mario M. Cuomo, Of Counsel*, WILLKIE FARR & GALLAGHER LLP, <http://www.willkie.com/MarioCuomo>. In what can be best described as a "grass is greener on the other side of the fence" syndrome, many New Yorkers apparently voted for Pataki simply to see whether he could do things that Cuomo could not. See Todd S. Purdum, *Voters Cry: Enough, Mr. Cuomo!*, N.Y. TIMES, Nov. 9, 1994, at B11.

⁸⁹ *Governor Mario M. Cuomo, Of Counsel*, *supra* note 88. Cuomo's recent work for the firm has included mediating the extremely contentious battle between the trustee of the fraudulent investment fund put forth by Bernard Madoff and the owners of the New York Mets baseball team, who suffered significant financial losses from Madoff's scam. Adam Rubin, *Mario Cuomo appointed mediator*, ESPN (Feb. 11, 2011, 10:50 AM), <http://sports.espn.go.com/new-york/mlb/news/story?id=6110060>.

⁹⁰ See, e.g., Matt Bai, *Papa Doesn't Preach*, N.Y. TIMES MAG., Apr. 10, 2011, at 28–29.

⁹¹ See *id.*

In a nutshell, one could sum up Mario Cuomo as an outspoken defender of modern liberal causes, a highly educated leader from humble beginnings, unafraid to buck the tide of popular opinion in order to advance his desired reforms. Seemingly transparent in his opinions and dogmatic about achieving his stated goals, he has been seen as a “man of action” ever since entering the legal and political arenas.⁹² With this background in mind, one can easily see why so many New Yorkers believed—and feared—that Cuomo would take every chance to re-cast the Court of Appeals in his own image, particularly upon the golden opportunity that was presented to him from the moment he took office.⁹³

II. THE SITUATION: NEW YORK STATE'S COURT OF APPEALS AS MARIO CUOMO FOUND IT

Upon becoming governor, Mario Cuomo inherited a high court that was aging, rather unpredictable, highly respected, and largely homogenous. The last of these qualities greatly bothered Cuomo from the outset.⁹⁴ By the time he took office, the Court of Appeals had gained a reputation as being an “old boy's club,” and understandably so.⁹⁵ Never had a female judge sat upon the Court of Appeals. Never had a Hispanic judge sat upon the Court of Appeals. Never had an African-American judge sat upon the Court of Appeals for an entire term.⁹⁶ The bench presided over by Chief Judge Lawrence H. Cooke and filled by Associate Judges Dominick Gabrielli, Jacob D. Fuchsberg, Hugh R. Jones, Matthew J. Jasen,

⁹² See *id.*; Mann, *supra* note 68, at 96; Schmalz, *supra* note 59; Stengel, *supra* note 31, at 32, 33.

⁹³ See *infra* Part III.

⁹⁴ See *infra* notes 130–31 and accompanying text.

⁹⁵ This issue particularly captured the public attention in 1986 with the release of a scathing report chronicling gender bias in New York State's entire court system. Jeffrey Schmalz, *Pervasive Sex Bias Found in Courts*, N.Y. TIMES, Apr. 20, 1986, at 1. The report was authored by a twenty-three member commission established in 1984 by Chief Judge Lawrence H. Cooke, and highlighted instances of gender bias toward female parties, witnesses, and attorneys at every level of the state's judiciary. *Id.* It also showed evidence that New York's judges tended to be out of touch with domestic violence issues, often wrongfully blaming the victim for the crime. *Id.*

⁹⁶ At this point, the only African-American to sit on the Court of Appeals at all was Judge Harold A. Stevens. See Hon. Theodore T. Jones, Jr., *Judge Harold A. Stevens*, 71 ALB. L. REV. 1087, 1087 (2008). In 1974, Stevens was appointed to the court by Governor Malcolm Wilson to serve out the one year that remained in the Associate Judge term of Charles Breitel, who had just been elected Chief Judge of the court. *Id.* This made Judge Stevens the first African-American to ever sit on the Court of Appeals. *Id.* However, when Stevens ran for election to the court the following year, hoping to return to the bench for a full term, he was defeated. *Id.* at 1087, 1088.

Bernard S. Meyer, and Sol Wachtler was solely white and solely male. Even before winning the gubernatorial election, Cuomo yearned for the opportunity to rectify what he deemed to be a Court of Appeals that was not representative of the state's diverse population. "I refused to make any promises except one or two," he later recalled of his 1982 gubernatorial campaign, "[b]ut one of them was that, if at all possible, I would appoint the first woman to the [C]ourt of [A]ppeals and the first African-American."⁹⁷

The court was notably diverse, however, in the area of religion. Chief Judge Cooke was Catholic, as were two other judges on the bench, Gabrielli and Jasen.⁹⁸ Judges Fuchsberg, Meyer, and Wachtler were Jewish.⁹⁹ Judge Jones, an Episcopalian, was the court's lone Protestant member.¹⁰⁰

From a political and ideological standpoint, the Court of Appeals was also diverse at the time Cuomo assumed office. Four of its judges—Cooke, Fuchsberg, Meyer, and Jasen—were registered Democrats; the other three, Gabrielli, Jones, and Wachtler, were Republicans.¹⁰¹ Yet the court's actual ideological composition was even closer—and consequently, even less predictable than these labels suggest. Jones, for instance, was a longtime member of the Republican Party, but he proudly and publically stated that he never voted for Richard Nixon to become President,¹⁰² authored the majority opinion of a key judicial victory for gay rights advocates,¹⁰³

⁹⁷ Mario M. Cuomo, *We Must Lead the Charge*, 36 CT. REV. 14, 15 (Fall 1999) [hereinafter Cuomo, *Lead the Charge*] (reprinting the full text of remarks delivered by Mario Cuomo to the American Judges Association in 1999).

⁹⁸ See Joyce & Lou Adolfsen, *Lawrence Henry Cooke*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 769, 770; WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 221 (2008) (referring to Cooke and Gabrielli as "the court's Catholic judges"); Hon. Eugene F. Pigott, Jr., *Judge Matthew J. Jasen*, 71 ALB. L. REV. 1081, 1082 (2008) (stating that Judge Jasen was "very proud of his Roman Catholic religion").

⁹⁹ Eric Pace, *Jacob D. Fuchsberg, 82, Dies; Lawyer and Appellate Judge*, N.Y. TIMES, Aug. 28, 1995, at B9; SOL WACHTLER, AFTER THE MADNESS 38, 43 (1997).

¹⁰⁰ Laura Mansnerus, *Hugh R. Jones, 86, Ex-Judge On New York Court of Appeals*, N.Y. TIMES, Mar. 6, 2001, at A19 ("Throughout his career Judge Jones was active in the Episcopal Church, serving as the chancellor of the bishops of the Diocese of Central New York.").

¹⁰¹ Adolfsen & Adolfsen, *supra* note 98, at 769; Sal Ferlazzo, *Bernard Stern Meyer*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 785, 786; James T. Potter, *Domenick Luciano Gabrielli*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 713, 715; Michael B. Powers, *Matthew Joseph Jasen*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 697, 699.

¹⁰² Mansnerus, *supra* note 100.

¹⁰³ See *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980). Jones, writing for the majority in the 5-2 decision, stated that it was unconstitutional to forbid consenting partners of the same sex to engage in sodomy in the privacy of their own homes. *Id.* at 491–92, 415 N.E.2d at 942–43, 434 N.Y.S.2d at 953. He wrote:

and was frequently regarded as a “swing vote” on several controversial topics to come before the court.¹⁰⁴ Conversely, Jasen was a Democrat, but was viewed by many commentators as a conservative one.¹⁰⁵ In fact, Wachtler, a Republican, tended to be a more liberal voice on certain issues—particularly those regarding the rights of the accused—than Jasen, commonly voting in favor of criminal defendants in cases where their due process rights had arguably been breached by the government.¹⁰⁶

the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.

...

It surely does not follow that, because it is constitutionally permissible to enter the privacy of an individual's home to regulate conduct justifiably found to be harmful to him, the Legislature may also intrude on such privacy to regulate individual conduct where no basis has been shown for concluding that the conduct is harmful.

Id. at 490, 491, 415 N.E.2d at 941, 942, 434 N.Y.S.2d at 952, 953. Such words from a Republican judge—one who had received seminary training in his church, no less—likely came as a surprise to the public when the court issued this opinion. Douglas E. Abrams, *Hugh Richard Jones*, in *JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 36, at 721, 723.

¹⁰⁴ See Mansnerus, *supra* note 100.

¹⁰⁵ The Honorable Brian Higgins said “[Jasen was] a conservative Democrat and [a] fiercely independent thinker. See *Honoring the Life of Retired New York State Court of Appeals Judge Matthew J. Jasen*, 152 CONG. REC. E129–30 (Feb. 14, 2006), <http://www.gpo.gov/fdsys/pkg/CREC-2006-02-14/pdf/CREC-2006-02-14-pt1-PgE129-3.pdf>.

¹⁰⁶ One of several key illustrations of this divide between Jasen and Wachtler on criminal matters appears in the case of *People v. Elwell*. *People v. Elwell*, 50 N.Y.2d 231, 406 N.E.2d 471, 428 N.Y.S.2d 655 (1980). In this case, the court considered whether New York State recognized broader protection against police intrusion than what was afforded under the federal Constitution. *Id.* at 233–34, 406 N.E.2d at 472, 428 N.Y.S.2d at 656. Specifically, the court in this case examined the standard for evaluating the validity of a search warrant based on information provided by a confidential informant or by some other form of “anonymous tip.” *Id.* at 236–37, 406 N.E.2d at 472, 428 N.Y.S.2d at 656–57. Under the U.S. Supreme Court standard at that time, two requirements had to be met in order to find that such information established probable cause for a warrant to be issued: the magistrate had to be informed of the reasons to support the conclusion that the information was reliable and credible, and the magistrate had to be told of some “underlying circumstances” relied on by the person providing the information. *Id.* at 236, 406 N.E.2d at 474, 428 N.Y.S.2d at 658 (citing *Aguilar v. Texas*, 378 U.S. 108 (1964)). In *Elwell*, however, the majority of the New York State Court of Appeals held that under the New York State Constitution, criminal defendants were entitled to a greater degree of protection against information from confidential informants and anonymous tips. *Elwell*, 50 N.Y.2d at 241–42, 406 N.E.2d at 477–78, 428 N.Y.S.2d at 662. “[W]hen the basis of the informant's knowledge is not given, personal police observation corroborative of data received from the informant should be regarded as sufficient *only when the police observe facts suggestive of criminal activity*,” Judge Bernard Meyer wrote for the majority. *Id.* at 237, 406 N.E.2d at 475, 428 N.Y.S.2d at 659 (emphasis added). “Otherwise privacy and liberty may be invaded by a warrantless search or arrest based solely on the quality of the informant and not at all on the quality of the information, i.e., its suggestiveness of criminal activity.” *Id.* Wachtler joined that pro-

Thus, the Court of Appeals appeared to have reached a point where nobody was entirely certain how any given judge would vote in a given case.¹⁰⁷ U.S. Supreme Court precedent did not stop this court from recognizing greater protections for New York State citizens in areas such as due process safeguards against governmental intrusions.¹⁰⁸ Known for its “hot bench” at oral arguments and for its well-reasoned opinions and dissents, the Court of Appeals had by this point gained a solid reputation as one of the finest state courts in the nation.¹⁰⁹

Yet it was also an aging court. By the time Cuomo took office on January 1, 1983, Judge Gabrielli and Judge Fuchsberg had both practically reached the age of seventy,¹¹⁰ the constitutionally established mandatory retirement age for all New York State Court of Appeals judges.¹¹¹ Chief Judge Cooke was also approaching this mandatory retirement age,¹¹² as were Judges Jones,¹¹³ Jasen,¹¹⁴ and Meyer.¹¹⁵ Only Judge Wachtler, the charismatic judicial wonderboy

defendant majority opinion. Jasen, on the other hand, dissented, vehemently arguing that the majority’s position “str[uck] down such reasonable and prudent law enforcement efforts undertaken for the protection of all members of our society” and unduly overburdened the government in its mission to fight crime. *Id.* at 246, 406 N.E.2d at 480, 428 N.Y.S.2d at 665 (Jasen, J., dissenting). Should somebody look at this decision with no knowledge of the judges’ party alliances, that observer might reasonably believe Wachtler to be the Democrat and Jasen to be the Republican, rather than the other way around.

¹⁰⁷ Again, *Elwell* provides a good illustration of this. Voting in favor of the defendant, and holding that the New York State Constitution provided greater due process protections to the defendant than did the federal Constitution, were two Democrats (Meyer and Fuchsberg) and two Republicans (Wachtler and Jones). Voting in favor of the prosecution were two Democrats (Cooke and Jasen) and one Republican (Gabrielli).

¹⁰⁸ *See id.* at 234–35, 406 N.E.2d at 473, 428 N.Y.S.2d at 657. *See also, e.g.*, *People v. Skinner*, 52 N.Y.2d 24, 26, 417 N.E.2d 501, 502, 436 N.Y.S.2d 207, 208 (1980) (holding that any individual who has obtained counsel may not be interrogated by the police even if that person is in a non-custodial setting); *People v. Rogers*, 48 N.Y.2d 167, 169, 397 N.E.2d 709, 710–11, 422 N.Y.S.2d 18, 19 (1979) (“[O]nce an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel. We may not blithely override the importance of the attorney’s entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated.”); *People v. De Bour*, 40 N.Y.2d 210, 223, 352 N.E.2d 562, 572, 386 N.Y.S.2d 375, 384–85 (1976) (preventing police from interfering with a citizen unless that officer has a “founded suspicion that [criminality] is afoot”).

¹⁰⁹ *See Shipp, supra* note 22.

¹¹⁰ Judge Gabrielli was born in 1912; Judge Fuchsberg was born in 1913. *See* Robert D. McFadden, *Domenick Gabrielli, 81, Ex-Judge on New York’s Top Court, Is Dead*, N.Y. TIMES, Mar. 28, 1994, at B8; Pace, *supra* note 99.

¹¹¹ *See supra* note 2 and accompanying text.

¹¹² Cooke was born in 1914. Adolfsen & Adolfsen, *supra* note 98, at 770.

¹¹³ Jones was also born in 1914. Mansnerus, *supra* note 100.

¹¹⁴ Jasen was born in 1915. Hon. Albert M. Rosenblatt, *A Tribute to Judge Matthew Jasen*, 69 ALB. L. REV. 391, 391 (2006).

¹¹⁵ Meyer, the youngest member of this quartet by a year, was born in 1916. Margalit Fox,

who had won election to the Court of Appeals in 1972, was young enough that he would not be affected by mandatory retirement, although his fourteen-year term would be up in 1986.¹¹⁶

Thus, change was clearly coming to the Court of Appeals, and coming soon. The number of upcoming age-induced vacancies guaranteed it. Additionally, Mario Cuomo, former Court of Appeals clerk, had just been elected into the perfect position to orchestrate those changes on the state's high court in whatever way he deemed fit.

III. THE OPPORTUNITY: HOW MARIO CUOMO INHERITED THE IDEAL SITUATION FOR RECASTING THE COURT OF APPEALS

From the moment he took office, the new governor knew that he would certainly be able to leave a deep imprint upon the New York State Court of Appeals. This unprecedented opportunity arose for two reasons. First was the number of judges approaching mandatory retirement age. Within days after taking the helm of the state's executive branch, Cuomo knew he would be looking for a replacement for Judge Gabrielli due to mandatory retirement. He knew he would also soon have to look for a replacement for Judge Fuchsberg for the same reason. He also knew that he would need to replace Chief Judge Cooke and Judge Jones when they were forced into mandatory retirement in two years, Judge Jasen in three years, and Judge Meyer in four years.

Even more important, though, was the newfound level of control that Cuomo would be able to exercise over these important judicial replacements. For virtually all of New York State's history, judges on the Court of Appeals had been chosen by popular election.¹¹⁷ Then, in 1977, an amendment to the state constitution erased the electoral process for seats on the Court of Appeals.¹¹⁸ Instead, Court of Appeals judges would now be chosen by a "merit appointment" process, appointed by the executive branch and subject to the approval of the legislative branch.¹¹⁹ Under this new

Bernard S. Meyer, 89; Served on New York's Top Court, N.Y. TIMES, Sept. 8, 2005, at B9.

¹¹⁶ Wachtler, born in 1930, was elected to the Court of Appeals when he was just forty-two years old. David Gould, *Sol Wachtler*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 733, 734.

¹¹⁷ See LIEBSCHUTZ ET AL., *supra* note 18, at 128.

¹¹⁸ See N.Y. CONST. art. VI, § 2(c) (describing appointment process); see also LIEBSCHUTZ ET AL., *supra* note 18, at 128 (discussing 1977 state constitutional amendment).

¹¹⁹ See N.Y. CONST. art. VI, § 2(c).

system, which is still used today in selecting Court of Appeals judges, a bipartisan statewide Commission on Judicial Nomination solicits applications from any candidates interested in the Court of Appeals vacancy.¹²⁰ From there, the Commission selects a “short list” of finalists for the vacancy, and submits that short list to the governor.¹²¹ The governor then selects a name from the short list as the nominee to fill the court vacancy.¹²² This nominee is then presented to the state legislature to approve or deny.¹²³

Mario Cuomo was the second governor in New York’s history to wield this power of appointment. The first, Hugh Carey, was able to appoint three Court of Appeals judges during his term of office, moving Cooke up from an associate judgeship on the court to replace Chief Judge Charles D. Breitel in 1979,¹²⁴ choosing Meyer to fill Cooke’s vacant associate judgeship during that same year,¹²⁵ and then re-appointing Judge Jasen for another term in 1981.¹²⁶ This was influential enough. Yet Cuomo already knew that he was guaranteed to exercise this power over far more vacancies than Carey. Furthermore, these guaranteed openings would be caused by mandatory retirements, meaning that Cuomo would not be under any pressure to re-appoint any of these judges to another fourteen-year term.¹²⁷ They would all be replaced by new judges. Clearly, Cuomo held in his hands the proverbial “terrible swift sword.” The only remaining question was what exactly he would do with it.¹²⁸

IV. THE CRITERIA: FACTORS TO STUDY WHEN REVIEWING MARIO CUOMO’S APPOINTMENTS TO THE COURT OF APPEALS

To answer this question—whether Cuomo would appoint judges

¹²⁰ See N.Y. JUD. LAW §§ 61–64 (McKinney 2013).

¹²¹ See *id.* §§ 63, 68.

¹²² See *id.* § 68.

¹²³ See *id.*

¹²⁴ Adolfsen & Adolfsen, *supra* note 98, at 774.

¹²⁵ See Vincent R. Johnson, *Judge Bernard S. Meyer: First Merit Appointee to the New York Court of Appeals*, 75 ALB. L. REV. 963, 970 (2012).

¹²⁶ See Pigott, *supra* note 98, at 1084, 1086 (noting that Judge Jasen spent eighteen years total on the Court of Appeals until he retired in 1985); see also John Caher, *Surge of Openings Will Allow Cuomo to Shape Judiciary*, N.Y.L.J., Nov. 9, 2011, at 1, col. 2 (noting that Governor Carey appointed Judge Jasen to a second term).

¹²⁷ In other words, all of these judges had no choice but to leave the court, due to the mandatory retirement age. Cuomo would not have to face any of the political battles surrounding the possibility of re-appointment for any of these judges.

¹²⁸ For a good look at the public speculation surrounding this question, see David Margolick, *New York’s Court of Appeals Faces Vast Changes as a New Era Begins*, N.Y. TIMES, Nov. 7, 1982, at 1.

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solely to satisfy his own political agendas and personal interests, or whether he would live up to his own professed beliefs that judges should be chosen only on the basis of “character, aptitude, and experience”¹²⁹—we will look at a number of factors to determine how “balanced” the “Cuomo Court” really was. Clearly, these are not the only factors that a reasonable observer could examine. However, these elements, and the trends revealed through this analysis, will provide at least a rough evaluation of what dynamics *may* have been at work in Cuomo's court appointments. We will examine the following demographic factors when looking at Mario Cuomo's Court of Appeals selections:

Race

Gender

Religion

Heritage

Political Affiliation

Predecessor's Political Affiliation

Region

Age at Time of Appointment

Prior Judicial Experience

Previous Appearances on The Short List

“Friendship Factors” With Governor Cuomo

Judicial Record and/or “Pet Causes”

The first two of these factors—race and gender—are particularly necessary in light of Cuomo's campaign promise to appoint the first female Court of Appeals judge and the first African-American Court of Appeals judge.¹³⁰ Even without these vows though, these factors would be worthy of review, given Cuomo's track record as a defender of minority rights.¹³¹ Religion is similarly a necessary factor to study, given that the Court of Appeals was religiously diverse at the time Cuomo assumed office.¹³² One could reasonably assume that Cuomo, ever the proponent of diversity, would want to maintain a blend of various religions on the Court of Appeals bench.

¹²⁹ Michael Kramer, *The Battle of the Brains*, N.Y. MAG., Nov. 1, 1982, at 30, 35 (“There are specific criteria for appointment: character, aptitude, and experience. You're not allowed to judge on the basis of tough or weak. You're not allowed to pick on the basis of philosophical predispositions.”).

¹³⁰ See *supra* text accompanying note 97.

¹³¹ See, e.g., *supra* note 38 and accompanying text (discussing Cuomo's position on state aid for the indigent); *supra* note 62 and accompanying text (discussing Cuomo's reputation as an advocate for the indigent).

¹³² See *supra* notes 98–100 and accompanying text.

Heritage, or national origin, is interesting to examine considering Cuomo's fervent advocacy of the rights of immigrants in general, and the advancement of Italian-Americans in particular.¹³³ Furthermore, Cuomo took great pride in being part of the first generation of his family to grow up solely on American soil, suggesting that he might favor judicial candidates who fit this profile.¹³⁴

Political affiliation makes the list for all of the obvious reasons, including the fear that Cuomo's appointments would be solely proponents of left-wing causes. The second part of this analysis—the examination of the political affiliation of the judicial predecessors of Cuomo's appointees—focuses on whether Cuomo sought to maintain the relative ideological balance that existed on the court at the time when Cuomo took office or whether he decided to remake the court in a more one-sided manner.

Looking at the region of Cuomo's appointees highlights another often-discussed demographic: namely, whether there is any geographic bias in Court of Appeals appointments. Some commentators have observed that there tends to be a four-to-three split between downstate and upstate judges on the court, with four judges typically coming from New York City and the surrounding area, and the remaining three coming from elsewhere.¹³⁵ Studying the geographic breakdown of Cuomo's appointments will look at whether Cuomo used this alleged ratio as a guideline, or whether this New York City native tended to appoint judges from his home region.¹³⁶

Age at the time of appointment is included on this list primarily because of the looming specter of seventy, the constitutionally mandated retirement age for Court of Appeals judges.¹³⁷ One could reasonably assume that a governor would want to appoint younger

¹³³ Again, this was (and still is) one of Cuomo's favorite causes. See, e.g., *supra* notes 30–32 and accompanying text (discussing Cuomo's remarks on immigrants and his Italian-American heritage).

¹³⁴ See *supra* notes 25–31 and accompanying text (discussing how being part of the first generation of his family to be born on American soil impacted Cuomo's life and personal values, as told largely in Cuomo's own words).

¹³⁵ See Sarah Lyall, *Cuomo Sets Day of Decision for Court Nomination*, N.Y. TIMES, Aug. 14, 1992, at B6 (“The convention has been usually that it's been four downstate [judges] and three upstate [judges].”).

¹³⁶ Of course, with this, as with all of these factors, Cuomo could only work with what the Commission gave him on the short list. Thus, if he had a downstate-heavy short list and picked a downstate judge, this would seem to be more of a product of the list than a product of personal bias by the governor.

¹³⁷ N.Y. CONST. art. VI, § 25(b).

judges to the court, allowing them to remain on the bench and influence major decisions for a longer period of time before being forced into retirement. This analysis will look at whether this may have been a factor in Cuomo's Court of Appeals appointment decisions.

Examination of prior judicial experience studies to what extent, if any, Cuomo wanted Court of Appeals nominees who had previously served as a judge on the state or federal level. The factor of whether a nominee previously appeared on the short list looks at whether Cuomo may have felt obligated to appoint certain individuals who had appeared on the Commission's list several times before.

Looking at "friendship factors" will take into account whether Cuomo drew upon judges from any particular background, or from any particular past professional and/or personal relationships. Of particular interest here is whether Cuomo appointed any judges who were connected in any way to St. John's University, Cuomo's own alma mater. More than one critic during Cuomo's time in office alleged that the fastest way to gain an appointment from the governor was to show him a diploma from St. John's.¹³⁸

Finally, a look at the nominee's past judicial record, as well as any "pet causes" endorsed by the individual over the course of his or her career, will be important in determining whether Cuomo sought out judges who were known to favor platforms that matched Cuomo's own interests—civil rights, protecting the rights of the accused, objecting to the death penalty, and the like.

Without a doubt, one must be careful of butterfly effects in this analysis. There is always a chance that any trends shown here are the result of correlation rather than causation—that they reflect coincidences rather than intentional aims on Cuomo's part. However, when it comes to evaluating Cuomo's selections, a review of these factors will at least be a step toward figuring out what interests were at work in these highly publicized and highly influential judicial picks.¹³⁹

¹³⁸ See, e.g., Elizabeth Kolbert, *Bellacosa is Appointed to State Court*, N.Y. TIMES, Jan. 6, 1987, at B3 (noting the "St. John's connection" and stating that Cuomo had given "key positions" to many alumni of St. John's).

¹³⁹ This article is *not* meant to suggest that any or all of these factors are "bad" or "illegitimate" in any way. Indeed, the importance of a Court of Appeals that is multi-faceted and diverse has been reaffirmed through the years, including a recent resounding statement by former Chief Judge Sol Wachtler. See Sol Wachtler, Op-Ed., *Judiciary in Need of Diversity*, TIMES UNION (Albany, N.Y.), Mar. 22, 2013, at D2. Instead, it is just meant to illustrate the number and variety of factors far beyond the courtroom that go into choosing these high court judges.

V. THE SELECTIONS: MARIO CUOMO'S JUDICIAL APPOINTMENTS AND THEIR DEMOGRAPHIC ANALYSIS

A. *Replacing Judge Dominick Gabrielli*

Just three days after taking office, Mario Cuomo made a selection from the first short list that he ever saw from the Commission on Judicial Nomination.¹⁴⁰ That list contained four names: Bronx County Surrogate Bertram R. Gelfand, Eastern District of New York Judge Joseph M. McLaughlin, Appellate Division Fourth Department Associate Justice Richard D. Simons, and Appellate Division Second Department Associate Justice Vito J. Titone.¹⁴¹ When Cuomo read this list, he was more than a little unhappy. The fact that the short list lacked any female candidates and lacked any ethnic minority candidates irritated him, and he publically made his displeasure known.¹⁴² In media interviews, he asked whether the Commission really was saying that New York State was bereft of any female jurists or any racial minority jurists who were qualified to be a finalist for a Court of Appeals position.¹⁴³ In part, this concern likely arose from Cuomo's campaign promise to appoint female and minority judges, a vow that would surely lead members of the public to demand results.¹⁴⁴

Ultimately, though, Cuomo did choose from the pool that the Commission gave him. Looking at the candidates on the list, an observer reasonably may have expected Cuomo to pick Second Department Associate Justice Vito Titone. Titone was one of Cuomo's classmates from St. John's Law School, and they had remained friends ever since.¹⁴⁵ What's more, Titone was a

¹⁴⁰ See Marjorie S. McCoy & David E. McCraw, *Richard Duncan Simons*, in *JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 36, at 793, 793.

¹⁴¹ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, CANDIDATES NOMINATED FOR APPOINTMENT TO THE NEW YORK STATE COURT OF APPEALS: 1979 TO PRESENT, at 1, <http://nysegov.com/ejn/assets/documents/CJN%20Nominees%20for%20Court%201979%20to%20present.pdf> [hereinafter *CANDIDATES NOMINATED FOR APPOINTMENT*].

¹⁴² See *THE OXFORD HANDBOOK OF NEW YORK STATE GOVERNMENT AND POLITICS* 369–70 (Gerald Benjamin, ed., 2012); *Top New York Court for Men Only So Far*, *THE HOUR* (Norwalk, Conn.), Dec. 9, 1982, at 26.

¹⁴³ See Sewell Chan, *Lack of Women on Court List Draws Fire*, *N.Y. TIMES* (Dec. 3, 2008, 5:45 PM), <http://cityroom.blogs.nytimes.com/2008/12/03/lack-of-women-on-court-list-draws-fire> ("In 1983, Gov. Mario M. Cuomo, who had campaigned in 1982 on a promise to appoint the first woman to the Court of Appeals, complained when a list of nominees for a vacancy contained no women.")

¹⁴⁴ See Cuomo, *Lead the Charge*, *supra* note 97; Chan, *supra* note 143.

¹⁴⁵ Lisabeth Harrison, *Vito Joseph Titone*, in *JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 36, at 843, 844, 847.

Democrat.¹⁴⁶ Appointing him to replace Gabrielli would allow Cuomo to replace a conservative judge with a liberal one.¹⁴⁷

Yet, Cuomo surprised everyone by appointing a Republican: Fourth Department Associate Justice Richard D. Simons.¹⁴⁸ Perhaps more surprised than anyone was Simons himself, who had abandoned any hope of being nominated after Cuomo was elected.¹⁴⁹ “I had not taken the application very seriously,” Simons later told one of his former clerks in an interview.¹⁵⁰ “I had been rejected several times before because of Democratic governors, and I only applied in this instance because it was an election year and I thought possibly a Republican would win. So I wasn't really losing a lot of sleep over it.”¹⁵¹ His family skiing trip had to be cut short in order to accept the governor's unexpected nomination.¹⁵²

In retrospect, nominating Simons was a skillful move by Cuomo, one which quelled—at least for the moment—the public criticisms about the new appointment system. The liberal governor from New York City had appointed an upstate Republican.¹⁵³ What's more, he chose a judge who was only fifty-five years old at the time Cuomo nominated him.¹⁵⁴ This meant that Cuomo had not only brought a likely conservative vote to the court, but also one who could be there for a long time, a judge who had fifteen years to go before reaching the mandatory retirement age.

¹⁴⁶ *Id.* at 847.

¹⁴⁷ Gabrielli's record on the Court of Appeals included votes in favor of the death penalty and statutes prohibiting consensual sodomy, and a staunchly pro-prosecution record on criminal cases—all votes that Cuomo probably would not like. *See Here Are Backgrounds of the 7 Judges*, SCHENECTADY GAZETTE, Dec. 30, 1981, at 24.

¹⁴⁸ McCoy & McCraw, *supra* note 140, at 794, 795.

¹⁴⁹ *See* Hon. Richard D. Simons, *The Role of Ideology in the Selection of Appellate Judges*, 70 ALB. L. REV. 855, 857 (2007) (“Governor Cuomo, a New York City Democrat, appointed me, a judge from a small town upstate and a registered Republican voter, to the Court of Appeals. I was his first appointment when he took office, and our manifest differences provoked a number of questions of the Governor by the press about how my views would harmonize with his as I addressed the work of the court.”); Interview with Richard D. Simons, N.Y. State Court Of Appeals, in N.Y.C., N.Y., at 1 (Apr. 3, 2004) (transcript available at www.courts.state.ny.us/history/legal-history-new-york/documents/Oral-Histories_Simons-Transcript.pdf) [hereinafter Interview with Richard D. Simons].

¹⁵⁰ Interview with Richard D. Simons, *supra* note 149, at 1.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Indeed, the public took notice. For instance, *The New York Times's* lead story on the nomination of Simons led with the fact that the liberal Cuomo had nominated a registered Republican, implicitly registering their surprise at this selection. *See* Michael Oreskes, *Cuomo Appoints a G.O.P. Judge to Appeals Seat*, N.Y. TIMES, Jan. 4, 1983, at A1.

¹⁵⁴ Judge Simons was born on March 23, 1927. *See* McCoy & McCraw, *supra* note 140, at 794.

One can assume—although there is, of course, no solid proof of this—that Cuomo’s choice was premised at least in part on the desire to reduce public fears that his Court of Appeals appointments would all be far left-wing party hacks. Additionally, Simons had amassed a solid judicial reputation during his years at the Appellate Division.¹⁵⁵ Fifteen times, the Court of Appeals had affirmed Simons’s logic on Appellate Division opinions that were appealed to the court.¹⁵⁶ Thus, one could infer, as Cuomo may have, that the current membership of the court already had a degree of respect for their new colleague.

Yet there was also a significant degree of controversy in nominating Simons, one that went beyond the debates about political party loyalty. In 1977, Simons had served on a panel investigating allegations that Court of Appeals Associate Judge Jacob Fuchsberg had committed judicial misconduct.¹⁵⁷ The issues surrounded Fuchsberg’s failure to recuse himself from cases involving New York City’s bonding scheme, even though Fuchsberg held millions of dollars of New York City’s municipal bonds at that time.¹⁵⁸ Later, the accusations expanded to additional allegations that Fuchsberg had recruited law professors to assist him in writing his Court of Appeals decisions.¹⁵⁹ Ultimately, the panel on which Simons sat determined that Fuchsberg had indeed violated the New York State Bar Association’s Code of Judicial Conduct, but determined that because he did not act with intent to defraud the court, he “should not be subject to disciplinary action.”¹⁶⁰ Yet Simons did not stop there. He dissented from the panel’s finding, vigorously objecting to the notion that a judge could continue in office after such a doubt had been cast upon his ability to remain impartial and independent.¹⁶¹ In fact, he was the only judge on this panel to take such a stance on Fuchsberg’s case—a viewpoint which favored requiring Fuchsberg to step down from the court.¹⁶² “The public need not always be convinced of the correctness of the court’s decisions,” Simons wrote in his dissent, “but they must always

¹⁵⁵ See Patrick M. Connors, *Dedication to the Honorable Richard D. Simons*, 13 *TOURO L. REV.* 587, 589 (1997); McCoy & McCraw, *supra* note 140, at 795.

¹⁵⁶ McCoy & McCraw, *supra* note 140, at 795.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *In re Fuchsberg*, 426 N.Y.S.2d 639, 666–67 (N.Y. Ct. Jud. 1978) (Simons, J., dissenting); McCoy & McCraw, *supra* note 140, at 795.

¹⁶² See *Fuchsberg*, 426 N.Y.S.2d at 649, 667 (per curiam).

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believe in the integrity of the decision-making process.”¹⁶³

Plenty of people wondered whether Simons and Fuchsberg could now co-exist on the same bench after Simons had very publically called for Fuchsberg's removal from the court.¹⁶⁴ Yet the two judges, at least from all outward appearances, never had any trouble with one another. Simons later stated that Fuchsberg had taken pains to avoid any potential conflicts between them during Simons's first day on the job:

[H]e came in very exercised [sic] and he said, “I've had nothing but telephone calls all day long about how you and I are going to have a lot of trouble working together.” He said, “Are we?” And I said, “Not as far as I'm concerned.” He said okay and he turned around and stomped out.¹⁶⁵

The demographic breakdown on Simons is as follows:

Race: White

Gender: Male

Religion: Protestant¹⁶⁶

Heritage: Scotch-Irish¹⁶⁷

Political Affiliation: Registered Republican

Predecessor's Affiliation: Republican

Region: Upstate (Oneida County)

Age: Fifty-five

Previous Judicial Experience: Yes, both trial court (1963 to 1971) and Appellate Division (1971 to 1983)¹⁶⁸

Previously On Short List: Yes, three times¹⁶⁹

“Friendship Factors”: Nothing obvious linking him to Cuomo

Judicial Record/“Pet Causes”: Generally conservative,¹⁷⁰ highly respected by both his colleagues on the Appellate Division and also

¹⁶³ *Id.* at 667 (Simons, J., dissenting).

¹⁶⁴ *See, e.g.*, Interview with Richard D. Simons, *supra* note 149, at 46–48 (detailing Simons own opinions on the *Fuchsberg* case, and his interactions with Fuchsberg himself).

¹⁶⁵ *Id.* at 2–3.

¹⁶⁶ It is unclear from the records explored in preparation of this article precisely what denomination within the Protestant category Judge Simons calls home. His religion is rarely mentioned in writings about him, and when it is mentioned, it is listed merely as “Protestant” with no further elaboration.

¹⁶⁷ McCoy & McCraw, *supra* note 140, at 794 (noting that Simons' father's family had migrated to Canada from Scotland, and then to the U.S., and that Simons' mother's family had predominantly Irish roots).

¹⁶⁸ *Id.* at 795.

¹⁶⁹ Simons had appeared on all three of the Commission's prior short lists. *See* CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 1.

¹⁷⁰ *See* McCoy & McCraw, *supra* note 140, at 796.

by judges on the Court of Appeals,¹⁷¹ controversial because of his role with the Fuchsberg investigation.

On the Court of Appeals itself, Simons ultimately proved to be one of Cuomo's most highly regarded appointments.¹⁷² For a brief period, he even served as the court's Chief Judge, stepping in on an interim basis when Sol Wachtler resigned from the position after being criminally convicted.¹⁷³ Known for his strong-willed ways, Simons became a leader on the court, never afraid to write in dissent against decisions with which he disagreed.¹⁷⁴ His voting record, as expected, was conservative, typically voting for the prosecution in criminal cases,¹⁷⁵ and commonly voting against individual interests in civil liberties cases.¹⁷⁶ He also became widely known for his utter intolerance of any public official who dared to breach the ethical duties of his or her office.¹⁷⁷ Many of his most notable Court of Appeals decisions dealt with these duties, and of the need to sanction officeholders who willingly violated the public trust.¹⁷⁸

¹⁷¹ *Id.* at 795, 799.

¹⁷² For a look at the tributes paid to Judge Simons by his colleagues on both sides of the aisle—many of which seem to go well beyond merely perfunctory ceremonial praise to a fellow jurist—see Judith S. Kaye, Chief Judge, Court of Appeals of the State of New York, Remarks at Ceremony Marking Retirement of Associate Judge Richard D. Simons, *in* 89 N.Y.2d vii, vii–xi (1997). See also Connors, *supra* note 155, at 589; Stewart F. Hancock, Jr., Alan J. Pierce & Patrick M. Connors, *Dedication to the Honorable Richard D. Simons*, 47 SYRACUSE L. REV. 287, 288 (1997) (reflecting the perceptions of Judge Simons from some of his colleagues who have served on the judiciary with him).

¹⁷³ Sarah Lyall, *Appeals Court's Senior Judge to Assume Wachtler's Duties*, N.Y. TIMES, Nov. 11, 1992, at B8 [hereinafter *Appeals Court's Senior Judge to Assume Wachtler's Duties*]. Simons later applied to become Chief Judge of the court, but Cuomo passed over him in favor of Judith Kaye.

¹⁷⁴ See Connors, *supra* note 155, at 591–94; McCoy & McCraw, *supra* note 140, at 796. That being said, all accounts also indicate that Simons was an extremely collegial individual who enjoyed collaboration with his fellow judges and with other attorneys. One particularly heartwarming account describes Simons's practice of allowing local lawyers in Rome, New York, to wander into his home chambers whenever they wanted to come in and utilize his extensive library. Connors, *supra* note 155, at 591.

¹⁷⁵ See, e.g., VINCENT MARTIN BONVENTRE, "STREAMS OF TENDENCY" ON THE NEW YORK COURT: IDEOLOGICAL AND JURISPRUDENTIAL PATTERNS IN THE JUDGES' VOTING AND OPINIONS 194 (2003) [hereinafter STREAMS OF TENDENCY] ("Simons' record on the court was strongly pro-prosecution. Simons had consistently been part of the court's conservative wing.") (citations omitted).

¹⁷⁶ See *Transcript: State Constitutional Jurisprudence: Decision Making at the New York Court of Appeals*, 13 TOURO L. REV. 3, 10 (1996) (quoting Professor Vincent M. Bonventre in stating that Simons ruled in favor of the individual in civil liberties cases less than fifty percent of the time).

¹⁷⁷ For an excellent discussion of Simons's jurisprudence in this area, see Jennifer M. Palmer, Comment, *Richard D. Simons: Judicial Intolerance of Official Misconduct*, 59 ALB. L. REV. 1781 (1996).

¹⁷⁸ As it turned out, Simons's stance in his dissent in *Fuchsberg* was only a taste of things

Simons also garnered a reputation of restraint on issues where the New York State Constitution seemed to conflict with provisions of the U.S. Constitution.¹⁷⁹ In such cases, he tended to view the Court of Appeals as serving the role of an “intermediate [federal c]ourt”¹⁸⁰ that needed to be concerned about “uniformity” in casting judicial decisions.¹⁸¹ As such, he was reluctant to decide cases under New York State law if he believed that federal law—the body of law that he considered the “ultimate responsibility” for all courts—could resolve the question.¹⁸² While willing to employ state law as a precedent-setting tool in certain circumstances,¹⁸³ he preferred to engage in more limited review under federal law—in large part because he believed that “the state constitution is a

to come in cases regarding the duties of public officeholders. *See* Connors, *supra* note 155, at 591–94; *see also* McCoy & McCraw, *supra* note 140, at 797 (“Judge Simons also distinguished himself in his Court of Appeals writings on the ethics and duties of public officeholders and judges.”). As noted by Professor Connors, it was fitting that one of Simons’s last decisions on the Court of Appeals bench dealt with allowing the Court of Claims to decide suits for damages against the state based on state constitutional breaches. *See* Connors, *supra* note 155, at 593. Simons wrote:

The point is that no government can sustain itself, much less flourish, unless it reaffirms and re-enforces the fundamental values that define it by placing the moral and coercive powers of the State behind those values. When the law immunizes official violations of substantive rules because the cost or bother of doing otherwise is too great . . . the integrity of the rules and their underlying public values are called into serious question.

Id. (quoting *Brown v. State*, 89 N.Y.2d 172, 196, 674 N.E.2d 1129, 1144, 652 N.Y.S.2d 223, 238 (1996)).

With such high expectations of public servants, Simons was particularly pained by the scandal that led to Wachtler’s sudden and very public resignation, and the embarrassment that this situation brought upon the court, and sought to restore dignity to the court, particularly during his tenure as acting Chief Judge. *See* John Caher, *Simons Known for High Ethical Standards*, TIMES UNION (Albany, N.Y.), Nov. 12, 1992, at A1.

¹⁷⁹ *See* McCoy & McCraw, *supra* note 140, at 796, 800–01; *see also* David E. McCraw, “Doubts About Our Processes”: *Richard D. Simons and the Jurisprudence of Restraint in State Constitutional Analysis*, 13 TOURO L. REV. 613, 615 (1997) [hereinafter McCraw, *Doubts About Our Processes*] (“What emerges from a close reading of Judge Simons’ opinions is a consistent belief that while the court undeniably has the freedom to use the state constitution to act independently of the United States Supreme Court and the Federal Constitution, it is a freedom that should be used sparingly and reluctantly.”); Hon. Richard D. Simons, *When is the New York Court of Appeals Justified in Deviating from Federal Constitutional Interpretation?*, 14 TOURO L. REV. 637, 641 (1998) (“I thought it was important that we make some determination of a methodology, an analysis that we would follow, to establish a structure and try to anchor a body of law that we would follow, and could guide our lower court judges.”).

¹⁸⁰ *See* McCraw, *Doubts About Our Processes*, *supra* note 179, at 626 (quoting *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 260–61, 567 N.E.2d 1270, 1285, 566 N.Y.S.2d 906, 921 (1991) (Simons, J., concurring)).

¹⁸¹ *See* McCraw, *Doubts About Our Processes*, *supra* note 179, at 614; Simons, *supra* note 179, at 641.

¹⁸² McCraw, *Doubts About Our Processes*, *supra* note 179, at 626.

¹⁸³ *See id.* at 615.

largely blank slate, free of the decisional process restraints that impose limits on the court in other areas.”¹⁸⁴ This approach, which Simons labeled a “federal floor” framework to judging, often put Simons at odds with his Court of Appeals colleagues on key questions regarding the balance of power between state and federal law.¹⁸⁵ In particular, he will be remembered in this regard for carefully and adamantly articulating his views about the limited role of the state constitution in the cases of *People v. P.J. Video, Inc.*¹⁸⁶ on the criminal side and *Immuno AG. v. Moor-Jankowski* on the civil side.¹⁸⁷

As anticipated, Simons’ run on the Court of Appeals bench was a long one. He served until 1997, stepping down at age sixty-nine, just one year short of the mandatory retirement age of seventy.¹⁸⁸

B. Replacing Judge Jacob Fuchsberg

After replacing Gabrielli with Simons, Cuomo knew that the next

¹⁸⁴ *Id.* at 629.

¹⁸⁵ *Id.* at 624. The term “federal floor” is actually derived from the words of former U.S. Supreme Court Justice William Brennan. *Id.*

¹⁸⁶ *People v. P.J. Video, Inc.*, 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986).

¹⁸⁷ *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991). *Immuno* dealt with the balance between state and federal constitutional protections on the right to freedom of speech for media defendants. *See id.* at 239–40, 567 N.E.2d at 1271–72, 566 N.Y.S.2d at 907–08. The plaintiff sued the publisher of a scientific journal for publishing a letter on a topic of “public controversy,” and the trial court dismissed the case on the grounds that such statements were entitled to absolute protection. *See id.* at 239, 567 N.E.2d at 1271, 566 N.Y.S.2d at 907. The case made it to the New York State Court of Appeals, which affirmed the trial court’s dismissal of the libel suit on state constitutional grounds. *See id.* Plaintiff then appealed to the U.S. Supreme Court, which reversed the decision on federal First Amendment grounds and remanded the case back to the New York Court of Appeals. *Id.* at 239–40, 567 N.E.2d at 1271–72, 566 N.Y.S.2d at 907–08. On remand, the New York Court of Appeals, in a majority decision written by Judge Judith Kaye, again held that the libel suit was correctly dismissed. *Id.* at 257, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918. This time, however, Kaye’s decision focused on both the federal and state grounds for dismissing the suit. *See id.* at 242–48, 567 N.E.2d at 1273–77, 566 N.Y.S.2d at 909–13 (analyzing the case on federal grounds); *id.* at 248–56, 567 N.E.2d at 1277–82, 566 N.Y.S.2d at 913–18 (analyzing the case on New York State grounds). In an outspoken concurring opinion, Simons wrote that the majority’s analysis on “independent State grounds” was improper, as it would prevent the U.S. Supreme Court from reviewing the case. *Id.* at 257, 567 N.E.2d at 1282–83, 566 N.Y.S.2d at 918–19 (Simons, J., concurring). “The result of reaching both State and Federal grounds is that the discussion of Federal law, under Supreme Court precedent, is dictum because we have relied on independent State grounds,” Simons wrote. *Id.* at 263, 567 N.E.2d at 1286, 566 N.Y.S.2d at 922. “The process is not in keeping with our institutional responsibility to provide stability and certainty in the development of law.” *Id.* For a discussion of this case in Simons’s own words, see Interview with Richard D. Simons, *supra* note 149, at 12–15.

¹⁸⁸ James Dao, *Pataki Gains Pick as Court Loses Judge*, N.Y. TIMES, Apr. 6, 1996, at 28.

seat to fill would be that of Judge Fuchsberg, who was about to turn seventy.¹⁸⁹ Under the state constitutional mandate, Fuchsberg would therefore have to leave the court on December 31 of that year. Yet Fuchsberg sped up the process, resigning from the Court of Appeals more than six months before his term actually ended, moving back to New York City to open a law firm with his daughter.¹⁹⁰ For the second time that year, Cuomo would be faced with the task of appointing a new judge to the Court of Appeals bench.

After the public spat over the previous short list, all eyes were on the Commission to see who would be named on the list this time. Notably, when the list was released, it did include the names of two female candidates—both of them Jewish, another potential consideration in replacing Fuchsberg.¹⁹¹ One was Betty Weinberg Ellerin, New York State's Deputy Chief Administrative Judge.¹⁹² The other was a commercial litigator named Judith S. Kaye, a partner of the large firm of Olwine, Connelly, Chase, O'Donnell & Weyher in Manhattan.¹⁹³ Also on the list were three Appellate Division judges—Joseph P. Sullivan of the First Department, Leon D. Lazer of the Second Department, and Stewart F. Hancock of the Fourth Department¹⁹⁴—and a federal judge from the Southern District of New York, Abraham D. Sofaer.¹⁹⁵ Finally, Bronx County Surrogate Bertram Gelfand returned to the list for the second consecutive time, the beginning of an odyssey that would see him appear on several more short lists but never receive the nod from the governor's office, in part because of a scandal involving an affair with his female law assistant in the late 1980s.¹⁹⁶

¹⁸⁹ See *supra* note 110 and accompanying text.

¹⁹⁰ Ian T. Macauley, *Judge Fuchsberg Resigns*, N.Y. TIMES, June 5, 1983, at 10.

¹⁹¹ Fuchsberg was Jewish, part of the diverse religious mix on the Court of Appeals. See *supra* note 98–100 and accompanying text. Some commentators have noted that there may even be such thing as “a Jewish seat” on the Court of Appeals, in that Jewish judges tend to replace other Jewish judges on the court. See Bennett Liebman, *Court of Appeals: The Jewish Seat(s) on the Court*, N.Y. CT. WATCHER, (Mar. 11, 2009), <http://www.newyorkcourtwatcher.com/2009/03/court-of-appeals-jewish-seats-on-court.html>.

¹⁹² CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

¹⁹³ *Id.*; see David Margolick, *Cuomo Selects First Woman for High Court*, N.Y. TIMES, Aug. 12, 1983, at A1.

¹⁹⁴ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

¹⁹⁵ *Id.*

¹⁹⁶ In total, Gelfand would appear on six short lists. *Id.* In the late 1980s, his career was badly tainted by a scandal involving a lengthy affair with a female law assistant. See Frank Lynn, *Surrogate's Removal Urged; Affair with Law Aide Cited*, N.Y. TIMES, Mar. 26, 1987, at B3.

All odds were on Cuomo nominating a female with this pick. Doing so would fulfill his campaign promise of appointing a female to the court, and would successfully culminate his fight with the Commission over the previous “males only” list. And when the Women’s Bar Association issued a report stating that Judith S. Kaye was “unqualified” to serve as a Court of Appeals judge,¹⁹⁷ the public attention immediately shifted to the other woman on the list, Betty Weinberg Ellerin. A former trial court judge,¹⁹⁸ Ellerin possessed the judicial experience that Kaye completely lacked.¹⁹⁹ According to some observers at that time, including Cuomo himself, Ellerin also may have possessed greater political connections than Kaye.²⁰⁰

Yet for the second appointment in a row, Cuomo had a surprise in store for New Yorkers. He nominated Kaye instead of Ellerin for the position, making the forty-five year old attorney the pioneering woman on the Court of Appeals bench²⁰¹—and one who, by virtue of her young age, was likely to be on the bench for a long time. Later, he said that his nomination was motivated in part by the Women’s Bar Association’s disregard of Kaye’s candidacy. “[T]hat’s all you had to say to a guy with a name like Mario Cuomo—wasn’t qualified,” he stated in a speech to the American Bar Association.²⁰² “And so, I looked and I saw and I studied and I interviewed her, and I compared her, and I made phone calls all over the State of New York, to the Women’s Bar, to some of the other candidates, to everybody, and decided.”²⁰³

The decision brought a new judge to the court with the following demographic characteristics:

Race: White

¹⁹⁷ See John Caher, *Judge Proves Herself on Bench*, TIMES UNION (Albany, N.Y.), June 16, 1991, at A1.

¹⁹⁸ At this point in her career, Ellerin was serving as Deputy Chief Administrative Judge for the New York City Courts, the first female ever to hold this position. See *Appellate Division First Department: Betty Weinberg Ellerin*, N.Y. STATE UNIFIED CT. SYS., <http://www.nycourts.gov/courts/ad1/centennial/Bios/bwellerin2.shtml>. Prior to that, she served as a trial court judge in New York City. See *id.* In 1985, Cuomo appointed her to the Appellate Division, First Department, making her the first woman to sit on that court. *Id.* Later, Pataki would elevate her to Presiding Justice of the First Department—again, the first female to serve in this role. *Id.*

¹⁹⁹ See David Margolick, *Two Women on List for Top State Court*, N.Y. TIMES, July 21, 1983, at B1 (noting Kaye’s lack of experience as a judge).

²⁰⁰ See Cuomo, *Lead the Charge*, *supra* note 97, at 15.

²⁰¹ Margolick, *supra* note 193.

²⁰² Cuomo, *Lead the Charge*, *supra* note 97, at 15.

²⁰³ *Id.*

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Gender: Female (first in the history of the Court of Appeals)

Religion: Jewish²⁰⁴

Heritage: Polish²⁰⁵

Political Affiliation: "Moderate Liberal"²⁰⁶

Predecessor's Political Affiliation: Liberal²⁰⁷

Region: Downstate (New York City)

Age: Forty-five

Prior Judicial Experience: None

Previously On Short List: Never

Friendship Factors: Nothing specifically linking her with Cuomo

Judicial Record/"Pet Causes": No judicial record at all. Kaye was largely an unknown quantity ideologically when Cuomo appointed her to the Court of Appeals. She was, however, known to be rather outspoken about judicial ethics issues and education issues.²⁰⁸

As a judge, Kaye enjoyed one of the longest and most admired tenures in the history of the Court of Appeals.²⁰⁹ She proved to be a quiet but firm leader on the bench and in conference, winning the respect of her colleagues and ultimately rising to the position of Chief Judge as a replacement for Sol Wachtler.²¹⁰ She received bipartisan praise during her time on the court, both from other judges and from the media.²¹¹ Her voting record proved to be largely liberal, but moderately so.²¹² On criminal justice issues, her

²⁰⁴ Steven C. Krane, *Judith Smith Kaye*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 805, 805.

²⁰⁵ *Id.* at 805 (noting that Kaye's parents had left Poland to escape religious persecution).

²⁰⁶ In actuality, very little was known about Kaye's political leanings at the time when Cuomo appointed her to the court. But she was a Democrat, and most people assumed that she would be a "moderate," to whatever extent that word can be used to signify anything. See Glaberson, *supra* note 82 ("When Judge Kaye was first appointed to the court in 1983, she was viewed as a liberal.").

²⁰⁷ Fuchsberg was recognized as one of the most liberal members of the court, especially on criminal cases. See Stuart Cohen, *Jacob David Fuchsberg*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 763, 764.

²⁰⁸ See Krane, *supra* note 204, at 806, 810, 813.

²⁰⁹ See Skip Card, *Judith S. Kaye*, N.Y. STATE BAR ASS'N J., 2008, at 11–12; Krane, *supra* note 204, at 820; Hon. Albert M. Rosenblatt, *The Jurisprudence of Judith S. Kaye: A Legacy of Humanism*, 10 GOV'T L. & POL'Y J. 8, 8 (2008).

²¹⁰ See Card, *supra* note 209, at 14.

²¹¹ See Editorial, *Judith Kaye's Example*, N.Y. TIMES, Dec. 14, 2008, at 9.

²¹² See, e.g., Lyle Denniston, *Sarcastic Justice Put Tart Touch on Conservatism*, BALTIMORE SUN, Mar. 20, 1993, at 1A (referring to Kaye as "[g]enerally liberal"); Jennifer Fermino, *'Special' Kaye Made Herstory*, N.Y. POST, Mar. 12, 2010, at 7 (quoting Columbia Law School Professor Richard Briffault as describing Kaye as "similar . . . 'only more liberal'" than Sandra Day O'Connor); Joel Stashenko, *Kaye's Approach to Change Cautious and Pragmatic*, N.Y.L.J., Dec. 1, 2008, at 1; STREAMS OF TENDENCY, *supra* note 175, at 67 (describing both Kaye and Ciparick as "[r]eluctant [l]iberals").

record was mixed, moving from moderately liberal to commonly conservative in her later years on the court.²¹³ She was more liberal on education issues, writing that New York State should be held liable for violating the state constitutional mandate to offer a sound public education to all New York children “by establishing an education financing system that fails to afford New York City’s public schoolchildren the opportunity guaranteed by the Constitution.”²¹⁴ In a move that must have delighted Cuomo, she voted that the death penalty was unconstitutional under the New York State Constitution on three separate occasions.²¹⁵ And in perhaps her most controversial votes, she asserted that the New York State Constitution protected the rights of gays and lesbians to legally adopt their partners’ children,²¹⁶ to take over rent-controlled apartments previously owned by their partners,²¹⁷ and to legally marry one another.²¹⁸ On this last issue, Kaye authored a twenty-seven page dissent, calling the state’s ban on same-sex marriage “an unfortunate misstep” by the court’s majority.²¹⁹ “The long duration of a constitutional wrong cannot justify its perpetuation,” she wrote, “no matter how strongly tradition or public sentiment might support it.”²²⁰

Like Simons, Kaye was also outspoken about the proper role of the New York State Constitution in balance with the U.S.

²¹³ STREAMS OF TENDENCY, *supra* note 175, at 67–68 (noting a “precipitous” change in Kaye’s voting record on criminal cases, swinging from often pro-defendant to frequently prosecution).

²¹⁴ Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 902, 801 N.E.2d 326, 328, 769 N.Y.S.2d 106, 108 (2003).

²¹⁵ See, e.g., People v. Mateo, 2 N.Y.3d 383, 398, 400, 811 N.E.2d 1053, 1060, 1062, 779 N.Y.S.2d 399, 406, 408 (2004) (writing for the majority that struck down imposition of the death penalty for a defendant who pled guilty when told that he could either admit his guilt or face a death sentence); Hynes v. Tomei, 92 N.Y.2d 613, 626, 706 N.E.2d 1201, 1207, 684 N.Y.S.2d 177, 183 (1998) (writing for the majority that declared the State’s new death penalty statute’s plea bargaining provisions unconstitutional, in that these provisions compelled defendants to enter guilty pleas just to avoid the possibility of facing the death penalty); People v. Smith, 63 N.Y.2d 41, 78–79, 468 N.E.2d 879, 898, 479 N.Y.S.2d 706, 725 (1984) (writing for the majority that struck down a mandatory death penalty for an inmate who committed murder while already serving a life term in prison).

²¹⁶ *In re Jacob*, 86 N.Y.2d 651, 667, 668, 669, 660 N.E.2d 397, 405, 636 N.Y.S.2d 716, 724 (1995).

²¹⁷ *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 210–11, 543 N.E.2d 49, 53–54, 544 N.Y.S.2d 784, 788–89 (1989).

²¹⁸ *Hernandez v. Robles*, 7 N.Y.3d 338, 380, 855 N.E.2d 1, 22–23, 821 N.Y.S.2d 770, 791–792 (2006) (Kaye, C.J., dissenting).

²¹⁹ *Id.* at 396, 855 N.E.2d at 34, 821 N.Y.S.2d at 803.

²²⁰ *Id.* at 386, 855 N.E.2d at 26, 821 N.Y.S.2d at 795.

Constitution.²²¹ Unlike Simons, however, Kaye was typically a staunch proponent of state constitutional independence.²²² Often, both in her scholarly writings and her judicial decisions, she argued that limits imposed by federal law were not applicable if the New York State Constitution recognized greater protection in that area for New York's citizens. On multiple occasions, she emphasized that it was the New York State Constitution—not the U.S. Constitution—that was the true bulwark of civil liberties for New Yorkers.²²³

By the time she retired in 2008, Kaye had served for twenty-five years on the Court of Appeals, spending fifteen of those years as Chief Judge.²²⁴ Today, she serves as the chair of New York's Commission on Judicial Nomination, helping select the newest finalists for the court on which she served.²²⁵

²²¹ See Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law As Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. REV. 727, 728–29 (1992) (describing New York's recognition of enhanced rights to privacy under independent state grounds); see generally Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 49–56 (1988) (advocating for state courts that are willing to provide greater protections than the federal courts offer to individuals); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399–429 (1987) (describing how underlying policy considerations in the New York State Constitution provided for departures from the U.S. Constitution on certain grounds where New Yorkers were entitled to additional protections). In one particularly notable address, Kaye remarked about a lawyer who came up to her after a talk on the New York State Constitution and proclaimed that he never knew that New York had its own state constitution. Judith S. Kaye, *State Constitutional Law and the State High Courts in the 21st Century*, 70 ALB. L. REV. 825, 828 (2007) (“I suspect that still, there are a lot of fish—far too many—like him, for whom the text and history of our great State Constitution, and the performance of our great state courts, is like Columbus discovering America.”).

²²² For a classic illustration of where and how Kaye differed from Simons on these points, compare Kaye's opinion for the majority in *Immuno AG. v. Moor-Jankowski* with Simons's concurring opinion in this same case. Whereas Kaye's opinion focuses primarily on state law, and notes that she is mentioning federal law only because the U.S. Supreme Court requested on remand that she do so, Simons chastises Kaye for precluding the U.S. Supreme Court from any review of this case by using independent state grounds to decide it. Compare *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 239–57, 567 N.E.2d 1270, 1271–82, 566 N.Y.S.2d 906, 907–18 (1991) (Kaye, J., majority), with *id.* at 257–68, 567 N.E.2d 1270 at 1283–90, 566 N.Y.S.2d 906 at 919–26 (Simons, J., concurring).

²²³ Judge Albert Rosenblatt, one of Kaye's colleagues on the Court of Appeals, stated that Kaye “has surely done more to advance [New York's] state constitution than anyone else alive. See Randall T. Shepard, *Judith Kaye as a Chief Among Chiefs*, 84 N.Y.U. L. REV. 671, 672 (2009).

²²⁴ Card, *supra* note 209, at 12.

²²⁵ See STATE OF NEW YORK COMMISSION ON JUDICIAL NOMINATION, *The Road to the Court of Appeals: Demystifying the Process*, May 30, 2012 <http://nysegov.com/cjn/assets/documents/press/Ciparick%20Vacancy%20Informational%20Meetings%20Press%20Release%205-30-2012%20v2.pdf>.

C. Replacing Chief Judge Lawrence H. Cooke

Cuomo's third appointment to the Court of Appeals was viewed at the time as potentially his most important: that of the court's new Chief Judge, the "first among equals" on the Court of Appeals' bench.²²⁶ In making this pick, he would be replacing a highly respected liberal in Lawrence Cooke, a judge who was seen as a down-to-earth unifying force at the court's helm.²²⁷ One would assume that court observers may have predicted that Cuomo was likely to choose a liberal for this key position.

For this short list, the Commission returned to an all-male, all-white lineup.²²⁸ This time, however, Cuomo did not raise any strenuous objections, at least not in public. Perhaps it was because he had already made New York State's first female Court of Appeals appointment with his previous pick. Or perhaps it was because the list, while not diverse in terms of gender or ethnicity, was impressive in its depth of judicial talent. Milton Mollen, who had served as the Presiding Justice of the Second Department since 1978,²²⁹ was on the list, as were First Department Associate Judges E. Leo Milonas and Joseph P. Sullivan.²³⁰ Abraham Sofaer, the tremendously respected federal court judge from the Southern District of New York, returned on this list, as did Gelfand, the Bronx County Surrogate.²³¹ Neal P. McCurn, a federal judge from

²²⁶ The Chief Judge receives one vote in deciding cases, giving him or her the same voting power as the other members of the court. However, the position does clearly come with additional prestige and additional responsibilities, primarily the oversight of the court's procedures and the establishment of rules and policies for the state's vast Unified Court System. See Joel Stashenko, Lippman is Pick for Chief Judge, N.Y.L.J., Jan. 14, 2009, at 1.

²²⁷ See, e.g., William H. Honan, *Lawrence H. Cooke, 85, New York Chief Judge, Dies*, N.Y. TIMES, Aug. 19, 2000, at C16.

²²⁸ See CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141 at 2.

²²⁹ See John Eligon, *Senior Counsel, Very Senior Counsel*, N.Y. TIMES, Feb. 21, 2010, at 6. A potential "plus factor" for Mollen in seeking the nomination was his educational background. Like Mario Cuomo, he had attended St. John's for both his undergraduate and law school degrees. *Milton Mollen*, N.Y. UNIFIED CT SYS., <http://www.courts.state.ny.us/history/legal-history-new-york/luminaries-appellate/mollen-milton.html> (last visited Nov. 26, 2013).

²³⁰ See CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

²³¹ *Id.* Sofaer also had served as an assistant U.S. Attorney in the Southern District of New York, taught at Columbia, and served as an Assistant U.S. Attorney prior to being nominated for the Court of Appeals. See *Abraham D. Sofaer*, HOOVER INST., <http://www.hoover.org/fellows/10685> (last updated July 3, 2013). After not being appointed to the Court of Appeals, he switched allegiances to the Republican Party. Michael R. Gordon, *Legal Adviser Leaves a Trail of Furious Debate*, N.Y. TIMES, Mar. 1, 1988, at A14. Sofaer then became a legal advisor to the U.S. Department of State, receiving the U.S. Secretary of State's Distinguished Service Medal in 1988. *Abraham D. Sofaer*, *supra*. Ultimately, he

the Northern District of New York, made his first short list appearance in this pool of finalists.²³² And then there was the judge seeking to be elevated from his associate judgeship on the Court of Appeals, the man whom Cuomo ultimately appointed to Chief Judge: Sol Wachtler of Nassau County.²³³

Wachtler was a Republican, although a moderate one at the time.²³⁴ Yet he was also one of the most rapidly rising stars of New York's political and judicial arenas.²³⁵ Charismatic, eloquent, intelligent, and seemingly fearless, he seemed to have a knack for not only entrancing his friends, but also captivating his enemies.²³⁶ In just two decades, he had ascended from Long Island town council member to Court of Appeals judge.²³⁷ At the time when he was elected, running on a "law-and-order" platform,²³⁸ Wachtler was the youngest judge ever to sit upon the court.²³⁹ Already, insiders from *both* parties were mentioning his name as a potential future governor, a potential future U.S. Supreme Court justice, or even the first Jewish President of the United States.²⁴⁰

Thus, some might say that Wachtler was the obvious choice for Chief Judge, given his combination of brains and leadership ability. Others, however, would claim that something else was at work. Back in the early 1980s, Wachtler and Cuomo were friends, frequently dining together to discuss Albany's political news of the

became one of President Ronald Reagan's most trusted advisors, as well as one of the most controversial figures of the Regan administration for some of his stances on key foreign policy matters. *See* Gordon, *supra*.

²³² *See* CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

²³³ *Sol Wachtler Confirmed Easily for Chief Judge*, SCHENECTADY GAZETTE, Jan. 23, 1985, at 14.

²³⁴ *See, e.g., supra* note 106 and accompanying text. *See also* Sam Roberts, *A Judge's Interest in Being Governor is Decided the Hard Way*, N.Y. TIMES, Nov. 9, 1992, at B6 (calling Wachtler a "suburban, moderate, Jewish jurist"); Andrea Sachs, *Sol Wachtler's Bizarre Demise*, A.B.A. J., Jan. 1993, at 34 (referring to Wachtler as a moderate Republican).

²³⁵ *See* Gould, *supra* note 116, at 734; David Margolick, *The Making of a Chief Judge*, N.Y. TIMES, Jan. 6, 1985, at 6.

²³⁶ *See, e.g.,* Gould, *supra* note 116, at 742 ("He was the rare person who had the deserved public image of being kind to everyone around him, extremely intelligent, a brilliant public speaker with an unmatched sense of humor, charismatic to a fault, and the administrative ability and boldness to get things done. He seemed almost too perfect.").

²³⁷ For a short but thorough account of Wachtler's upward move, see Frank J. Prial, *2 Court Appointees From Different Backgrounds: Sol Wachtler*, N.Y. TIMES, Jan. 3, 1985, at B6.

²³⁸ *See* WACHTLER, *supra* note 99, at 190–91 ("It was not until the cultural insurrection of the sixties that the popularity of 'law-and-order' issues introduced a whole new political agenda. I know because I capitalized on it, along with Richard Nixon, in the election of 1972.").

²³⁹ Gould, *supra* note 116, at 734.

²⁴⁰ *See id.* at 738; Sachs, *supra* note 234.

day.²⁴¹ By 1985, however, Cuomo had to recognize Wachtler as a significant political threat.²⁴² “[Wachtler] was the only Republican in New York who could approach Cuomo’s eloquence,” one reporter later stated.²⁴³ Other newspapers claimed that Cuomo would never share a speaking engagement with Wachtler “for fear of being upstaged in humor and equaled in rhetoric.”²⁴⁴ Thus, when Cuomo appointed this member of a rival political party to the most prestigious judicial position in the state, many felt that this was a strategic move to “neutralize” Wachtler in future elections.²⁴⁵ These observers believed that Cuomo was letting Wachtler take the court in an effort to prevent Wachtler from taking over the Governor’s Mansion.²⁴⁶

Whatever the reason for his appointment, Wachtler brought to the Court of Appeals a Chief Judge with the following demographic characteristics:

Race: White

Gender: Male

Religion: Jewish

Heritage: Russian²⁴⁷

Political Affiliation: Republican (“moderate”)

Predecessor’s Political Affiliation: Democrat²⁴⁸

Region: Downstate (Long Island)

Age: Fifty-five

Prior Judicial Experience: Yes, four years as a Nassau County Supreme Court trial judge and then thirteen years (1972-1985) as an associate judge of the Court of Appeals²⁴⁹

²⁴¹ See DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 111 (5th ed. 2010) (“The governor and the chief judge were longtime friends.”); Sam Howe Verhovek, *Wachtler v. Cuomo: Duel of Ex-Friends*, N.Y. TIMES, Oct. 29, 1991, at B1 (“Back in 1981, before either Mario M. Cuomo or Sol Wachtler was at the head of a branch of state government, they were friends and frequent dinner companions in Albany: one night they were out for ‘six pleasant hours of jokes and discussions,’ according to a passage in Mr. Cuomo’s diaries.”).

²⁴² See Verhovek, *supra* note 241; Gould, *supra* note 116, at 738.

²⁴³ Eric Pooley, *Crazy For You: The Chief Judge, the Park Avenue Princess—And Passion Run Amok*, N.Y. MAG., Dec. 14, 1992, at 38.

²⁴⁴ Gould, *supra* note 116, at 736.

²⁴⁵ See *id.* at 736; Sam Howe Verhovek, *Friends’ View of Judge: G.O.P. Answer to Cuomo*, N.Y. TIMES, Nov. 8, 1992, at 48; Verhovek, *supra* note 241.

²⁴⁶ See Gould, *supra* note 116, at 736; Verhovek, *supra* note 245; Verhovek, *supra* note 241.

²⁴⁷ See JOHN M. CAHER, KING OF THE MOUNTAIN: THE RISE, FALL, AND REDEMPTION OF CHIEF JUDGE SOL WACHTLER 33 (1998). Wachtler himself grew up in the American South. *Id.*

²⁴⁸ See Adolfsen & Adolfsen, *supra* note 98, at 769.

²⁴⁹ See Gould, *supra* note 116, at 734.

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Previously On Short List: N/A (already on the Court of Appeals; not considered for prior Chief Judge vacancy)

Friendship Factors: Previously a good friend of Cuomo during their early days in Albany together. Now a possible threat to Cuomo winning another term in office.

Judicial Record/"Pet Causes": Conservative, but not overly so. Known to break ranks with the Republicans on the Court of Appeals and vote in favor of more liberal causes, particularly on civil liberties issues.²⁵⁰ Willing to assert greater protections under the New York State Constitution than were recognized under the United States Constitution.²⁵¹

As Chief Judge, Wachtler's star power only grew. As both an administrator of New York's court system and as a leader of his bench, he proved to be almost magnetic in convincing people to follow him.²⁵² So in 1987, when Wachtler's opinions suddenly

²⁵⁰ See, e.g., *People v. Liberta*, 64 N.Y.2d 152, 163–64, 474 N.E.2d 567, 573, 485 N.Y.S.2d 207, 213 (1984) (terminating the "marital exemption" for rape in New York); *People v. Brown*, 48 N.Y.2d 388, 392, 394–95, 399 N.E.2d 51, 52, 54, 423 N.Y.S.2d 461, 462, 464 (1979) (holding that a new trial was required when a juror engaged in independent investigation outside the scope of the trial that resulted in information that prejudiced defendant and violated defendant's right to a fair trial); *People v. Stewart*, 40 N.Y.2d 692, 699, 358 N.E.2d 487, 492–93, 389 N.Y.S.2d 804, 809 (1976) (holding that there were no grounds for findings of guilt beyond a reasonable doubt in first degree manslaughter case); *People v. De Bour*, 40 N.Y.2d 210, 219, 352 N.E.2d 562, 569, 386 N.Y.S.2d 375, 382 (1976) (establishing a set of seminal rights for New Yorkers in police encounters in an area of law the Supreme Court had previously avoided resolving); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (holding that in order to prevail on a libel suit in New York, the plaintiff must prove that the newspaper was grossly irresponsible in its coverage and conduct). Still another major pro-civil liberties case from Wachtler came just months after he was sworn in as Chief Judge, establishing that employers could not discriminate against an individual on the basis of obesity. See *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 220, 480 N.E.2d 695, 699, 491 N.Y.S.2d 106, 110 (1985).

²⁵¹ Beyond his actual Court of Appeals jurisprudence, Wachtler wrote about state constitutional adjudication multiple times during his years on the Court of Appeals. See, e.g., Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381, 397 (1986) (stating that the most direct protectors of individual rights are the state constitutions, not the U.S. Constitution). Wachtler's opinion for the court in *De Bour* is a classic example of the Court of Appeals moving beyond the federal standard to carve out an additional set of rights for New Yorkers. See *De Bour*, 40 N.Y.2d at 219, 352 N.E.2d at 569, 386 N.Y.S.2d at 382.

²⁵² Notably, the number of dissents written by Wachtler—a vigorous dissenter in his early years on the Court of Appeals—decreased dramatically over time. Indeed, Wachtler wrote *only fifteen dissents during his entire tenure as Chief Judge*—a sure sign that his opinions now held sway at the court. See John R. Bunker, "You Could Look It Up": *The Judicial Opinions of Sol Wachtler on the New York Court of Appeals*, 52 SYRACUSE L. REV. 847, 879 (2002). See also Shipp, *supra* note 22 ("[M]ost observers give [Wachtler] high marks so far, noting that he is unquestionably in control of the court's proceedings."). See also CAHER, *supra* note 247, at 18 (describing further Wachtler's charismatic nature).

became significantly more conservative²⁵³—a move that some court-watchers attributed to an attempt to encourage the Republican-dominated White House to consider him for a U.S. Supreme Court appointment²⁵⁴—the Court of Appeals followed his lead, shifting further to the right.²⁵⁵ He also engaged in a very public legal battle with the governor's office, suing Cuomo over a perceived slight when Cuomo significantly reduced the budget of the state judiciary.²⁵⁶ By the end of 1992, many were predicting another “battle of the titans” between these two men in the next gubernatorial election.²⁵⁷

Then came the crash, a downfall of operatic proportions. On November 7, 1992, FBI agents arrested Wachtler on criminal charges.²⁵⁸ The story that soon came to light—that Wachtler had been anonymously blackmailing his ex-girlfriend, Republican fundraiser Joy Silverman, writing harassing letters to her, and threatening the safety of her fourteen year old daughter—left New Yorkers of all political stripes shocked.²⁵⁹ One of Wachtler's friends went as far as telling *The New York Times* that it was like finding out that “Mother Teresa was a serial killer.”²⁶⁰ Yet the story was true. Wachtler ultimately pleaded guilty to the charges, stating

²⁵³ See STREAMS OF TENDENCY, *supra* note 175, at 241 (calling the later Wachtler court “lopsidedly pro-prosecution and pro-government”); Vincent Martin Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, 4 EMERGING ISSUES ST. CONST. L. 1, 10, 12–13 (1991) (“Drug testing . . . [is an] area[] in which the New York Court of Appeals has been retrenching.”). See also *id.* at 12–13 (explaining several of Wachtler's decisions involving drug testing).

²⁵⁴ See Michael Pakenham, *Sol Wachtler: A Man Who Would Be Everything Writes of His Fall From Grace*, BALT. SUN, Apr. 6, 1997, at 4F (“Powers both behind and in thrones of influence in the state and the land insisted that Wachtler, a moderate Republican, was destined to be governor, vice presidential candidate, U.S. Supreme Court justice, or all three, seriatim.”).

²⁵⁵ See STREAMS OF TENDENCY, *supra* note 175, at 241.

²⁵⁶ A full discussion of this case warrants a book, or at least another paper. To read the actual complaint filed by the Chief Judge against the governor who appointed him, see Plaintiff's Verified Complaint, *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991). In the end, after attempts to transfer the case to the federal courts, Cuomo and Wachtler settled their differences over the funding issue amicably. See Gary Spencer, *Wachtler, Cuomo Settle Funding Suit*, N.Y.L.J., Jan. 17, 1992, at 1; Kevin Sack, *Cuomo and Chief Judge Settle Court Budget Fight*, N.Y. TIMES, Jan. 17, 1992, at B4.

²⁵⁷ See Verhovek, *supra* note 245.

²⁵⁸ *Former Lover Charges Blackmail Against N.Y. Judge*, THE TELEGRAPH (U.K.), Nov. 9, 1992, at 4.

²⁵⁹ For a review of some of these expressions of shock from New Yorkers who knew and worked with Wachtler, see Gould, *supra* note 116, at 738–39; Lisa Anderson, *Judge's Fall a Painfully Public Tale of Obsession*, CHI. TRIB., Nov. 14, 1992, at 1; Sachs, *supra* note 234, at 34.

²⁶⁰ Gould, *supra* note 116, at 739.

that his actions stemmed from his severe bipolar disorder.²⁶¹ Sent to federal prison, he spent time in solitary confinement after allegedly being stabbed by another inmate.²⁶²

Today, Wachtler serves as a professor of Constitutional Law at Touro Law School.²⁶³ His law license has been returned to him by the State.²⁶⁴ Yet his primary work seems to involve speaking engagements, all of them apparently presented without Wachtler receiving a speaker's fee, about his own battles with mental illness and about the need for greater care of the mentally ill in prisons.²⁶⁵

Ultimately, Wachtler proved to be one of the most peculiar judicial selections that Cuomo made, glowing brighter and brighter until he exploded. Cuomo, however, always emphasized the important role that his one-time friend and potential rival played on the Court of Appeals during his golden days. "Of all the appointments I made," he told a reporter from the American Bar Association in 1993, "there's none I'm prouder of than Sol Wachtler."²⁶⁶

D. Replacing Judge Hugh R. Jones

The second short list that Mario Cuomo saw in 1985 was short in name only. An unprecedented eleven names were presented to Cuomo as finalists²⁶⁷ to replace Judge Hugh R. Jones, another casualty of the mandatory retirement age.²⁶⁸ The list included a number of repeats from previous lists, including Bronx County Surrogate Bertram Gelfand, First Department Associate Justice

²⁶¹ See Diana Jean Schemo, *A Prison Term of 15 Months for Wachtler*, N.Y. TIMES, Sept. 10, 1993, at B1; Editorial, *Judge Wachtler Heads for Prison*, N.Y. TIMES, Sept. 10, 1993, at A26. Wachtler's own account of the night before he departed for prison is particularly moving. In it, he notes how his obituary would have looked if he had died the previous year:

[P]eople would tearfully say, "He could have been governor—maybe even vice president—or a member of the United States Supreme Court." All this would have happened if I had died a year ago. But I didn't—and tomorrow I leave for federal prison. The thought terrifies me. How will the other prisoners relate to a former judge? . . . What will they do to me?

WACHTLER, *supra* note 99, at 24.

²⁶² Gould, *supra* note 116, at 740.

²⁶³ *Id.*

²⁶⁴ Peter Lattman, *Sol Wachtler Got His Law License Back*, WALL ST. J. L. BLOG (Oct. 3, 2007, 11:27 AM), <http://blogs.wsj.com/law/2007/10/03/sol-wachtler-got-his-law-license-back>.

²⁶⁵ See Nicole Peradotto, *Sol Wachtler: The trial of his life*, BP MAG., <http://www.bphope.com/Item.aspx/9/sol-wachtler-the-trial-of-his-life>.

²⁶⁶ Sachs, *supra* note 234, at 34.

²⁶⁷ See CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

²⁶⁸ See John Caher, *Judge Hugh R. Jones*, N.Y.L.J., Mar. 6, 2001, at 2.

Joseph P. Sullivan, Fourth Department Associate Justice Stewart F. Hancock, Second Department Associate Justice Leon D. Lazer, and federal district court judges Abraham Sofaer and Neal McCurn.²⁶⁹ This batch of names also marked the first appearance on the list of a respected Third Department Associate Justice named Howard Levine,²⁷⁰ and the first appearance of New York University School of Law Professor William E. Hogan—only the second time since the appointment process began that an academic made the short list—on the Commission’s catalog of court finalists.²⁷¹

Yet there was one name on the list that received particular attention from Cuomo: First Department Associate Justice Fritz W. Alexander II.²⁷² Alexander was an African-American, the first time a racial minority had appeared on the short list during Cuomo’s time in office.²⁷³ Just as Cuomo had seized his first opportunity to appoint a woman to the court by nominating Kaye, he took this chance to fulfill his second campaign promise: appointing the first African-American eligible to serve a full term on the Court of Appeals.²⁷⁴

Alexander clearly understood the historical impact of his appointment to the court. “I would be remiss if I did not acknowledge the symbolic significance of my elevation to the Court of Appeals,” he told the Judiciary Committee of the New York State Senate.²⁷⁵ Yet he also was emphatic that he wanted to be appointed for his merit as a judge, not because of his skin color.²⁷⁶ “The fact that I’m black is an accident of birth. I’m here to serve the people of this state as a judge of this court.”²⁷⁷

²⁶⁹ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

²⁷⁰ *Id.*

²⁷¹ *Id.* Among other things, Professor Hogan served during his career as Chairman of the Corporation, Banking, and Business Section of the American Bar Association, co-produced New York’s Annotations to the Uniform Commercial Code, and served as a consultant to the New York State Law Revision Commission on the Uniform Consumer Credit Code. See William Hogan, *In Memoriam: Norman Smith Penney*, 31 AM. U. L. REV. 197, 203–04 (1982).

²⁷² CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

²⁷³ A search of every other name on prior short lists reveals only individuals who are not racial minorities. This search does not include “ethnic minority” status, as the Italian-American Justice Vito Titone—later to become Judge Titone—did appear on the first short list that Cuomo received in 1983.

²⁷⁴ *Senate Confirms Judge Alexander*, *supra* note 17.

²⁷⁵ *Id.*

²⁷⁶ See Angela Burton, *Fritz Winfred Alexander II*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 829, 830.

²⁷⁷ Isabel Wilkerson, *2 Court Appointees From Different Backgrounds: Fritz Winfred Alexander 2d*, N.Y. TIMES, Jan. 3, 1985, at B6. Unfortunately, there was at least one

Indeed, there were positive factors for Cuomo beyond Alexander's skin color in making this appointment. Alexander had already established a reputation as a liberal judge, although he was often described as a "centrist."²⁷⁸ While he had served on the Appellate Division for only three years before being appointed to the Court of Appeals,²⁷⁹ he was viewed as a defender of the rights of the accused, as well as a proponent of civil rights causes,²⁸⁰ positions which interlocked with Cuomo's own stances. Furthermore, Alexander's background likely appealed to Cuomo. Around the time when Cuomo was representing individuals in New York City in housing disputes, Alexander was serving as the chairperson of the Lawyers Committee of the Housing Task Force in Manhattan.²⁸¹ It is unknown what Cuomo thought about Alexander's background in this area of work. However, if he knew about it—and one can logically assume that he did—then it certainly could not have hurt Alexander's chances in receiving the nomination.

By appointing Alexander to the Court of Appeals, Cuomo gained a judge with the following demographic characteristics:

Race: African-American (first to serve a full term in the history of the Court of Appeals)

Gender: Male

Religion: Not known²⁸²

Heritage: Born in the American South, raised by relatives in the Midwest²⁸³

particularly nasty incident prior to his appointment to the Court of Appeals in which somebody judged Alexander for his skin color rather than his intellectual merit. In 1981, an unknown party (or group of individuals) broke into Alexander's chambers in New York City, where he was sitting as a trial court judge at that time. The trespassers vandalized his office and wrote "KKK" in large letters on his wall. *Chambers of Black Judge Defaced During Break-In*, N.Y. TIMES, Jan. 18, 1981, at 27.

²⁷⁸ Catherine M. Feehan & Elisa Karnis, *Is There High Ground in the Middle of the Road? A Review and Analysis of the Jurisprudence of the Honorable Fritz W. Alexander II*, 8 ST. JOHN'S J. LEGAL COMMENT. 531, 533 (1993).

²⁷⁹ Alexander served on the First Department bench from 1982 to 1985. See Burton, *supra* note 276, at 832.

²⁸⁰ See *id.* at 833–34; Feehan & Karnis, *supra* note 278, at 558. Additionally, Alexander gained attention during his Appellate Division years for his service on the New York State Commission on Judicial Conduct, leaving the Commission only when appointed to the Court of Appeals. N.Y. STATE COMM'N ON JUDICIAL CONDUCT, TENTH ANNUAL REPORT 7 (1985).

²⁸¹ BERNARD S. MEYER ET AL., THE HISTORY OF THE NEW YORK COURT OF APPEALS: 1932–2003 32 (2006).

²⁸² None of the resources consulted in preparing this report specifically mentioned Judge Alexander's religion. This does not mean that he was an agnostic, merely that his religion was not stated in any of the materials read in preparation of this article.

²⁸³ Burton, *supra* note 276, at 829. At Dartmouth, Alexander was one of only four African-American students in his graduating class. *Id.* at 831.

Political Affiliation: Democrat

Predecessor's Political Affiliation: Republican²⁸⁴

Region: Downstate (New York City)

Age: Fifty-eight²⁸⁵

Prior Judicial Experience: Yes, serving as a trial court judge from 1970 until 1982, and then serving on the First Department from 1982 until 1985²⁸⁶

Previously On Short List: Never

Friendship Factors: Potentially, especially if Cuomo knew about their similar legal interests in the housing issues of New York City in the late 1960s and early 1970s.

Judicial Record/"Pet Causes": Described as a "centrist."²⁸⁷ Viewed by observers to be a more consistently liberal judge than he purported to be, particularly on rights of the accused and civil rights cases.²⁸⁸

On the Court of Appeals, Alexander typically voted the way one would expect a modern-day liberal to vote. If anything, he proved to be slightly more liberal than advertised.²⁸⁹ His notable decisions expanded the rights of involuntarily committed New Yorkers,²⁹⁰ struck down a state law permitting warrantless searches of junkyards and businesses storing "discarded or secondhand merchandise,"²⁹¹ and upheld civil rights interests in the jury

²⁸⁴ Mansnerus, *supra* note 100.

²⁸⁵ See Burton, *supra* note 276, at 829.

²⁸⁶ *Id.* at 832.

²⁸⁷ Feehan & Karnis, *supra* note 278, at 533.

²⁸⁸ See *id.*; Burton, *supra* note 276, at 833–34.

²⁸⁹ See Feehan & Karnis, *supra* note 278, at 533.

²⁹⁰ *Rivers v. Katz*, 67 N.Y.2d 485, 492, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986) (holding that compelling involuntarily committed mental health patients to take antipsychotic drugs without their consent violates the due process clause of the New York State Constitution).

²⁹¹ *People v. Burger*, 67 N.Y.2d 338, 340, 493 N.E.2d 926, 926, 502 N.Y.S.2d 702, 702 (1986), *rev'd*, 482 U.S. 691 (1987). Alexander based this ruling solely on the language of the U.S. Constitution, holding that the statute in question violated the fundamental Fourth Amendment rights of commercial property owners. See *id.* at 343, 344, 493 N.E.2d at 928, 929, 502 N.Y.S.2d at 704, 705. Subsequently, this decision was reversed by the U.S. Supreme Court. *New York v. Burger*, 482 U.S. 691 (1987). Ultimately, the New York Court of Appeals returned to this issue in the case of *People v. Keta*, in which Alexander joined an opinion by Judge Vito Titone that again struck down the statute, but this time did so on adequate and independent state grounds. *People v. Scott*, 79 N.Y.2d 474, 496–97, 593 N.E.2d 1328, 1342, 583 N.Y.S.2d 920, 934 (1992) ("An independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright.").

selection process.²⁹² As Catherine M. Feehan and Elisa Karnis noted in a biographical sketch of Alexander, “[a]lthough considered a ‘centrist,’ Judge Alexander authored several opinions . . . which suggest a decidedly more liberal and expansive philosophy in cases involving protections afforded by the Bill of Rights.”²⁹³ While not as influential on the court as Simons, Kaye, or Wachtler, Alexander carved out a niche on the court’s bench that not only left a jurisprudential mark, but also earned him the respect of his colleagues.²⁹⁴

In 1992, after serving on the Court of Appeals for just seven years,²⁹⁵ Alexander surprised everyone by resigning from the court, accepting the position of New York City’s Deputy Mayor for Public Safety.²⁹⁶ Precisely why Alexander did this is unclear, other than the fact that he was close friends with New York City Mayor David M. Dinkins.²⁹⁷ Many of his Court of Appeals colleagues considered this to be a step down for Alexander.²⁹⁸ Regardless of whether it

²⁹² *People v. Jenkins*, 75 N.Y.2d 550, 555, 556, 554 N.E.2d 47, 49, 50, 555 N.Y.S.2d 10, 12, 13 (1990) (determining that where the government, in prosecuting a case with an African-American defendant, had used seven of its ten peremptory challenges to remove African-American prospective jurors from the venire panel, there was a prima facie case of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment); *People v. Kern*, 75 N.Y.2d 638, 642, 653, 554 N.E.2d 1235, 1236, 1243, 555 N.Y.S.2d 647, 648, 655 (1990) (holding that purposefully excluding individuals from a jury on the basis of race violates the Civil Rights Clause of the New York State Constitution).

²⁹³ Feehan & Karnis, *supra* note 278, at 533 (footnotes omitted).

²⁹⁴ See, e.g., Andy Newman, *Fritz Alexander II, 73, Judge Who Became a Deputy Mayor*, N.Y. TIMES, Apr. 25, 2000, at B8 (“Mr. Alexander was remembered as perceptive and thorough on the bench, warm and sociable off, with a sense of humor that belied his sometimes formal bearing.”); Kevin Sack, *Alexander’s Departure Leaves Cuomo Tricky Task of Picking a New Judge*, N.Y. TIMES, Feb. 9, 1992, at 136 [hereinafter *Alexander’s Departure*] (“[Alexander] is a very cordial, unegotistical jurist and a person who seeks resolution, who prefers reason to acrimony.”).

²⁹⁵ Sol Wachtler, Chief Judge, State of New York, Remarks at Ceremony Marking the Departure of Associate Judge Fritz. W. Alexander, II (March 24, 1992), in 79 N.Y.2d ix, x (1992) [hereinafter Wachtler, *Remarks*].

²⁹⁶ *Alexander’s Departure*, *supra* note 294.

²⁹⁷ See *id.*; Burton, *supra* note 276, at 832. Alexander did try to articulate his reasons for leaving the court, stating, in part:

The answer is perhaps far more complex than even I understand. A part of it is David Dinkins, who is striving mightily to bring the City he and I love through these days of fiscal difficulty; a part of it is the City I have come to love that must survive these difficult times; a part of it is a sense that these times are historic, even if troubled, and an era of which I very much want to be a part.

Wachtler, *Remarks*, *supra* note 295, at xii–xiii.

²⁹⁸ See Feehan & Karnis, *supra* note 278, at 559 (“When Judge Alexander decided to retire from the bench, many were critical of his choice. They saw it as folly, a step in the wrong direction.”). Chief Judge Wachtler went as far as to remark, “[i]f he [Judge Alexander] follows the trajectory, his next job will be school crossing guard.” *Id.* at 532 n.3 (quoting Maurice Carroll et al., *Dinkins Scores with Fire Dept.*, NEWSDAY (N.Y.), June 12, 1992, at 20).

was, Cuomo had nevertheless achieved his promise of appointing an African-American to the Court of Appeals with Alexander's nomination, as well as securing a predictable liberal vote during a period when the court crept decidedly to the right.²⁹⁹

E. Replacing Associate Judge Wachtler

After appointing Wachtler to become Chief Judge, Cuomo now needed to fill the vacant associate judgeship left behind by Wachtler's promotion. The short list presented to him by the Commission this time was back to the standard seven names.³⁰⁰ Again, it was entirely white and entirely male.³⁰¹ It was also comprised entirely of repeat players, familiar names on this list of finalists: Professor Hogan from New York University, Howard Levine from the Third Department, Leon D. Lazer and Richard A. Brown from the Second Department, Joseph P. Sullivan from the First Department, and Neal P. McCurn from the Northern District.³⁰² All but one of them had appeared on the previous short list.³⁰³

Yet Cuomo's nominee was that one outlier, a judge who had not been on the short list since 1983: Vito J. Titone from the Second Department.³⁰⁴ This was an appointment that many court watchers expected Cuomo to make the first time that Titone's name appeared on the list, leading to some surprise when Cuomo chose the conservative Richard Simons instead.³⁰⁵ Titone was both personally and philosophically close to Cuomo.³⁰⁶ The two men had been classmates at St. John's together, frequently going out on "double dates" with the women who would eventually become their wives.³⁰⁷ Like Cuomo,³⁰⁸ Titone was an Italian-American who was born and

²⁹⁹ See *Alexander's Departure*, *supra* note 294 ("Judge Alexander, in the view of some students of the court, has been a centrist swing vote on a bench that has been inching toward the right."); see also *id.* (noting that in cases where the court split four to three, Alexander voted for the defendant ninety percent of the time, again demonstrating that he was probably not as "centrist" as he and others claimed).

³⁰⁰ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

³⁰¹ See *id.*

³⁰² *Id.* This was Joseph Sullivan's fourth short list and the third short list for Lazer and McCurn. *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See *supra* notes 145–48 and accompanying text.

³⁰⁶ See Harrison, *supra* note 145, at 844, 847; THE CAMPAIGN FOR GOVERNOR, *supra* note 25, at 4.

³⁰⁷ Harrison, *supra* note 145, at 844.

³⁰⁸ THE CAMPAIGN FOR GOVERNOR, *supra* note 25, at 8.

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bred in New York City, the son of immigrant parents.³⁰⁹ He was also a Roman Catholic, just like Cuomo.³¹⁰ And ideologically, he appeared to be virtually a carbon copy of Cuomo: pro-defendant, opposed to the death penalty, sensitive to the struggles of marginalized populations, and the like.³¹¹ Furthermore, he had by this point garnered a reputation as one of the most respected and empathetic judges on New York's Appellate Division.³¹² His age also worked in his favor, for at age fifty-five,³¹³ Titone would be on the court for a guaranteed fourteen-year term, barring any unforeseen events.

Thus, Cuomo's decision to nominate Titone was not a surprising one, although it did annoy some commentators who may have felt that Wachtler's vacancy should have been filled by a Republican.³¹⁴ By appointing Titone, the court gained a judge with the following demographic characteristics:

Race: White

Gender: Male

Religion: Roman Catholic

Heritage: Italian

Political Affiliation: Democrat

Predecessor's Political Affiliation: Republican

Region: Downstate (New York City)

³⁰⁹ See Harrison, *supra* note 145, at 844. This fact was not lost on Cuomo, who clearly wanted an Italian-American on the Court of Appeals—nor was it lost on New York's court watchers. See Shipp, *supra* note 22 (“In choosing Vito J. Titone and Judge Bellacosa, the Governor has named two Italian-Americans, members of an ethnic group he felt had traditionally been underrepresented on the court.”). For an interesting commentary about the jurisprudence of three Italian-American judges—two New York Court of Appeals Judges in Titone and Joseph Bellacosa, and the U.S. Supreme Court voting record of Justice Antonin Scalia, see Peter A. Lauricella, *Chi Lascia La Via Vecchia Per La Nuova Sa Quel Che Perde e Non Sa Quel Che Trova: The Italian-American Experience and its Influence on the Judicial Philosophies of Justice Antonin Scalia, Judge Joseph Bellacosa, and Judge Vito Titone*, 60 ALB. L. REV. 1701 (1997).

³¹⁰ See THE CAMPAIGN FOR GOVERNOR, *supra* note 25, at 4; *Index to Politicians*, POLITICAL GRAVEYARD, <http://http://politicalgraveyard.com/bio/timmons-tittmann.html> (last visited Jan. 17, 2014).

³¹¹ For a summary of the more than 150 opinions that Judge Titone wrote while serving on the Appellate Division, see Harrison, *supra* note 145, at 846–47.

³¹² See *id.* at 847, 848–50 (noting Judge Titone's sympathy for defendants and the extent to which he had gained the respect and affection of his colleagues both on and off the bench).

³¹³ Titone was born in 1929. *Id.* at 844.

³¹⁴ In one editorial titled “The Cuomo Court,” *The New York Times* was particularly hard on Titone, stating that “Mr. Cuomo's poorest choice was of a Democrat, Vito Titone, a Brooklyn appellate judge whose strong ethnic support outweighed his judicial credentials.” Editorial, *The Cuomo Court*, N.Y. TIMES, Dec. 2, 1985, at A14. For one reader's indignant response to this editorial, see Peter J. McQuillan, Letter to the Editor, *Why Cuomo Named Titone to Appeals Seat*, N.Y. TIMES, Dec. 20, 1985, at A34.

Age: Fifty-five

Prior Judicial Experience: Yes, both as a trial judge (1969 to 1975) and on the Second Department (1975 to 1985)³¹⁵

Previously On Short List: Yes, once

Friendship Factors: Absolutely: Cuomo and Titone were such close friends that when Cuomo called to offer Titone the nomination, he spoke first to Titone's wife, jokingly asking her if she would like "to get rid of [her husband] by sending him to Albany."³¹⁶

Judicial Record/"Pet Causes": Over the course of more than 150 Appellate Division opinions, Titone became known as a defender of the rights of the accused in criminal cases³¹⁷ and as a defender of minority rights in Equal Protection cases.³¹⁸ He also was known to be adamantly against lengthy terms of incarceration for non-violent crimes, a stance that originated in his trial court work.³¹⁹

Within a couple of years, Titone had clearly become the leader of the liberal wing on the Court of Appeals.³²⁰ His decisions were not exclusively liberal, as evinced by his opinion in a case where he refused to extend free speech protections to a privately owned shopping mall, holding that members of the New York Civil Liberties Union could not pass out political pamphlets there.³²¹ Yet his votes on criminal cases were dominantly pro-defendant, holding firm while the court moved to the right under Wachtler.³²² This was

³¹⁵ BERNARD S. MEYER ET AL., *supra* note 281, at 33.

³¹⁶ Harrison, *supra* note 145, at 847.

³¹⁷ STREAMS OF TENDENCY, *supra* note 175, at 1 (noting that from 1987 to August 1998, Titone voted in favor of the defendant in 77% of divided criminal cases).

³¹⁸ See Harrison, *supra* note 145, at 846.

³¹⁹ See *id.* at 845.

³²⁰ See, e.g., Harrison, *supra* note 145, at 847; Luke Bierman, *The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals*, 68 TEMP. L. REV. 1403, 1441 (1995) (discussing the extremely liberal trends in Titone's voting); Wolfgang Saxon, *Vito Titone of Top New York Court Dies at 76*, N.Y. TIMES, July 8, 2005, at B8 ("Judge Vito J. Titone [was] a firm liberal voice on the New York State Court of Appeals."); Richard Pérez-Peña, *A Liberal on Top Court is Resigning*, N.Y. TIMES, Feb. 21, 1998, at B1 (identifying Titone as one of the "most liberal" on the court).

³²¹ SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498, 505, 488 N.E.2d 1211, 1212, 1217, 498 N.Y.S.2d 99, 100, 105 (1985). Interestingly, while Titone proved to be liberal overall on civil issues, his voting record in civil cases was definitely not as dominantly pro-individual rights as it was in criminal matters. See STREAMS OF TENDENCY, *supra* note 175, at 65 chart 2.4, 66 chart 2.5.

³²² In 1990, for instance, Titone voted for the defendant in an astonishing 92% of the cases in which the Court of Appeals was divided on the outcome. Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1990*, 12 PACE L. REV. 1, 50 (1992). The following year, he voted in favor of the defendant in 90% of the criminal cases in which the court was divided on the outcome. See Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1991*, 14 PACE L. REV. 353, 455 tbl.B (1994) (indicating Titone's 90% "liberal" voting record in criminal justice cases). Overall, from 1987 to August 1998,

especially true in cases where Titone believed that the government had unduly invaded the privacy that, in his view, New York citizens had reasonably come to expect.³²³ Protection of children also proved to be another area of the law in which Titone held particularly strong views.³²⁴ He also consistently displayed a willingness to depart from U.S. Supreme Court precedent in cases where he felt the New York State Constitution granted a higher level of protection than what was afforded under federal law.³²⁵

Titone voted for the defendant in 77% of divided criminal cases. STREAMS OF TENDENCY, *supra* note 175, at 1.

³²³ See, e.g., *In re Gregory M.*, 82 N.Y.2d 588, 596, 627 N.E.2d 500, 504, 606 N.Y.S.2d 579, 583 (1993) (Titone, J., dissenting) (arguing that a school security guard should not be able to search an individual's book bag where it is clear that there is not "even a 'reasonable suspicion' of criminality"); *People v. Scott*, 79 N.Y.2d 474, 492, 496-97, 593 N.E.2d 1328, 1339, 1342, 583 N.Y.S.2d 920, 931, 934 (1992) (striking down a New York statute that permitted warrantless searches of junkyards and businesses selling second-hand materials as violating the New York State Constitution); *People v. Dunn*, 77 N.Y.2d 19, 22-23, 25-26, 564 N.E.2d 1054, 1056, 1058, 563 N.Y.S.2d 388, 390, 392 (1990) (holding that canine sniffs were a search under the New York State Constitution, as they violated a New Yorker's reasonably expected right to privacy, even though the U.S. Supreme Court had previously held that canine sniffs were not a search under the Fourth Amendment to the federal Constitution); *People v. Torres*, 74 N.Y.2d 224, 227, 543 N.E.2d 61, 63, 544 N.Y.S.2d 796, 798 (1989) (determining that the police lacked probable cause to search for a weapon in a closed container within the passenger compartment of the suspect's car).

³²⁴ See, e.g., *Tropea v. Tropea*, 87 N.Y.2d 727, 738-39, 665 N.E.2d 145, 150, 642 N.Y.S.2d 575, 580 (1996) (holding that when the custodial parent wants to move to a distant location, the decision of which parent should henceforth have custody of the child should not be based on the interests of the parents, but rather upon the needs of the child, the "innocent victims of their parents' decision to divorce"). In one particularly controversial case, *People v. Salaam*, Titone combined his emphasis on protecting the rights of children and his concerns about oppressive police actions in one dissent. See *People v. Salaam*, 83 N.Y.2d 51, 58-64, 629 N.E.2d 371, 374-78, 607 N.Y.S.2d 899, 902-06 (1993) (Titone, J., dissenting). In this case, police officers and an Assistant District Attorney obtained a confession of a fifteen year old boy while holding him in isolation, away from the three adults who had come to the police station with him. *Id.* at 58, 629 N.E.2d at 374, 607 N.Y.S.2d at 902. These three adults attempted to see the boy at the police station, but police blocked their access until the boy confessed to the crime. *Id.* at 59-60, 629 N.E.2d at 375, 607 N.Y.S.2d 899 at 903. The majority of the court held that the evidence obtained by the police in this questioning process should not be suppressed, and upheld the boy's conviction. *Id.* at 57-58, 629 N.E.2d at 374, 607 N.Y.S.2d at 902 (majority opinion). Titone, in one of his most impassioned dissents, disagreed. *Id.* at 58, 629 N.E.2d at 374, 607 N.Y.S.2d at 902 (Titone, J., dissenting). "Because the officers' actions represented a deliberate effort to keep him away from all responsible individuals who might have offered counsel or assistance, I would . . . hold instead that the resulting confession must be suppressed." *Id.*

³²⁵ *Scott*, 79 N.Y.2d at 492, 497, 593 N.E.2d at 1339, 1342, 583 N.Y.S.2d at 931, 934 ("An independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright."). For an emphatic statement of Titone's views on the growing importance of state constitutions, see Vito J. Titone, *State Constitutional Interpretation: The Search For An Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431, 438 (1987) ("[T]he urgings of the federal judiciary, the current proclivity of litigants to use state courts, the federal retrenchment in

Titone served for all but one year of his fourteen-year term, retiring from the court in 1998.³²⁶ By this time, George Pataki was governor, engaging in a public war of words with Titone over the proper function of courts, accusing the Court of Appeals of using technicalities for the purpose of “protecting the guilty and not the innocent.”³²⁷ Yet Titone emphatically told the press that the battles with Pataki had no bearing on his decision to retire a year before his term ended.³²⁸ “I’m leaving now because I’m healthy now,” he told *The New York Times*, “and [thirty] years is a long time to be a judge.”³²⁹

F. Replacing Judge Matthew Jasen

With Judge Matthew Jasen forced into mandatory retirement after celebrating his seventieth birthday in 1985, Cuomo was able to make his fourth Court of Appeals nomination in the span of just one year.³³⁰ Once again, the Commission presented him with a short list filled with familiar faces: Bronx County Surrogate Bertram Gelfand, First Department Justice Joseph Sullivan, Third Department Justice Howard Levine, New York University Professor William Hogan, and Fourth Department Justice Stewart Hancock.³³¹ The lineup also included a new female candidate, New York City attorney Carolyn Gentile, and a new academic candidate, Albany Law School Dean Richard J. Bartlett.³³²

Conspicuously absent, however, was Michael F. Dillon, a Democrat who was serving as the Presiding Justice of the Fourth

the human rights area and the willingness of state courts to engage in state constitutional analysis have all contributed to the current trend toward expansive state constitutional adjudication.”).

³²⁶ Pérez-Peña, *supra* note 320.

³²⁷ See James Dao, *Pataki, in High Court, Exchanges Barbs With Top Judge*, N.Y. TIMES, May 2, 1996, at B3.

³²⁸ Titone actually proved to grow *more* pro-defendant in his criminal case voting after the Pataki attacks on the court’s integrity. See Vincent Martin Bonventre, *N.Y. Court of Appeals: Granting Criminal Appeals—Up, Down, Now Up Again? (Part 7: Pataki’s Attack and The Court’s Retreat)*, N.Y. CT. WATCHER, (Dec. 5, 2009), http://www.newyorkcourtwatcher.com/2009/12/ny-court-of-appeals-granting-criminal_03.html (showing that Titone’s pro-defendant voting rose to a staggering 100% in 1998).

³²⁹ Pérez-Peña, *supra* note 320.

³³⁰ Indeed, the media took due note of the sudden frequency with which Cuomo was able to appoint Court of Appeals judges. See Associated Press, *Cazenovian Nominated to State’s Highest Court*, OBSERVER-DISPATCH (Utica, N.Y.), Nov. 27, 1985, at A1.

³³¹ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 3. All of these individuals had appeared on at least one previous short list. *Id.* at 1–3.

³³² *Id.*

Department.³³³ Many observers believed that Dillon would be a logical choice to replace Jasen on the Court of Appeals.³³⁴ Without Dillon on the list, however, Cuomo went ahead and nominated another member of the Fourth Department: Stewart F. Hancock, Jr.³³⁵

Hancock was a somewhat surprising choice, primarily because he was a Republican appointed by a Democratic governor to replace a judge who was a Democrat.³³⁶ By this point, however, Cuomo had demonstrated that he was not adverse to such moves.³³⁷ Conceivably, after the appointment of his liberal friend Vito Titone, Cuomo may have believed that selecting a more conservative judge was necessary to balance the court.³³⁸ Hancock also was Cuomo's first selection of an upstate judge since the appointment of Simons in 1983, another factor which Cuomo potentially may have taken into account. Additionally, Hancock had developed a solid reputation throughout New York State as both an attorney and a judge.³³⁹ Known as a level-headed and pragmatic jurist, he may have seemed to be a "safe" pick for Cuomo to make.³⁴⁰

³³³ See Hope B. Engel, *Stewart Freeborn Hancock, Jr.*, in *JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 36, at 855, 864 n.16.

³³⁴ See *id.* This was a reasonable assumption to make. Cuomo had appointed Dillon to the position of Presiding Justice in 1987, and it was no secret that the governor held Dillon in very high esteem. See Mario M. Cuomo, *A Tribute to Justice Michael F. Dillon*, 40 *BUFF. L. REV.* vii, vii–viii (1992).

³³⁵ BERNARD S. MEYER ET AL., *supra* note 281, at 33.

³³⁶ Hancock was not just a Republican, but an extremely active and outspoken member of the Republican Party. He had served as a delegate to the Republican National Convention in 1964, served as the chair of the Onondaga County Republican Party, and ran (unsuccessfully) for Congress in 1966 on the Republican ticket. See *id.*

³³⁷ See *supra* Part V.A. (discussing Cuomo's appointment of Republican and upstate resident Judge Simons when he had the option to appoint a downstate liberal, his friend Vito Titone, to the court in 1983).

³³⁸ Cuomo would make a similar move later, with the appointment of Howard Levine, an upstate Republican, after a run of downstate liberal appointments to the Court of Appeals. See *infra* Part V.J. While it is impossible to state with certainty, this pattern certainly seems to indicate that Cuomo was conscious of maintaining some sort of ideological and geographic balance on the court.

³³⁹ See generally Vincent Martin Bonventre, *Dedication to the Honorable Stewart F. Hancock, Jr.*, 9 *TOURO L. REV.* 545, 550–51 (1993) [hereinafter *Dedication to the Honorable Stewart F. Hancock, Jr.*] (describing how both the Court of Appeals and New York have been privileged to have benefitted from "Judge Hancock's talents, mind and commitment"); see also Thompson Gould Page, *Apostle of Fundamental Fairness: New York Court of Appeals Judge Stewart F. Hancock Jr.'s State Constitutional Decision-Making*, 9 *TOURO L. REV.* 553, 553, 585 (1993) (describing Judge Hancock's commitment to fairness in constitutional rights and liberties cases).

³⁴⁰ In other words, a Republican and an upstate resident to prove that Cuomo had not abandoned his word about choosing judges on merit rather than party loyalty, but not a judge who was so conservative as to destroy Cuomo's hallmark stances on key issues, such as the

Hancock brought with him the following demographic characteristics:

Race: White

Gender: Male

Religion: Presbyterian³⁴¹

Heritage: British

Political Affiliation: Republican

Predecessor's Political Affiliation: Democrat

Region: Upstate (Syracuse)

Age: Sixty-three

Prior Judicial Experience: Yes, both as a trial judge (1971 to 1977) and an Associate Judge on the Fourth Department (1977 to 1986)³⁴²

Previously On Short List: Yes, twice

Friendship Factors: No obvious link to Cuomo

Judicial Record/"Pet Causes": Viewed as a moderate conservative, willing to vote with liberals on certain issues, particularly on matters involving personal privacy³⁴³

On the Court of Appeals, Cuomo may have been pleasantly surprised to find Hancock a more liberal voice than many anticipated.³⁴⁴ Court observers noted that Hancock tended to vote

rights of the accused.

³⁴¹ Engel, *supra* note 333, at 861 (noting that in his retirement, Hancock still sings in the choir of the Cazenovia Presbyterian Church).

³⁴² See *id.* at 857.

³⁴³ See *id.* (discussing some of Hancock's Appellate Division "highlights"). Hancock's "favorite" Appellate Division moment dealt with the case of *People v. Battaglia*, in which Hancock was the lone dissenter on the Fourth Department. *People v. Battaglia*, 82 A.D.2d 389, 442 N.Y.S.2d 316 (App. Div. 4th Dep't 1981), *rev'd*, 56 N.Y.2d 558, 435 N.E.2d 395 (1982). While his dissent was short in length, it revealed much about Hancock's leanings. The case involved a burglary conviction in which the police detained and searched a suspect, found evidence on the suspect's person, and then used the evidence against the suspect at trial. See *id.* at 390, 391-92, 442 N.Y.S.2d at 317, 318 (majority opinion). The defendant moved to have the evidence suppressed on the grounds that the police lacked probable cause to search and detain him. *Id.* at 391-92, 442 N.Y.S.2d at 318. The majority of the Fourth Department, in an opinion written by Presiding Justice Dillon, held that the trial court was correct in not granting the motion to suppress. *Id.* at 395, 442 N.Y.S.2d at 320. Hancock was the only judge on the Fourth Department to vote to suppress the evidence, arguing that the evidence was derived only because the police engaged in a warrantless, probable cause-less search and seizure of the defendant. See *id.* at 395-97, 442 N.Y.S.2d at 321-22 (Hancock, J., dissenting). After the initial pat-down for weapons, Hancock argued, the defendant seemed unarmed, showing no threat to the officers. *Id.* at 396-97, 442 N.Y.S.2d at 321-22. Thus, the officers' actions in going further with the search and seizure violated state protections against unreasonable search and seizure. See *id.* On appeal to the New York State Court of Appeals, the court overturned the decision and fully adopted Hancock's dissent in their decision. See *Battaglia*, 56 N.Y.2d at 560-61, 435 N.E.2d at 396, 450 N.Y.S.2d at 178.

³⁴⁴ See, e.g., David Bauder, *Study: Top N.Y. Court More Liberal Under Kaye*, THE DAILY

with liberals Titone and Kaye more often than he voted with the court's conservatives.³⁴⁵ This was particularly true for cases regarding the due process rights of criminal defendants.³⁴⁶ He also became known as a defender of free speech and free expression rights for New Yorkers.³⁴⁷ And he grew to be quite outspoken about the independent role of state constitutions in state court adjudication.³⁴⁸ When he reached mandatory retirement age just eight years into his term, he was forced to leave the bench at a time when many believed he was just beginning to reach the zenith of his judicial life.³⁴⁹

GAZETTE (Schenectady, N.Y.), Mar. 11, 1994, at B4 (quoting study by Professor Vincent Martin Bonventre that examined seventy-five decisions involving a divided court and determined that Hancock had been voting in favor of individual rights more frequently in recent years, a trend which Bonventre correlated to the resignation of Chief Judge Wachtler from the court); see also STREAMS OF TENDENCY, *supra* note 175, at 172 n.131 (noting that Hancock evolved into a third member of the court's liberal wing, along with Kaye and Titone).

³⁴⁵ See STREAMS OF TENDENCY, *supra* note 175, at 172 n.131.

³⁴⁶ See, e.g., *People v. Diaz*, 81 N.Y.2d 106, 107, 612 N.E.2d 298, 299, 595 N.Y.S.2d 940, 941 (1993) (deciding that the “plain touch” doctrine—under which warrantless searches are allowable if an officer conducting protective pat-frisk feels something suspicious on the suspect’s clothing or person—is not allowable under the New York State Constitution); *People v. Scott*, 79 N.Y.2d 474, 478, 593 N.E.2d 1328, 1330, 583 N.Y.S.2d 920, 922 (1992) (holding that the “open fields” doctrine established by the U.S. Supreme Court—under which government agents can enter land beyond the curtilage of an owner’s home and conduct an investigation on that land without a warrant without that investigation being deemed a “search” for Fourth Amendment purposes—is unconstitutional under New York State law).

³⁴⁷ See, e.g., *People v. Dietze*, 75 N.Y.2d 47, 50, 549 N.E.2d 1166, 1167, 550 N.Y.S.2d 595, 596 (1989) (striking down a state statute prohibiting “abusive” language with the intent to “harass” or “annoy” another party as unconstitutionally overbroad); *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286-87, 288-89, 501 N.E.2d 550, 551, 552, 508 N.Y.S.2d 901, 902-03 (1986) (recognizing statements made about a union by one of its members as statements of “pure opinion” protected by the U.S. Constitution—and therefore presumably the New York State Constitution as well).

³⁴⁸ In addition to the cases described above, for a strong statement of Hancock’s views on the importance of state constitutions, see Stewart F. Hancock, *The State Constitution, A Criminal Lawyer’s First Line of Defense*, 57 ALB. L. REV. 271 (1993). In part, Hancock wrote the following:

As the nation’s highest tribunal and the most prestigious voice on constitutional questions, the Supreme Court should be afforded the respect given the leading, most learned authority in any field of law. Moreover, to the extent that there is any value to uniformity in state and federal law in a particular case, that should be given consideration. But, as the Court of Appeals did in *People v. Scott* and *People v. Keta*, a state court is *always fully free to reject reasoning of the [United States] Supreme Court in a case which deals with the identical issue before the state court.*

Id. at 286 (emphasis added).

³⁴⁹ See, e.g., *Engel*, *supra* note 333, at 861. Today, Hancock remains quite active in Syracuse, practicing law full-time, and apparently becoming more liberal in his leanings than ever, including taking a very open stance against the death penalty. See John O’Brien, *Ready for Anything: At 87, Stewart Hancock’s Legal Expertise Remains in Demand*, POST-STANDARD (Syracuse, N.Y.), Sept. 19, 2010, at I-1.

G. Replacing Judge Bernard S. Meyer

By 1986, Judge Meyer was the last remaining member of the court not to be appointed by Cuomo.³⁵⁰ A replacement became necessary for him by the end of that year, however, as Meyer had reached mandatory retirement age.³⁵¹ And once again, the Commission sent Cuomo a list lined with familiar names: Second Department Justice Richard Brown, Third Department Justice Howard Levine, Southern District Judge Joseph McLaughlin, New York University Professor William Hogan, and private practitioner Carolyn Gentile.³⁵² Two new finalists also joined this list: New York Law School Dean Norman Redlich—marking the first time that two academics had been on one short list—and New York State’s Chief Administrative Judge, Joseph Bellacosa.³⁵³

Cuomo told the media that he agonized over the decision of who should replace Meyer.³⁵⁴ Yet his ultimate choice of Joseph Bellacosa did not come as any shock to observers.³⁵⁵ Like Titone, Bellacosa was a close friend of Cuomo, again dating back to connections at St. John’s Law School.³⁵⁶ A New York City-born Catholic Italian-American, Bellacosa’s background was virtually identical to Cuomo’s upbringing.³⁵⁷ The paths of the two men had intersected in state government, too, with Cuomo becoming Secretary of State at the same time Bellacosa became Chief Clerk of the Court of

³⁵⁰ Technically speaking, Wachtler had been elected to the court. However, to attain his post as Chief Judge of the court, the post that he held at this time, he had to be appointed by Cuomo. Gould, *supra* note 116, at 734, 736.

³⁵¹ See Fox, *supra* note 115.

³⁵² CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 3.

³⁵³ See *id.*

³⁵⁴ See Kolbert, *supra* note 138 (“[Cuomo] is said to have been undecided [on whom to nominate to the court] as late as New Year’s Eve.”).

³⁵⁵ *Id.* (“But to watchers of the court, the selection of Judge Bellacosa, a longtime friend of the Governor and a fellow graduate of St. John’s Law School, was no surprise.”).

³⁵⁶ *Id.*; see also Anthony J. Albanese, *Joseph William Bellacosa*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 869, 870–71 (“During his tenure on the *Law Review*, [Bellacosa] assisted in the editing and eventual publication of an article on the Court of Appeals, which was authored by a young former Court of Appeals law clerk, practitioner, and St. John’s alumnus, future Gov. Mario M. Cuomo.”); Jeffrey Schmalz, *Cuomo Is Said to Pick Judge for Top Court*, N.Y. TIMES, Jan. 5, 1987, at B1.

³⁵⁷ Like Cuomo, Bellacosa was part of his family’s first generation to be born on American soil. See Albanese, *supra* note 356, at 869. Like Cuomo, Bellacosa’s father was a hard-working Italian-American manual laborer. *Id.* And like Cuomo, Bellacosa was fiercely proud of his Italian heritage, making a “pilgrimage” back to his ancestor’s hometown in Italy in 1989 and keeping a bronze pair of ice tongs and an ice pick in his office to remind him of his father’s work as an iceman. *Id.* at 870.

Appeals.³⁵⁸ In terms of background, Bellacosa seemed in many ways like a younger version of Titone.³⁵⁹

However, there was at least one key distinction between the two men: Bellacosa's lack of judicial experience. While Titone had served for years as an Appellate Division judge before being appointed to the Court of Appeals, Bellacosa never had served in a decision-making judicial position. He did have significant exposure to the court system, overseeing the judges and nonjudicial employees of New York's judicial branch as the state's Chief Administrative Judge.³⁶⁰ Yet he never actually had been in a spot where he had to render judicial decisions in either a trial or appellate capacity.

Still, Cuomo had already appointed a candidate with no judicial experience—Kaye—with positive results.³⁶¹ And like Kaye, Bellacosa was considered to be a “moderate”³⁶² who was coming to the court largely as an unknown ideological quantity—so much of an unknown, in fact, that he was not registered in any political party.³⁶³ In an interview with *The New York Times*, State Senator John Dunne, the chair of the Senate Judiciary Committee, predicted “that he could ‘not imagine any problem’” in Bellacosa being confirmed to the court.³⁶⁴ He was correct.³⁶⁵

With Bellacosa, Cuomo gained a judge with the following demographic features:

Race: White

Gender: Male

³⁵⁸ Kolbert, *supra* note 138. When the two men were about to leave for Albany, Mario Cuomo wrote a note to Bellacosa, asking “Did it occur to you that we may both be making a mistake?” *Id.* At his swearing-in ceremony for the Court of Appeals, Bellacosa declared to Cuomo that the question had been answered, and neither man had made a mistake by going to Albany. Albanese, *supra* note 356, at 875.

³⁵⁹ That is, in terms of straight demographics: both from New York City, both Italian-Americans, both the children of working class immigrant families, both St. John's University Law School graduates, and both friends of Cuomo.

³⁶⁰ Albanese, *supra* note 356, at 874–75. Bellacosa served in this position from January 1985 until his nomination to the Court of Appeals in 1987. *Id.* at 875. He received high marks from Cuomo and from others in the court system in this role. *See id.* Among his efforts in this position was creating a random wheel assignment method for assigning particular cases to particular judges, a key effort to avoid “judge shopping” practices by litigants. *See id.*

³⁶¹ *See supra* Part V.B.

³⁶² Kolbert, *supra* note 138.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Bellacosa was confirmed unanimously by the New York State Senate. Joe Picchi & Shirley Armstrong, *Senate Unanimously Confirms Bellacosa for High Court*, TIMES UNION (Albany, N.Y.), Jan. 28, 1987, at B-6.

Religion: Roman Catholic. Bellacosa had previously studied for the priesthood before pursuing a legal career.³⁶⁶

Heritage: Italian

Political Affiliation: Unclear (not registered in any political party)

Predecessor's Political Affiliation: Democrat

Region: Downstate (New York City)

Age: Forty-nine³⁶⁷

Prior Judicial Experience: None (in terms of rendering judicial decisions)

Previously on Short List: No

Friendship Factors: Definitely, beginning with connections at St. John's University and continuing through their respective careers in state government. In the words of one anonymous Commission member quoted in *The New York Times*: “[Cuomo] and Joe [Bellacosa] and Sol Wachtler used to have lunch together all the time in Albany, and Joe was the chief clerk. He was the obvious choice.”³⁶⁸

Judicial Record/Pet Causes: Largely unknown. *The New York Times* declared that he was “considered a moderate.”³⁶⁹ Clearly interested in criminal procedure issues, as author of an eight-volume guide to New York State's Criminal Procedure Law.³⁷⁰ Legal scholarship also indicated a concern with judicial ethics and governmental ethics and procedures.³⁷¹ Also, while it seems that nobody knew for certain what Bellacosa's views on major social controversies actually were, many observers questioned how his devout Catholicism would impact his opinions on issues such as abortion.³⁷²

As a judge, Bellacosa soon proved to be the “anti-Hancock.” While Hancock was a more liberal judge than Cuomo likely expected, Bellacosa quickly became a far more conservative jurist than Cuomo probably believed him to be in both civil and political cases.³⁷³

³⁶⁶ Albanese, *supra* note 356, at 870.

³⁶⁷ Picchi & Armstrong, *supra* note 365.

³⁶⁸ Sarah Lyall, *Replacing Judge Wachtler, With an Eye on Politics*, N.Y. TIMES, Dec. 9, 1992, at B7 [hereinafter *Replacing Judge Wachtler, With an Eye on Politics*].

³⁶⁹ Kolbert, *supra* note 138.

³⁷⁰ *Id.*

³⁷¹ See, e.g., Joseph W. Bellacosa, *The Importance of Being an Earnest Clerk*, 54 N.Y. ST. B.J. 74, 74 (1982); Joseph Bellacosa, Chief Clerk of the Court of Appeals of the State of N.Y., A Judge's Self-Respect Is What Counts, Talk at Bar Association of Nassau County's Judiciary Night, in N.Y.L.J., Dec. 3, 1980, at 2.

³⁷² See *Replacing Judge Wachtler, With an Eye on Politics*, *supra* note 368.

³⁷³ See, e.g., STREAMS OF TENDENCY, *supra* note 175, at 14 (referring to Bellacosa as not

In criminal cases, he was almost uniformly pro-prosecution.³⁷⁴ In civil matters, he typically ruled in favor of government interests triumphing over individual liberties.³⁷⁵ Additionally, he resisted the pull of judges like Titone, Kaye, and Hancock toward state constitutional primacy, preferring instead to follow the U.S. Supreme Court whenever possible.³⁷⁶ By the time he retired, Bellacosa was widely seen as by far the most conservative member of the court. Many viewed him as the polar opposite of Titone, the counterbalance of Cuomo's other extremely outspoken Italian-American appointee.³⁷⁷

Bellacosa left the Court of Appeals in April 1999, departing just a few months before his fourteen-year term would have expired.³⁷⁸ At age sixty-one, he could have sought re-appointment from Pataki, and likely would have received it.³⁷⁹ However, he elected to vacate his seat, leaving just thirteen months after Titone, a man of virtually identical demographic background but, as it turned out,

only a predictable vote for the prosecution, but a "militant" one as well); Timothy B. Lennon, *Joseph W. Bellacosa: Cardozo's Knight-Errant?*, 59 ALB. L. REV. 1827, 1827 (1996) ("Joseph W. Bellacosa has been an Associate Judge of the New York Court of Appeals for nearly a decade. In that time, he has established himself as one of the most consistently 'conservative' members of a court that has a history of being protective of personal rights and liberties.") (footnotes omitted); Alan Finder, *Judge Bellacosa to Leave Court of Appeals Before Term Ends*, N.Y. TIMES, Apr. 1, 1999, at B9 ("A political independent, he became known on the court for generally conservative views, particularly in supporting prosecutors' rights.").

³⁷⁴ See STREAMS OF TENDENCY, *supra* note 175, at 1–2 (noting that in cases with a divided court between 1987 and August 1998, Bellacosa ruled in favor of the prosecution 80% of the time). See also Gary Spencer, *Conservative Look to 1994 Rulings*, N.Y.L.J., Oct. 3, 1994, at 24, col. 3 ("While he was waiting his turn for oral argument, one prosecutor commented recently, 'It was just nice to look up and see Simons, Bellacosa and Levine all in a row.'").

³⁷⁵ See Lennon, *supra* note 373, at 1827.

³⁷⁶ For a few illustrative examples of Bellacosa's viewpoint on federalism—one in which the state government was clearly subordinate to the federal government—see, e.g., *People v. Scott*, 79 N.Y.2d 474, 506, 593 N.E.2d 1328, 1348, 583 N.Y.S.2d 920, 940 (1992) (Bellacosa, J., dissenting) ([The majority] propels the Court across a jurisprudential Rubicon into a kind of Articles of Confederation time warp.); *People v. Harris*, 77 N.Y.2d 434, 442, 570 N.E.2d 1051, 1056, 568 N.Y.S.2d 702, 707 (1991) (Bellacosa, J., dissenting) (chastising the Court of Appeals for "reject[ing] the analysis, wisdom and experience" of the Supreme Court in cases regarding police station confessions following warrantless arrests); *People v. Kohl*, 72 N.Y.2d 191, 199, 527 N.E.2d 1182, 1186, 532 N.Y.S.2d 45, 49 (1988) ("[T]he court, of course, cannot accept the views of the dissenting opinion which fails to provide an analytic basis for deviating in this case from the modern and sound jurisprudence of the Supreme Court of the United States.") (emphasis added).

³⁷⁷ See STREAMS OF TENDENCY, *supra* note 175, at 17 (depicting the stark differences in the voting records of Titone and Bellacosa).

³⁷⁸ Finder, *supra* note 373.

³⁷⁹ Pataki often praised Bellacosa for criticizing his more liberal colleagues, indicating that Bellacosa was precisely the type of judge whom Pataki wanted on the Court of Appeals. See *id.*

completely different ideological beliefs.³⁸⁰

With Bellacosa's appointment, Mario Cuomo became the first governor in New York's history to appoint every sitting member of the Court of Appeals.³⁸¹

H. Replacing Judge Fritz W. Alexander II

After the appointment of Bellacosa, the Court of Appeals entered a period of stasis with its personnel. The membership of the court remained steady for the next five years. Alliances formed among Cuomo's seven appointees as the court, perhaps to Cuomo's surprise, began to swing to the right, beginning with the conservative shift of Chief Judge Wachtler around 1987.

Then, in 1992, Judge Alexander dropped the bombshell that he was leaving the court to work as a Deputy Mayor in New York City.³⁸² Immediately, Cuomo was tossed into the middle of a battle over who the next appointee would be. Two major issues were at work in deciding this nomination. First, as noted earlier, Alexander had proven to be a rather reliable liberal voice on the court, even as it moved toward the right under Wachtler's influence.³⁸³ Now, if Alexander were replaced by a conservative judge, the consequence would almost certainly be a court that was largely conservative on most issues—a political hazard for a liberal Democratic governor.³⁸⁴

The other issue dealt with the color of Judge Alexander's skin. As the first African-American appointed to a full term in the history of the Court of Appeals, Alexander would also be the first African-American *replaced* by gubernatorial appointment in the history of the Court of Appeals.³⁸⁵ Literally days after Alexander announced his resignation from the court, pressure began mounting on Cuomo to appoint another African-American—or at least another racial minority—to take his place.³⁸⁶ “Because there was a great deal of

³⁸⁰ *See id.* (“The court will have lost its two most outspoken judges.”).

³⁸¹ Shipp, *supra* note 22.

³⁸² *See Alexander's Departure*, *supra* note 294.

³⁸³ *See supra* note 299 and accompanying text.

³⁸⁴ Already, Bellacosa had proven to be far more conservative than Cuomo had likely envisioned. The same could probably be said for Wachtler, who had moved from a moderate Republican to a more conventional “law-and-order” Republican. Simons, as noted earlier, tended to be a reliable conservative vote on most issues. One more conservative on the court, and Cuomo could find himself facing a high court that was ideologically quite different from him.

³⁸⁵ *Alexander's Departure*, *supra* note 294 (“Mr. Cuomo has never faced the prospect of filling a position that many lawyers and politicians now consider a ‘minority seat.’”).

³⁸⁶ *See id.*

pride among blacks in the appointment of Judge Alexander, we do feel a great sense of loss at his decision to leave the court," Manhattan Democrat Charles B. Rangel, an African-American member of the U.S. House of Representatives, told *The New York Times*. "It's imperative that a view be expressed on the court that comes from his socioeconomic background."³⁸⁷

Cuomo made no secret of the fact that he wanted the short list to include a quality sampling of "minority candidates."³⁸⁸ His counsel, Elizabeth A. Moore, plainly stated as much, telling *The New York Times* that "[t]he Governor has made it clear to the commission that diversity in terms of the people on the list is something that he would appreciate."³⁸⁹ And the Commission by and large responded, presenting Cuomo with its most racially diverse list ever. Appellate Division Judges Joseph Sullivan of the First Department and Howard A. Levine of the Third Department, both of them Caucasian, appeared for yet another time on this list.³⁹⁰ The newcomers, however, included trial court judge Carmen B. Ciparick, a Hispanic female,³⁹¹ and two African-American judges: Lewis L. Douglass, a trial court judge from Kings County,³⁹² and George Bundy Smith, an Associate Justice from the First Department.³⁹³ If Cuomo wanted to appoint a minority—and it seemed clear that he did—he had a rather deep talent pool to pick from among these three candidates. In the end, Cuomo decided to nominate George Bundy Smith to replace Alexander.³⁹⁴ Smith had long been an outspoken civil rights advocate.³⁹⁵ Earlier in his life, he had gone on the Freedom Rides into the segregated South, winding up in jail for

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

³⁹¹ *See infra* Part V.K.

³⁹² CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 3. Douglass, whose legal legacy spans more than a half century of work, had served in positions ranging from an Assistant U.S. Attorney for the Eastern District of New York to Executive Deputy Commissioner to New York State's Department of Corrections to serving as a trial court judge and a judge in the New York State Court of Claims. *See Justice Lewis L. Douglass, Supreme Court (Ret'd), PETROFF LAW FIRM*, http://deedworks.com/lewisdouglass_judge_PetroffLawFirm.php.

³⁹³ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 3.

³⁹⁴ BERNARD S. MEYER ET AL., *supra* note 281, at 34; *see also* Editorial, *A New Judge for New York's Top Court*, N.Y. TIMES, Aug. 25, 1992, at A20 ("Mr. Cuomo was wise to choose Justice Smith, a black member of the Appellate Division's downstate region, thereby maintaining previously achieved racial and geographic balance.")

³⁹⁵ *See* Sandra Jefferson Grannum, *A Tribute to Hon. George Bundy Smith: Excellence*, 34 FORDHAM URB. L.J. 1161, 1164 (2007).

trying to order coffee at a “Whites Only” lunch counter.³⁹⁶ Later, he had gone on to work for the NAACP Legal Defense and Education Fund, and then moved from there into the judiciary.³⁹⁷ The only one of the three minorities on the short list to receive a “highly qualified” rating from the New York State Bar Association,³⁹⁸ Smith was the likely pick from the outset; it apparently was unclear whether his ideological predilections were liberal or conservative, although he was a registered Democrat.³⁹⁹ Many observers seemed to care more about his race than his ideology, anyway. Notably, the headline in *The New York Times* when Cuomo revealed his nomination read “Cuomo Says He’ll Name Black Judge To Top Court.”⁴⁰⁰

Appointing Smith to the court gave Cuomo a judge with the following demographic characteristics:

Race: African-American

Gender: Male

Religion: Protestant (Congregationalist)⁴⁰¹

Heritage: American South⁴⁰²

Political Affiliation: Democrat

Predecessor’s Political Affiliation: Democrat

Region: Downstate (New York City)

Age: Fifty-five

³⁹⁶ Inez Smith Reid, *Dedication, From Birth to the Bench: A Quiet but Persuasive Leader*, 68 ALB. L. REV. 215, 219 (2005). On one of those Freedom Rides, a mob surrounded the bus and began throwing rocks at it. Smith, who was enrolled at Yale Law School at that time, took out a textbook and began studying. Incredulous, one of the other Riders asked Smith how he could read at such a time. His response: “[S]ticks and stones can break my bones, but law exams can kill me.” Grannum, *supra* note 395, at 1164 (quoting Reid, *supra* note 396, at 218–19 (alteration in original)).

³⁹⁷ Anita Womack-Weidner, *Two Court of Appeals Judges Retire*, 2 BENCHMARKS 1, 4 (Fall 2006), http://www.nycourts.gov/publications/benchmarks/issue5/smith_Retirement.shtml.

³⁹⁸ Sarah Lyall, *Cuomo Says He’ll Name Black Judge to Top Court*, N.Y. TIMES, Aug. 25, 1992, at B5.

³⁹⁹ *See id.* (explaining that Governor Cuomo did not know that Smith was a registered Democrat, but instead made the decision to appoint Smith based on conversations with others).

⁴⁰⁰ *Id.*

⁴⁰¹ Smith was extremely religious, in part because his father was an ordained minister. *See* Womack-Weidner, *supra* note 397, at 4. “From the time he was young, George Bundy Smith wanted to be a lawyer or a minister.” *Id.* On September 11, 2001, most of the judges of the Court of Appeals were gathered in the courthouse on Eagle Street when the news arrived that the World Trade Center and the Pentagon had been struck by planes. Smith gathered his colleagues in the courthouse’s conference room and proceeded to lead them in prayer for what lay ahead. Richard C. Wesley, *A Tribute to Hon. George Bundy Smith: A Friend and Colleague*, 34 FORDHAM URB. L.J. 1156, 1158 (2007).

⁴⁰² *See* Womack-Weidner, *supra* note 397, at 4 (noting that Smith was born in New Orleans, Louisiana).

Prior Judicial Experience: Yes, as a trial court judge (1975–1987) and then as an Associate Justice of the First Department (1987–1992)⁴⁰³

Previously On Short List: No

Friendship Factors: Nothing specifically linking him with Cuomo
Judicial Record/“Pet Causes”: No definitive trends one way or another; known as a “centrist.” At the time of his appointment, however, news reports indicated that he was known to be very concerned about civil rights issues and about the “fairness” of the criminal justice system.⁴⁰⁴

On the Court of Appeals, Smith proved to be a consistent liberal vote on most issues.⁴⁰⁵ His record on criminal cases tended to be quite liberal,⁴⁰⁶ although not universally so.⁴⁰⁷ On the civil side,

⁴⁰³ See *id.*

⁴⁰⁴ See generally *id.* (explaining Smith's decision to become a lawyer when he graduated from college, at the beginning of the civil rights movement, and that Smith was not afraid to be the only dissenter in the interest of fairness); see also Lyall, *supra* note 398 (“Justice Smith . . . is known as a pragmatic jurist.”).

⁴⁰⁵ See, e.g., STREAMS OF TENDENCY, *supra* note 175, at 16–17 (showing Smith's tendency to vote in favor of individual right in both criminal and civil cases). The term “liberal,” however, might be too simplistic to truly capture the essence of Smith's decisions on the Court of Appeals. See, e.g., *id.* at 4 (“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.”) (emphasis added); Charles J. Scibetta, Jr., *A Reliability Based Criminal Jurisprudence*, 59 ALB. L. REV. 1853, 1856, 1857 n.14, 1857 (1996) (stating that Smith's jurisprudence on criminal law cases represents a search for reliability, not a stance on government interests versus individual rights); Wesley, *supra* note 401, at 1158 (“I have always found it somewhat curious that George was viewed as the ‘most liberal’ judge on the Court. That moniker is hard for me to understand. When one looks at the opinions of George Bundy Smith . . . [t]hey are forceful but never overstated.”).

⁴⁰⁶ See *Bonventre*, *supra* note 20, at 6 (“[Smith] was the most liberal member of the court in criminal cases and, certainly, regarding the death penalty, he always voted against it.”). For a couple of Smith's best-known pro-defendant holdings on the Court of Appeals, see, e.g., *People v. Calabria*, 94 N.Y.2d 519, 522–23, 727 N.E.2d 1245, 1247, 706 N.Y.S.2d 691, 693 (2000) (determining that defendant had been deprived the opportunity of a fair trial by unjust and deceptive prosecutorial tactics); *People v. Benevento*, 91 N.Y.2d 708, 713, 697 N.E.2d 584, 588, 674 N.Y.S.2d 629, 633 (1998) (holding that New York State recognized a higher standard than the federal government did in deciding whether a defendant had been denied effective assistance of counsel).

⁴⁰⁷ See, e.g., *In re Muhammad F.*, 94 N.Y.2d 136, 151, 152, 722 N.E.2d 45, 53, 54, 700 N.Y.S.2d 77, 85, 86 (1999) (Smith, J., dissenting) (arguing that arrests by plainclothes police officers under a procedure stopping every third livery cab in New York City did not violate state or federal constitutional standards, as the government interest in curbing a trend of violent crime against taxi drivers outweighed the individual interests in being free from police intrusions); *People v. Wesley*, 83 N.Y.2d 417, 425, 633 N.E.2d 451, 455, 611 N.Y.S.2d 97, 101 (1994) (holding that the trial court properly admitted DNA evidence against defendant); *Boyd v. Constantine*, 81 N.Y.2d 189, 196, 613 N.E.2d 511, 514, 597 N.Y.S.2d 605, 608 (1993) (refusing to extend the exclusionary rule to certain administrative proceedings because applying the rule would have a “significant adverse impact” upon truth-finding in administrative proceedings).

though, the judge who was best known as an attorney for his civil rights work delivered an unexpected blow to same-sex couples in New York, voting to uphold the state's ban on same-sex marriage.⁴⁰⁸ Yet perhaps Smith's most controversial decision came in 2004, when he wrote the controversial opinion of the four-three majority that struck down the death penalty in New York State.⁴⁰⁹ Over time, he became more liberal in many of his holdings, moving leftward even as the court itself moved to the right, ultimately gaining the reputation as the "most liberal" judge on the Court of Appeals bench.⁴¹⁰

It was the death penalty opinion which may have spelled the end of Smith's time on the court. In 2006, with his fourteen-year term up, Smith sought re-appointment to the bench.⁴¹¹ Yet Pataki denied Smith's re-appointment attempt, selecting Eugene F. Pigott, Jr. to replace him.⁴¹² The move, which was roundly criticized by many court observers, seemed to be an effort by Pataki to demonstrate his commitment to a "tough on crime" stance.⁴¹³ It brought a swift, and perhaps disappointing, end to the tenure of the first African-American to actually serve out an entire term on the Court of Appeals bench.⁴¹⁴

I. Replacing Chief Judge Wachtler

Just two months after Cuomo appointed Smith to the Court of Appeals, Chief Judge Wachtler was arrested by federal agents for harassing and blackmailing his ex-lover. One week later, Wachtler

⁴⁰⁸ *Hernandez v. Robles*, 7 N.Y.3d 338, 366, 855 N.E.2d 1, 12, 821 N.Y.S.2d 770, 781 (2006). Smith joined the court's four-two majority in this decision, which upheld the same-sex marriage ban on the grounds that if the people of New York wanted to re-define "marriage," the proper venue for doing so was the legislature, not the Court of Appeals. *See id.*

⁴⁰⁹ *People v. LaValle*, 3 N.Y.3d 88, 131-32, 817 N.E.2d 341, 368, 783 N.Y.S.2d 485, 512 (2004).

⁴¹⁰ *See* STREAMS OF TENDENCY, *supra* note 175, at 243 ("Smith is the only liberal remaining."); Michael Cooper, *A Place on the Bench Puts Pataki on the Spot*, N.Y. TIMES, June 21, 2006, at B1 ("[Smith had] a reputation as perhaps the most liberal judge on New York's highest court.").

⁴¹¹ Celeste Katz, *Judgment Day Approaches for George Bundy Smith*, N.Y. DAILY NEWS (Aug. 18, 2006, 3:45 PM), <http://www.nydailynews.com/blogs/dailypolitics/2006/08/judgement-day-approaches-for-g.html>.

⁴¹² Michael Cooper, *With New Pick, Pataki Puts Mark on Highest Court*, N.Y. TIMES, Aug. 19, 2006, at A1.

⁴¹³ *See id.*

⁴¹⁴ Harold Stevens was the first African-American to sit on the Court of Appeals, and Fritz Alexander II was the first African-American appointed to the court, but Smith was the first African-American to serve for a full fourteen-year period on the Court of Appeals.

resigned from the court.⁴¹⁵ Unexpectedly, the top position in New York's judicial branch was now up for grabs again.

Cuomo urged the Commission to act quickly in presenting him with a short list.⁴¹⁶ Wachtler's departure, he said, had created "[t]he most publicized vacancy in history."⁴¹⁷ The court had suddenly been thrust into the spotlight for a very unpalatable reason, and the governor knew that the sooner the Chief Judge's chair was filled, the faster the media circus would die down.⁴¹⁸

In December 1992, *The New York Times* ran an article listing several individuals that they deemed likely to make the short list, including several names proposed by Cuomo himself: former federal judge Abraham Sofaer, previously named on three short lists that Cuomo had received;⁴¹⁹ Columbia Law School Professor Kent Greenwalt; and federal district court judges Leonard B. Sand and Pierre N. Leval.⁴²⁰ Yet when the Commission released its list just two months later, none of those names were on it.⁴²¹ Instead, the list featured three Appellate Division judges, all of them returnees from previous short lists: E. Leo Milonas and Joseph P. Sullivan from the First Department, and Howard Levine from the Third Department.⁴²² Lewis A. Kaplan, a partner at Paul, Weiss, Rifkind, Wharton & Garrison in New York City and a finalist for the Alexander vacancy, also appeared on this list, as did Brooklyn Law School Professor William E. Hellerstein, another finalist for the Alexander vacancy.⁴²³ Finally, two sitting Court of Appeals judges were on the list: Richard Simons, the most senior member of the

⁴¹⁵ See *supra* notes 258–62 and accompanying text.

⁴¹⁶ Sarah Lyall, *Cuomo Submits List of Choices for Judgeship*, N.Y. TIMES, Nov. 13, 1992, at B5 [hereinafter *Cuomo Submits List of Choices for Judgeship*] ("Emphasizing that he wants to appoint a new chief judge of the New York State Court of Appeals as soon as possible, Gov. Mario M. Cuomo today gave the commission that nominates judges a list of seven or eight potential candidates for the job."); *Replacing Judge Wachtler, With an Eye on Politics*, *supra* note 368 ("Governor Cuomo has complained that the panel is not moving quickly enough.");

⁴¹⁷ *Cuomo Submits List of Choices for Judgeship*, *supra* note 416.

⁴¹⁸ See *id.* (noting the reason for the former Chief Judge's departure and quoting Cuomo for the high publicity of the opening).

⁴¹⁹ Sofaer had appeared on the 1983 list to replace Judge Fuchsberg, the 1985 list to replace Chief Judge Cooke, and the 1985 list to replace Judge Jones. CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2.

⁴²⁰ *Replacing Judge Wachtler, With an Eye on Politics*, *supra* note 368.

⁴²¹ See CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 3.

⁴²² *Id.*

⁴²³ *Id.*; see also Sarah Lyall, *Panel Gives Cuomo Its List of 7 Choices for Chief Judge*, N.Y. TIMES, Feb. 4, 1993, at B6 [hereinafter *Panel Gives Cuomo Its List of 7 Choices for Chief Judge*] (naming Kaplan as one of the men on the list who is not a judge).

court, and the acting Chief Judge after Wachtler's resignation, Judith Kaye.⁴²⁴

All of the candidates on the short list were white, and all had appeared on at least one previous short list. Kaye was the lone female member of the list. Yet the primary topic of conversation was the fact that only twelve people in total had applied for the position, and that only two current Court of Appeals judges were on the short list.⁴²⁵ Some commentators blamed Cuomo for this, claiming that he had made remarks immediately following Wachtler's resignation that led people to believe that Kaye was a shoo-in for the post.⁴²⁶ Cuomo, for his part, said that "his remarks had not had a chilling effect on potential applicants."⁴²⁷ He also expressed surprise, even annoyance, over the fact that Titone's name was not on the list of finalists.⁴²⁸

Whether Cuomo had made up his mind to pick Kaye immediately after Wachtler resigned is a question that will probably never be answered publically. Yet nineteen days after the short list appeared, Cuomo announced that Kaye was his choice to ascend to the position of Chief Judge.⁴²⁹ This selection made Kaye the first female Chief Judge of New York State.⁴³⁰ It also placed Cuomo into a couple of politically advantageous positions. Not only had he once again underscored his promise to create a more diverse Court of Appeals, but he had replaced the combative Wachtler with a Chief Judge who was well-liked and known as a consensus builder.⁴³¹ Kaye's record also showed that she was more liberal on most issues than the increasingly conservative Wachtler had become.⁴³² Additionally, by appointing Kaye to the position of Chief Judge, he had guaranteed himself the chance to appoint another judge to the

⁴²⁴ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 3; *see also Appeals Court's Senior Judge to Assume Wachtler's Duties*, *supra* note 173.

⁴²⁵ *See Panel Gives Cuomo Its List of 7 Choices for Chief Judge*, *supra* note 423.

⁴²⁶ *Id.* ("In November, he seemed to go out of his way to praise Judge Kaye, the first woman ever to serve on the court, leading to speculation that he might well select her for the post.").

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ Sarah Lyall, *Cuomo Nominates Judith Kaye for Top New York Judicial Post*, N.Y. TIMES, Feb. 23, 1993, at A1 [hereinafter *Cuomo Nominates Judith Kaye for Top New York Judicial Post*].

⁴³⁰ *Id.*

⁴³¹ *Id.* ("[Kaye] brings a perceived ability to argue her cases forcefully and to forge coalitions without alienating anyone on a personal level.").

⁴³² For a look at several of the key decisions and writings of Judge Kaye, *see supra* notes 213–23 and accompanying text.

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court, seemingly an opportunity to “liberalize” a court that had been shifting to the right.⁴³³

Appointing Kaye gave Cuomo a Chief Judge with the following demographic characteristics:⁴³⁴

Race: White

Gender: Female (first female Chief Judge in the history of the Court of Appeals)

Religion: Jewish

Heritage: Polish

Political Affiliation: “Moderate Liberal”

Predecessor's Political Affiliation: Conservative

Region: Downstate (New York City)

Age: Fifty-five

Prior Judicial Experience: Associate Justice of the Court of Appeals (1983-1993)

Previously On Short List: N/A (already on the court)

Friendship Factors: Cuomo praised Kaye as a potential replacement for Wachtler in November 1992, sparking speculation that she would be the front-runner to become the new Chief Judge.⁴³⁵

Judicial Record/“Pet Causes”: Moderately liberal on most issues. Outspoken advocate of the concept that the New York State Constitution can provide greater protections of individual rights of New Yorkers than the federal Constitution does.

A brief discussion of Kaye's voting record can be found earlier, under the section describing her appointment as an Associate Judge of the Court of Appeals.⁴³⁶ In addition to this, Kaye became a very active judicial administrator during her time as Chief Judge.⁴³⁷ She modernized New York's court system in both its facilities and its technological prowess,⁴³⁸ improved conditions for individuals serving on New York State juries,⁴³⁹ and upgraded the services

⁴³³ This fact was not lost on court observers. See *Cuomo Nominates Judith Kaye for Top New York Judicial Post*, *supra* note 429.

⁴³⁴ See *supra* Part V.B.

⁴³⁵ *Panel Gives Cuomo Its List of 7 Choices for Chief Judge*, *supra* note 423.

⁴³⁶ See *supra* Part V.B.

⁴³⁷ See, e.g., Hon. Jonathan Lippman, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84 N.Y.U. L. REV. 655, 655 (2009).

⁴³⁸ *Id.* at 661.

⁴³⁹ *Id.* at 656–57. Improving the situation for New York State's jurors became one of Kaye's primary crusades during her time as Chief Judge. See Jeffrey Toobin, *Special Kaye*, THE NEW YORKER, Dec. 15, 2008, at 21.

available to pro se litigants.⁴⁴⁰ Left unfinished at the time of her retirement though, was one of the key campaigns of her later years as Chief Judge: an effort to encourage the state to increase the pay of its judges.⁴⁴¹

Kaye remained Chief Judge until 2008, when she reached the mandatory retirement age of seventy.⁴⁴²

J. Replacing Associate Judge Kaye

With Kaye elevated to Chief Judge, Cuomo now turned his attention to filling the Associate Judge vacancy created by Kaye's promotion. The short list turned over to him by the Commission contained just six names instead of the customary seven, with three of them being repeats: Associate Justice Joseph Sullivan of the First Department, on the list for the eighth time;⁴⁴³ Associate Justice Howard A. Levine of the Third Department, on the list for the seventh consecutive time;⁴⁴⁴ and Professor William E. Hellerstein from Brooklyn Law School, on the list for the third consecutive time.⁴⁴⁵ Perhaps even more intriguing from the standpoint of diversity, though, were the three newcomers on this list. There was Myriam J. Altman, a Jewish female trial court judge from New York City whose family had fled Nazi persecution in Belgium when Altman was just two years old.⁴⁴⁶ There was Samuel L. Green, the first African-American outside of New York City to be elected to the state Supreme Court and the first African-American to serve on the Fourth Department of the Appellate Division.⁴⁴⁷ And then there was John Carro, a highly respected Hispanic judge who was presently serving on the First Department.⁴⁴⁸

Some commentators might have thought that Cuomo would select

⁴⁴⁰ Lippman, *supra* note 437, at 661.

⁴⁴¹ See Toobin, *supra* note 439, at 21.

⁴⁴² Krane, *supra* note 204, at 820.

⁴⁴³ Sullivan had appeared on all but one short list since 1983, missing only the Meyer vacancy. See CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2–4.

⁴⁴⁴ Levine had appeared on every short list since the list to replace Jones in 1985. See *id.*

⁴⁴⁵ Hellerstein had appeared on the previous two short lists. See *id.* at 3–4.

⁴⁴⁶ See Wolfgang Saxon, *Myriam J. Altman, 65, New York State Appeals Court Judge*, N.Y. TIMES, Feb. 4, 2005, at B7. Altman would go on to serve as an Appellate Division judge for the Second Department—a position to which she was appointed by Mario Cuomo in 1994—until just days before her death. *Id.*

⁴⁴⁷ See Matt Chandler, *Green Honored for Mentoring, Service*, BUFF. BUS. FIRST, May 7, 2012, <http://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2012/05/briefs-green-honored-for-mentoring-service.html?page=all>.

⁴⁴⁸ See Kevin Sack, *Cuomo Names Republican to Court of Appeals Seat*, N.Y. TIMES, Aug. 13, 1993, at B4.

Altman, filling Kaye's seat with another woman. Most court observers, however, believed that Cuomo would appoint Carro for this vacancy, thereby making him the first Hispanic judge in the history of the Court of Appeals.⁴⁴⁹ Also, Carro, who moved to New York from Puerto Rico with his parents in 1937, was well-known in the state for his campaigns against xenophobia and in favor of immigrants' rights,⁴⁵⁰ something which certainly would have endeared him to Cuomo.⁴⁵¹ Yet just one day before Cuomo announced his pick, Carro stunningly withdrew his name from the list.⁴⁵² When asked why, he cited only "personal reasons" and refused to elaborate further.⁴⁵³

Suddenly, Cuomo was left without a bona fide "front runner" for this nomination. Consequently, even the political and judicial pundits seemed surprised by the choice that he made on the day after Carro withdrew: Howard Levine, the Third Department Associate Justice from Schenectady who had been on every short list since 1985, a man whom journalists had compared with a soap opera actress who had been nominated for multiple Emmys but never won.⁴⁵⁴ White, male, and Republican, Levine seemed to be an unusual pick for Cuomo.⁴⁵⁵ A former District Attorney who admired the restrained approach of former U.S. Supreme Court Justice John Harlan, it seemed probable that Levine would vote against many of Cuomo's liberal platforms, particularly on criminal cases.⁴⁵⁶

⁴⁴⁹ See *id.* Already, Carro had achieved a significant "first" for his race: first Puerto Rican ever to sit on an Appellate Division bench. See *John Carro*, N.Y. ST. UNIFIED CT SYS., <http://www.nycourts.gov/courts/ad1/centennial/Bios/jcarro2.shtml>. Also, Carro recently had been nominated for a federal judgeship, but had withdrawn after the federal government had failed to take any action regarding his nomination for three years. See Wayne King, *Hispanic Nominee for U.S. Bench*, N.Y. TIMES, Mar. 2, 1991, at 28.

⁴⁵⁰ David Firestone, *New Judge Won't Walk in Father's Footsteps*, N.Y. TIMES, June 5, 1998, at B2 ("[Carro] acutely felt the responsibility of being a 'first'—using his bench to rail against biases he found within the Police Department, helping to found the Puerto Rican Legal Defense and Education Fund and various Hispanic societies of municipal employees, exhorting Hispanic students to study law and claim for themselves the reins of power.").

⁴⁵¹ See Heffner, *supra* note 32.

⁴⁵² See Sack, *supra* note 448.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* Levine, when asked about whether he felt that his chances had been better for this vacancy than it had been in the past, responded by saying "I had learned to be fairly unoptimistic about it at this point." *Id.*

⁴⁵⁵ See *id.*; see John Caher, *Levine OK'd for High Court*, TIMES UNION (Albany, N.Y.), Sept. 8, 1993, at A1.

⁴⁵⁶ See Laura Etlinger & Tim O'Neal Lorah, *Howard Arnold Levine*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 897, 898 ("In Judge Levine's own words, it is Justice Harlan's 'approach of incremental, common law law-making' that he admires—an approach that allows the law to develop slowly and incrementally 'to see if the changes

Yet the appointment of Levine did maintain the court's balance of three Republicans, three Democrats, and one independent,⁴⁵⁷ something which certainly seemed to be important to Cuomo.⁴⁵⁸ In terms of religious affiliation, Levine's appointment meant that the vacancy left by Kaye, who is Jewish, would be filled by another Jewish judge.⁴⁵⁹ In terms of geographic distribution, the appointment brought another upstate judge to the court.⁴⁶⁰ It also elevated a highly respected and experienced judge to a position that many believed he should have received earlier in his career.⁴⁶¹ At the press conference where Cuomo announced Levine's appointment, the new Court of Appeals judge apparently could not manage to suppress his smile.⁴⁶² "I never, of course, dreamed in my wildest imagination that I would be in this position of honor sometime later in my career," he told *The New York Times*.⁴⁶³

The appointment of Levine gave the court a new member who possessed the following demographic characteristics:

Race: White

work." (quoting John Caher, Self-Described 'Centrist' at Court of Appeals Retires, N.Y.L.J., Dec. 2, 2002, at 1, col. 4.); Jason J. Legg, *Howard A. Levine: Paladin of the State*, 59 ALB. L. REV. 1879, 1882–83 (1996) ("Some commentators believe . . . that Levine's appointment to the court signaled a change to a pro-prosecution bench."); see also Sack, *supra* note 448 (noting Judge Levine's experience as an Assistant District Attorney).

⁴⁵⁷ The court's Republican wing now consisted of Hancock, Simons, and Levine. The three Democrats were Kaye, Titone, and George Bundy Smith. Bellacosa continued to bill himself as an "independent," but his voting record by this point, as described earlier, had demonstrated without any doubt that he possessed a modern conservative ideology that governed the bulk of his jurisprudence.

⁴⁵⁸ Once again, the media took notice of this preservation of "balance" in the court's composition. See Sack, *supra* note 448 ("[Cuomo], who has named all of the top court's members, has made it a point of pride that he has looked beyond partisan politics in making his judicial appointments.").

⁴⁵⁹ Liebman, *supra* note 191 (discussing whether there really is such thing as a "Jewish seat" on the New York Court of Appeals).

⁴⁶⁰ See Etlinger & Lorah, *supra* note 456, at 898. This was important if Cuomo was seeking geographic balance on the court. No upstate judge had been appointed to the Court of Appeals since Hancock in 1986.

⁴⁶¹ See Etlinger & Lorah, *supra* note 456, at 902 ("Levine's philosophical approach to the law is not definable by ideological label Of the legal issues that came before our court, he made his own in depth analyses, based on logic, consonant with reason and strongly supported by state and federal judicial precedent." (quoting Gary Spencer, Levine Named to Court of Appeals, N.Y.L.J., Aug. 13, 1993, at A1)); Legg, *supra* note 456, at 1880 ("I have always found [Levine] difficult to peg, which is one of the earmarks of a good judge for me. I don't think you can pigeonhole him as a liberal or a conservative, a strict constructionist or a liberal constructionist. He's shown a balanced approach to both civil and criminal cases."); Caher, *supra* note 455 ("Even a cursory review of his opinions reveals the character of the man—a thoughtful and caring human being with a generosity of spirit.").

⁴⁶² See Sack, *supra* note 448.

⁴⁶³ *Id.*

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Gender: Male

Religion: Orthodox Jewish

Heritage: Family had lived in upstate New York for at least two generations⁴⁶⁴

Political Affiliation: Republican

Predecessor's Political Affiliation: Democrat

Region: Upstate (Albany)

Age: Sixty-one⁴⁶⁵

Prior Judicial Experience: Yes, as a trial court judge (1971–1981) and as an Associate Justice on the Third Department (1982–1993)⁴⁶⁶

Previously On Short List: Yes, six times

Friendship Factors: Nothing specifically that directly links him with Cuomo

Judicial Record/“Pet Causes”: Deeply involved with legal issues involving children and families, stemming from his decade as a family court judge in Schenectady.⁴⁶⁷ Wrote more than 950 opinions during his time on the Third Department, including several dissents that were later adopted as the majority reasoning by the Court of Appeals.⁴⁶⁸ Known for his precise and detailed writing style, and for his narrow holdings in cases.⁴⁶⁹

During his time on the Court of Appeals, Judge Levine's record proved to be largely similar to his stance as an Appellate Division judge: that of a moderate conservative.⁴⁷⁰ In criminal cases, he

⁴⁶⁴ See Etlinger & Lorah, *supra* note 456, at 898 (noting that Levine was born in Troy and raised in Schenectady). Both of Levine's parents were attorneys. *Id.* at 897.

⁴⁶⁵ Sack, *supra* note 448.

⁴⁶⁶ See *id.*; see also Etlinger & Lorah, *supra* note 456, at 901 (mentioning Judge Levine's eleven-year career on the Third Department following a decade on the family court).

⁴⁶⁷ See Etlinger & Lorah, *supra* note 456, at 899, 900. Indeed, Levine's legal work on behalf of children became so respected that the New York State Bar Association created an award in Levine's name to be presented annually to people “who demonstrate outstanding work protecting and promoting the rights of children in New York.” See 2009 Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare, N.Y. ST. BAR ASS'N, <http://www.nysba.org/Content/NavigationMenu28/Awards/LevineAwardforExcellenceinJuvenileJusticeandChildWelfare/default.htm> (last visited Nov. 24, 2013).

⁴⁶⁸ See Etlinger & Lorah, *supra* note 456, at 901 (quoting Howard A. Levine, Lecture, *Hugh R. Jones Lecture at Albany Law School*, 67 ALB. L. REV. 1, 5–6 (2003)) (“[D]uring the time Judge Levine sat with the Third Department, clerks at the Court of Appeals ‘used to joke that it was a relief to see an appeal of a case where he had written the majority or dissenting opinion. Then, they said, their job was easy: Just follow Judge Levine.’”).

⁴⁶⁹ See Sack, *supra* note 448 (“You always have to think very carefully if you're going against a Levine opinion because he thinks things out so clearly.”).

⁴⁷⁰ See STREAMS OF TENDENCY, *supra* note 175, at 5 (referring to Levine's record as “somewhat conservative” overall, but also noting that Levine showed an intermittent willingness to explore controversial “rights-protective” positions).

tended to favor the prosecution; in civil matters, he tended to vote more frequently than his brethren in favor of government interests rather than individual liberties.⁴⁷¹ In all areas of the law, his decisions were highly detailed and tended to take narrower, “restraintist” viewpoints rather than allowing for broader, sweeping changes.⁴⁷² His 1994 decision upholding the Rockefeller Drug Laws, for instance, clearly stated that the harsh penalties imposed by these laws had not succeeded in any way as a crime deterrent, yet allowed the statutes to stand on the ground that the court simply lacked the authority to strike them down.⁴⁷³ His multiple search-and-seizure decisions ruled for the defendants more often than one might have expected from the former prosecutor,⁴⁷⁴ although he also wrote many criminal law opinions on both search-and-seizure matters and law enforcement interrogation issues that favored the government.⁴⁷⁵ Neither clearly part of the liberal wing headed by

⁴⁷¹ *Id.* (“[Levine’s] voting has generally been favorable to the prosecution . . . [and has] been very deferential to government in civil cases.”).

⁴⁷² *See, e.g.,* Legg, *supra* note 456, at 1910 (“[Levine] has a deep respect for the concept of checks and balances, as well as the doctrine of separation of powers. Levine recognizes the power that the court possesses; however, he cautiously exercises such power against the state.”); *see also* Etlinger & Lorah, *supra* note 456, at 899 (noting Levine’s strong belief that the common law should not be developed overnight, but rather should emerge through “incremental steps”). Interestingly, Legg observes that there is one discrete area of the law where Levine consistently loses his cautious posture: the rights and well-being of children. *See* Legg, *supra* note 456, at 1910 (“When it comes to the interests of the children of the state, Levine’s judicial sword is raised to protect such interests against any and all who seek to do them harm. Although he is generally not responsive to emotional appeals, he carries a deep conviction regarding the protection of children and will vote to promote their interests and needs.”). This particular vigor toward ensuring justice for children seems to parallel another Cuomo appointee passionate about these issues: the overall more liberal Vito Titone. *See supra* note 324 and accompanying text.

⁴⁷³ *People v. Thompson*, 83 N.Y.2d 477, 487, 488, 633 N.E.2d 1074, 1080, 1081, 611 N.Y.S.2d 470, 476, 477 (1994).

⁴⁷⁴ *See, e.g.,* *People v. Jackson*, 99 N.Y.2d 125, 132, 782 N.E.2d 67, 71–72, 752 N.Y.S.2d 271, 275–76 (2002) (determining that a random road block stop for a less-than-pressing government purpose was unconstitutional under New York law); *People v. Robinson*, 97 N.Y.2d 341, 360, 366, 367, 767 N.E.2d 638, 650, 654, 655, 741 N.Y.S.2d 147, 159, 163, 164 (2001) (Levine, J., dissenting) (arguing that “pretextual traffic stops” by police should be seen as unconstitutional under New York law, as these stops put the police in “arbitrary control” of passengers (quoting *Maryland v. Wilson*, 518 U.S. 408, 423 (1997) (Kennedy, J., dissenting))); *People v. Banks*, 85 N.Y.2d 558, 562–63, 650 N.E.2d 833, 835, 626 N.Y.S.2d 986, 988 (1995) (striking down as unconstitutional a police search of a vehicle where officers detained the defendant without probable cause). Levine also wrote the majority opinion in a case where the Court of Appeals voted against the capital punishment scheme that existed in New York State at that time. *See Francois v. Dolan*, 95 N.Y.2d 33, 37, 731 N.E.2d 614, 616, 709 N.Y.S.2d 898, 900 (2000).

⁴⁷⁵ Again, Levine voted for the prosecution in the majority of the criminal appeals that he heard on the Court of Appeals. *See STREAMS OF TENDENCY, supra* note 175, at 5. *See, e.g.,* *People v. Spencer*, 84 N.Y.2d 749, 762, 646 N.E.2d 785, 793, 622 N.Y.S.2d 483, 491 (1995)

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Titone, nor clearly part of the conservative wing headed by Bellacosa, he was viewed as an intellectual leader on the court,⁴⁷⁶ described by at least one commentator as being as close to a “neutral” jurist as one can possibly be.⁴⁷⁷

After nine years on the court, Levine's age forced him into mandatory retirement in 2002.⁴⁷⁸ Today, he remains active on the legal scene as an attorney at the Albany law firm of Whiteman, Osterman & Hanna, where his son Neil serves as a partner.⁴⁷⁹

K. Replacing Judge Stewart F. Hancock

At the beginning of 1992, Cuomo knew of only one upcoming vacancy on the Court of Appeals: that of Judge Hancock, who would be facing mandatory retirement at the end of the following year.⁴⁸⁰ Then came the surprising resignation of Judge Alexander, the even more stunning arrest and resignation of Chief Judge Wachtler, and the replacement of Judge Kaye's seat as Associate Judge. As the end of 1993 arrived and Hancock's retirement drew near, Cuomo suddenly found himself looking at a partially remade Court of Appeals. Hancock's replacement would mark Cuomo's third Court of Appeals appointment in fourteen months, and his fourth appointment in just two years.

The short list presented to Cuomo was the most demographically diverse group of finalists since the appointment process began. For the first time, the list included three female candidates: Hispanic trial court judge Carmen B. Ciparick, who had previously appeared

(Levine, J., dissenting) (arguing that individual defendant's interest in freedom from government intrusion was outweighed by the legitimate government interests necessary to a law enforcement investigation); *People v. Parris*, 83 N.Y.2d 342, 349, 632 N.E.2d 870, 874 (1994) (deciding that at a suppression hearing, hearsay evidence could be used to establish probable cause against the defendant); *In re Gregory M.*, 82 N.Y.2d 588, 593, 627 N.E.2d 500, 502, 606 N.Y.S.2d 579, 581 (1993) (establishing that a lower threshold for finding cause exists in a school setting where police are seeking to keep weapons out of schools, and thus, police can search students without even reaching a “reasonable suspicion” threshold); *People v. Alls*, 83 N.Y.2d 94, 100, 629 N.E.2d 1018, 1021, 608 N.Y.S.2d 139, 142 (1993) (deciding that law enforcement did not need to provide *Miranda* warnings before interrogating a prison inmate).

⁴⁷⁶ See *STREAMS OF TENDENCY*, *supra* note 175, at 129–30, 131, 157, 158, 182.

⁴⁷⁷ *Etlinger & Lorah*, *supra* note 456, at 905.

⁴⁷⁸ *Caher*, *supra* note 456, at 1, col. 3.

⁴⁷⁹ See Paul Grondahl, *Levine's Love of the Law Thriving*, *TIMES UNION* (Albany, N.Y.), June 29, 2008, at D7.

⁴⁸⁰ All of the other judges on the court had time left on their fourteen-year terms, giving the impression—wrongfully, as it turned out—that this initial arrangement of the “Cuomo Court” would be together for a long time to come. See *CANDIDATES NOMINATED FOR APPOINTMENT*, *supra* note 141, at 3–4 (showing that three additional judges would leave the bench in 1993, including the scandalized Chief Judge Wachtler).

on the short list for the Alexander vacancy; Jewish trial court judge Myriam Altman, who was on the short list to fill Kaye's Associate Judge vacancy; and New York University School of Law Professor Sylvia A. Law, known for her scholarship on women in the law and her focus on health law issues.⁴⁸¹ The African-American Associate Justice Samuel Green from the Fourth Department appeared on his second consecutive list, and Professor William Hellerstein from Brooklyn Law appeared on his third consecutive list.⁴⁸² Appearing for the first time on this list was Third Department Associate Justice Albert M. Rosenblatt, a former District Attorney and a Republican.⁴⁸³ And once again, First Department Associate Justice Joseph P. Sullivan's name appeared on the short list.⁴⁸⁴

Yet, this would not be Sullivan's year either. In fact, most court observers seemed to have this one picked long before Cuomo made the announcement.⁴⁸⁵ The predictability arose from the fact that Cuomo was facing very public pressures on two fronts in making this selection. First, Hispanic organizations had been heavily advocating for Cuomo to select a Hispanic judge ever since the bizarre withdrawal of John Carro from the previous list.⁴⁸⁶ At the time, fewer than two percent of New York's judges were Hispanic, a fact that groups lobbying for a Hispanic judge to join the court frequently reminded Cuomo through the media.⁴⁸⁷ And secondly, Chief Judge Kaye herself had entered the fray, publically stating that she wanted Cuomo to appoint another female jurist to the Court of Appeals.⁴⁸⁸ Thus, the "smart money" was clearly on the lone candidate on the list who was both female and Hispanic: Carmen Beauchamp Ciparick.

Indeed, Ciparick was Cuomo's choice, announced by the governor

⁴⁸¹ *Id.* For biographical information about Professor Law, see *Sylvia A. Law*, NYU SCH. OF LAW, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=20071> (last visited Nov. 25, 2013).

⁴⁸² CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 4.

⁴⁸³ *Id.* Later, in 1999, Governor Pataki would nominate Albert Rosenblatt to the New York Court of Appeals. George D. Marlow, *Albert Martin Rosenblatt*, in *JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 36, at 945, 947, 949, 956.

⁴⁸⁴ CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 4.

⁴⁸⁵ *See* Dao, *supra* note 16 ("[Carmen Beauchamp Ciparick]'s selection was not considered a surprise.").

⁴⁸⁶ *See id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ In fact, Chief Judge Kaye had started lobbying for another female on the Court of Appeals when Cuomo was still deciding whom to choose for the Associate Judgeship that Kaye had vacated. *See* Sack, *supra* note 448. Judge Kaye stated, "I still do hope to be joined by another woman." *Id.*

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in December 1993.⁴⁸⁹ The selection pleased the Hispanic legal and civil rights organizations, including the Puerto Rican Legal Defense and Education Fund, whose president, upon hearing that Ciparick was the nominee, stated, “[t]his was a long time in coming.”⁴⁹⁰ Likewise, it satisfied Chief Judge Kaye’s call for another female judge on the court.⁴⁹¹ Ciparick’s appointment also gave Cuomo a new liberal Democratic voice on the court,⁴⁹² again preserving the balance between Democrats and Republicans on New York’s highest judicial tribunal.⁴⁹³

Ciparick’s appointment gave the court a new judge with the following demographic characteristics:

Race: Hispanic (first Hispanic on the Court of Appeals)⁴⁹⁴

Gender: Female

Religion: Roman Catholic

Heritage: Puerto Rican⁴⁹⁵

Political Affiliation: Democrat

Predecessor’s Political Affiliation: Republican

Region: Downstate (New York City)⁴⁹⁶

Age: Fifty-one⁴⁹⁷

Prior Judicial Experience: Yes, as a trial court judge in New York City (1978 to 1993)⁴⁹⁸

Previously On Short List: Yes, once in 1992

⁴⁸⁹ Dao, *supra* note 16.

⁴⁹⁰ *Id.*; see also Edwin Martinez, Jr., *Choosing Ciparick Boosts Hispanics*, BUFF. NEWS, Jan. 25, 1994, at B-2 (stating that the appointment of Ciparick should be considered a key moment in New York’s history, especially for Hispanic New Yorkers).

⁴⁹¹ Dao, *supra* note 16.

⁴⁹² See *id.* (“Judge Ciparick . . . is considered a liberal jurist who will be replacing one of the court’s more conservative members.”). Of course, as noted above, the extent to which Hancock really was one of the court’s most conservative members is questionable, particularly on criminal appeals.

⁴⁹³ The Democratic wing of the Court of Appeals now consisted of Titone, Kaye, Smith, and Ciparick. The Republican wing consisted of Simons and Levine in terms of official party membership and Bellacosa in terms of voting record. See Pérez-Peña, *supra* note 320.

⁴⁹⁴ Actually, this is a subject of some debate. While Ciparick is broadly acknowledged to be the first Hispanic on the court, there is a faction claiming that Judge Benjamin Cardozo should be considered the court’s first Hispanic because his ancestors came from the Iberian Peninsula—specifically, from Portugal. See Neil A. Lewis, *Was Hispanic On the Court In the ‘30s?*, N.Y. TIMES, May 27, 2009, at A16. However, it remains historically reasonable to refer to Judge Ciparick as the first Hispanic to sit on New York State’s highest court. See Antonio E. Galvao, *Carmen Beauchamp Ciparick*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 36, at 911, 911.

⁴⁹⁵ Galvao, *supra* note 494, at 911.

⁴⁹⁶ See *id.* at 912 (describing Ciparick’s early years in the Washington Heights neighborhood of Manhattan).

⁴⁹⁷ See *id.* at 911, 918.

⁴⁹⁸ *Id.* at 915.

Friendship Factors: Nothing directly linking her with Cuomo. However, there definitely are significant links between the two individuals. Cuomo and Ciparick certainly had similar upbringings (i.e., born into working-class immigrant families in New York City).⁴⁹⁹ Also, Ciparick graduated from St. John's School of Law, just as Cuomo did, making her the third St. John's graduate appointed to the Court of Appeals by Cuomo.⁵⁰⁰

Judicial Record/"Pet Causes": Known as a liberal judge on both civil and criminal issues.⁵⁰¹ Particularly controversial for her ruling on abortions in New York State,⁵⁰² a topic on which she was questioned aggressively by the Senate Judiciary Committee in her confirmation hearing.⁵⁰³

Judge Ciparick's voting record on the Court of Appeals proved that she was as liberal as expected.⁵⁰⁴ She voted against the death penalty,⁵⁰⁵ favored the rights of same-sex couples to legally

⁴⁹⁹ See *id.* at 912.

⁵⁰⁰ *Id.* Cuomo's prior two Court of Appeals appointments from St. John's were Judge Titone and Judge Bellacosa.

⁵⁰¹ See Dao, *supra* note 16.

⁵⁰² See *Hope v. Perales*, 150 Misc. 2d 985, 571 N.Y.S.2d 972 (Sup. Ct. New York County 1991), *aff'd*, 189 A.D.2d 287, 595 N.Y.S.2d 948 (App. Div. 1st Dep't 1993), *rev'd*, 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994). The case focused on a social welfare program that provided free medical services to women who met certain poverty guidelines. *Id.* at 990, 571 N.Y.S.2d at 975. The program specifically excluded abortions from the list of services that it would provide. *Id.* at 990, 571 N.Y.S.2d at 975–76. Plaintiffs challenged this exclusion of abortions from the services provided by this social program. *Id.* at 989, 571 N.Y.S.2d at 975. Ciparick ruled that the program violated the due process rights of eligible pregnant women "for whom an abortion is medically necessary by leaving her with no real choice in the decision of whether to 'bear or beget a child.'" *Id.* at 997, 571 N.Y.S.2d at 980. The program, she held, amounted to government coercion of pregnant women, virtually forcing them to make the "[s]tate-preferred choice of childbirth." *Id.* at 995, 571 N.Y.S.2d at 979. Employing a rationale that revealed her views on the role of state constitutions as well as her opinions on abortion, Ciparick stated that while the U.S. Constitution permitted the government to exclude abortion from state-funded medical services, such an act was not permissible under the New York State Constitution. *Id.* at 993–94, 571 N.Y.S.2d at 978. "Historically, the New York Court of Appeals has read our State Constitution expansively, *broadening the scope of individual rights and liberties accorded by the Federal Constitution*, finding the basis for such rights in our State Constitution," she wrote. *Id.* at 993, 571 N.Y.S.2d at 978 (emphasis added).

⁵⁰³ James Dao, *Court Nominee Questioned on Abortion Case*, N.Y. TIMES, Dec. 16, 1993, at B8.

⁵⁰⁴ For an overview of Ciparick's voting patterns through her dissents, see Jillian Kasow, *Judge Carmen Beauchamp Ciparick: A Glimpse into the Senior Associate Judge's Judicial Philosophy Through Her Dissents*, 73 ALB. L. REV. 953, 953 (2010). See also John M. Bagyi, *Carmen Beauchamp Ciparick: The Court of Appeals' Voice of Compassion*, 59 ALB. L. REV. 1913, 1932–33 (1996) (noting that from the outset, Ciparick demonstrated an interest in compassion-based, pro-individual decision-making in her judicial opinions).

⁵⁰⁵ *People v. Taylor*, 9 N.Y.3d 129, 137–38, 878 N.E.2d 969, 970–71, 848 N.Y.S.2d 554, 555–56 (2007).

marry,⁵⁰⁶ held that employers could not fire employees on the basis of past alcoholism when the employee was actively seeking rehabilitation and was performing well on the job,⁵⁰⁷ strictly supported a distinct separation between church and state,⁵⁰⁸ and consistently supported the due process rights of defendants in criminal cases.⁵⁰⁹ After the retirement of Judge Titone, she came to be widely viewed as the leader of the court's liberal wing.⁵¹⁰

In 2007, when her fourteen-year term came to an end, Ciparick was re-appointed by Eliot Spitzer.⁵¹¹ Five years later, she retired from the court upon reaching mandatory retirement age.⁵¹² At the time when she retired, she was the last of Mario Cuomo's

⁵⁰⁶ *Hernandez v. Robles*, 7 N.Y.3d 338, 380, 855 N.E.2d 1, 22, 821 N.Y.S.2d 770, 791 (2006) (Kaye, C.J., dissenting). Ciparick was the only judge on the Court of Appeals to join Kaye in dissent on this case. *See also In re Jacob*, 86 N.Y.2d 651, 655–56, 660 N.E.2d 397, 398, 636 N.Y.S.2d 716, 717 (1995) (concurring with Kaye in a decision that allowed gays and lesbians to adopt the children of their partners).

⁵⁰⁷ *McEniry v. Landi*, 84 N.Y.2d 554, 556, 644 N.E.2d 1019, 1020, 620 N.Y.S.2d 328, 329 (1994).

⁵⁰⁸ *Grumet v. Cuomo*, 90 N.Y.2d 57, 63–64, 681 N.E.2d 340, 342, 659 N.Y.S.2d 173, 175 (1997).

⁵⁰⁹ *See, e.g., People v. Devone*, 15 N.Y.3d 106, 114–16, 931 N.E.2d 70, 74–76, 905 N.Y.S.2d 101, 105–07 (2010) (Ciparick, J., dissenting) (arguing that the New York State requires “reasonable suspicion” of criminal activity before police can impose a canine sniff on the exterior of a vehicle); *People v. Gomez*, 5 N.Y.3d 416, 417, 838 N.E.2d 1271, 1272, 805 N.Y.S.2d 24, 25 (2005) (holding that suspect's general consent to search vehicle did not authorize police officer to remove carpeting from the vehicle and use a crowbar to pry open the sheet metal on the car); *People v. McDonald*, 1 N.Y.3d 109, 111, 802 N.E.2d 131, 132, 769 N.Y.S.2d 781, 782 (2003) (determining that a defendant suffers ineffective assistance of counsel when his attorney wrongfully tells him that entering a guilty plea will have no deportation consequences); *People v. Mundo*, 99 N.Y.2d 55, 59–63, 780 N.E.2d 522, 524–28, 750 N.Y.S.2d 837, 839–43 (2002) (Ciparick, J., dissenting) (voting to suppress information obtained from a warrantless seizure on the grounds that there was no “actual and specific danger” to police and thus the seizure was unconstitutional); *People v. Spencer*, 84 N.Y.2d 749, 751, 646 N.E.2d 785, 786, 622 N.Y.S.2d 483, 484 (1995) (deciding that police exceeded their authority by stopping defendant's car to seek information that they thought defendant knew about a suspect).

⁵¹⁰ However, Ciparick was not always viewed as a staunch liberal. *See STREAMS OF TENDENCY*, *supra* note 175, at 67 (referring to Ciparick as a “[r]eluctant [l]iberal[]”). The lull in Ciparick's liberalism occurred during the early years of the Pataki administration, a time when Pataki criticized the court for “coddling criminals.” *Id.* at 242–43 (“The liberal Ciparick is gone; the ‘most liberal member of the court’ for the first two years following her appointment has had, even more so than Kaye, a shift in recent years that was sharply pro-prosecution on criminal issues and pro-government on civil ones.”). However, Ciparick ultimately moved leftward again as time went by. *See, e.g., Kasow, supra* note 504, at 953 (“Although the extent and degree of her liberal favor has evolved during the course of her sixteen-year tenure on the bench, Ciparick is still perhaps the most liberal judge voting on the Court today.”).

⁵¹¹ Penelope Andrews, *A Tribute to the Honorable Carmen Beauchamp Ciparick*, 76 ALB. L. REV. 833, 833 (2012).

⁵¹² *Id.*

appointees remaining on the court.⁵¹³

VI. THE TRENDS: CONNECTING DOTS TO FIND DEMOGRAPHIC TRENDS IN MARIO CUOMO'S COURT OF APPEALS APPOINTMENTS

In the foregoing section, the discussions of Mario Cuomo's Court of Appeals appointments reveal, if nothing else, that these nominations are nuanced processes, with multiple interests at stake for any governor. Many of these interests are discussed in varying degrees of specificity in that section. Now, in the section to come, we "connect the dots" of the demographic data collected above to see whether any trends can be discerned about Cuomo's Court of Appeals appointments and whether those trends may reveal what interests Cuomo considered paramount in making these eleven court selections.

A. Race

Eight of Cuomo's eleven Court of Appeals selections were white. This is due in no small part to an overall lack of racial diversity in many of the short lists that he received.⁵¹⁴ He did fulfill his campaign promise to appoint the first African-American member of the court for a full term (Alexander), and replaced that judge with another African-American jurist (Smith). He also appointed the first Hispanic judge on the court, a move made in the face of significant pressure from Hispanic groups. Even though Cuomo told the media that "[i]f you made someone a judge or elected them governor because of their ethnicity, you'd be doing the wrong thing,"⁵¹⁵ the racial composition of the Court of Appeals clearly appears to have been a consideration that Cuomo took into account in making these selections. His anger at the lack of racial diversity on the first short list that he received only seems to underscore this point.⁵¹⁶

⁵¹³ Ironically, or perhaps poetically, Ciparick served long enough that her replacement on the court, Judge Jenny Rivera, was chosen by Mario Cuomo's son. *See id.* at 833; *Judges of the Court: Honorable Jenny Rivera*, NYCOURT.GOV, <http://www.nycourts.gov/ctapps/jrivera.htm>.

⁵¹⁴ The only African-Americans on the short lists presented to Cuomo were Alexander, Smith, Lewis L. Douglass, and Samuel L. Green. The only Hispanics on the short lists presented to Cuomo were Ciparick and John Carro. *See* CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 2–4.

⁵¹⁵ Dao, *supra* note 16.

⁵¹⁶ *See supra* note 97 and accompanying text (noting Cuomo's desire from the outset to

B. Gender

Eight of Cuomo's eleven Court of Appeals selections were males. More tellingly, seven of the nine judges appointed by Cuomo to the court for the first time were men.⁵¹⁷ Again, this is due largely to a lack of female finalists on the short lists that were presented to him.⁵¹⁸ He did appoint the court's first female judge at the first possible opportunity with Judge Kaye, and then later elevated her to Chief Judge after Wachtler resigned. He also did not appoint another female until his last court nomination with Carmen Ciparick. Perhaps most surprising in this regard was his decision to bypass Myriam Altman, well-known as a pioneering woman in the judiciary and well-liked by Cuomo, in favor of Howard Levine in 1993. Yet Levine had an impressive appellate judicial record and lived in upstate New York, and his appointment maintained the ideological balance of the court. In any event, it seems that gender, like race, was a consideration that Cuomo did take into account when making at least some of his Court of Appeals nominations.

C. Religion

Cuomo inherited a religiously diverse court upon taking office.⁵¹⁹ By the time he left, the court was still religiously varied. Cuomo appointed three Jewish judges (Wachtler, Kaye, and Levine), three Catholic judges (Titone, Bellacosa, and Ciparick), and three Protestant judges (Simons, Hancock, and Smith). Whether preserving the religious diversity of the court was as important to Cuomo as some commentators—including those who have suggested the presence of a so-called "Jewish seat" on the court⁵²⁰—have stated is difficult to discern. However, whether intentional or coincidental, Cuomo's Court of Appeals appointments did ensure that the state's highest tribunal remained a religiously diverse body.

appoint both a woman and an African-American to the Court of Appeals).

⁵¹⁷ The only two female judges brought to the court by Cuomo were Kaye and Ciparick. See CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 1–4.

⁵¹⁸ The only female candidates on the short lists received by Cuomo were Kaye, Ciparick, Betty Weinberg Ellerin (on the list from which Kaye was appointed), Carolyn Gentile, Myriam J. Altman, and Sylvia A. Law (on the list from which Ciparick was appointed). *Id.* at 2–4.

⁵¹⁹ See *supra* notes 98–100 and accompanying text.

⁵²⁰ Liebman, *supra* note 191.

D. Heritage

Along with criticizing the Commission for failing to include women and racial minorities on the first short list that he received, Cuomo also chastised the Commission for the lack of Italian-American finalists on the early lists that were presented to him.⁵²¹ Later, he would appoint two Italian-Americans—Titone and Bellacosa—to the court. Both were selections that seemed to surprise no one. One can only speculate as to whether Cuomo, ardently and openly a promoter of Italian-American interests, would have appointed more Italian-Americans to the Court of Appeals if more Italian-Americans had been named on the short lists that he received. Certainly, the mere fact that Cuomo mentioned the lack of Italian-Americans on the court strongly demonstrates that this was a factor of significant interest to him in making his picks for the court.

E. Political Affiliation

Cuomo's court appointments encompass a very close balance in terms of political party: five Democrats (Kaye, Alexander, Titone, Smith, and Ciparick), four Republicans (Simons, Wachtler, Hancock, and Levine), and one registered independent (Bellacosa). Taking into consideration the fact that Bellacosa voted precisely the way one would expect a contemporary conservative Republican to vote, one could legitimately argue that "Cuomo's Court" was a dead heat between Democrats and Republicans.⁵²²

Cuomo entered office at a time when the public clearly feared the level of power that the new appointment system placed in the governor's hands.⁵²³ The fact that such a liberal governor appointed such a balanced court—much to the surprise of observers who expected him to use these judicial vacancies to turn the court into a left-wing stronghold—indicates that Cuomo likely was paying careful attention to these concerns of the public.

Particularly noteworthy in this category is the fact that Cuomo rarely replaced a judge with a new judge from the same political party. Eight of Cuomo's eleven appointments came from a political

⁵²¹ See Shipp, *supra* note 22.

⁵²² Bellacosa's pro-prosecution record in criminal cases and pro-government record in civil cases is the type of voting record that one would expect of a solidly conservative judge in today's judiciary. See Finder, *supra* note 373.

⁵²³ See *supra* notes 118–28 and accompanying text.

party that was different from that of their predecessor. Spun a different way, only Simons, Kaye (for her Associate Judge position), and Smith inherited a seat held by a judge from the same political party as themselves.⁵²⁴ Republicans replaced Democrats, and Democrats replaced Republicans, with surprising frequency over the course of Cuomo's court picks.

This willingness to replace judges with new judges from the opposing political party could indicate an extreme meticulousness on Cuomo's part in seeking an ideologically balanced Court of Appeals. Or, conversely, it could potentially mean that Cuomo simply did not pay much attention to the political party of the exiting judge, instead weighing other factors more heavily than this one. Either could be a logical explanation of this surprising statistic.

F. Region

The vast majority of Cuomo's Court of Appeals nominees were individuals from New York City and the surrounding area. Only three of Cuomo's eleven appointments—Simons, Hancock, and Levine—were from outside the New York City region.

At first glance, this virtual regional uniformity could indicate that Cuomo, a lifelong New York City resident, did not care about geographic diversity on the court. However, a closer look at the data may reveal otherwise. Cuomo's three upstate appointments came at points in his tenure when he may have intentionally been seeking out an upstate nominee. Simons was Cuomo's first nominee, and from all outward appearances, the governor was trying to demonstrate that he was willing to appoint judges who were not carbon copies of himself—including judges who came from a region other than New York City. Hancock's nomination came after Cuomo had appointed four consecutive downstate judges (Kaye, Wachtler, Alexander, and Titone) and may have been feeling pressure to appoint a judge who came from somewhere besides New York City or Long Island. Similarly, Cuomo nominated Levine after a run of downstate appointments (Bellacosa, Smith, and Kaye [as Chief Judge]) had left the court particularly downstate-heavy in its membership.

Thus, it is actually unclear what effect, if any, geographic region

⁵²⁴ Simons replaced Gabrielli, a Republican; Kaye replaced Fuchsberg, a Democrat; and Smith replaced Alexander, a Democrat.

had on Cuomo's choices. Yet it appears evident that geography may have impacted Cuomo's picks—his three upstate appointments, at the very least—with a desire to maintain some level of regional diversity on the Court of Appeals.

G. Age

As noted earlier, the constitutionally mandated retirement age makes this a particularly important category of study for New York State Court of Appeals appointments. Younger appointees are inherently likely to remain on the court—and, concurrently, influence the direction in which the court moves on major issues—for a longer period of time.

Altogether, the mean age of Cuomo's court nominees is fifty-five. Thus, the average Cuomo appointment was automatically eligible to serve until his or her sixty-ninth birthday, meaning that their fourteen-year terms would not be cut short by mandatory retirement. Cuomo thus guaranteed that his imprint upon the Court of Appeals would remain for a very long time.

Outliers on the upper end of the age spectrum are two sixty-year-old judges, Hancock (age sixty-three at the time of appointment) and Levine (age sixty-one at the time of appointment). On the other side, outliers on the younger end of the age spectrum are Kaye (age forty-five when Cuomo appointed her as an Associate Judge) and Bellacosa (age forty-nine at the time of appointment). Interestingly enough, both of the Cuomo appointees over the age of sixty—meaning that they were guaranteed to have only a short tenure on the court—were Republicans. Whether this was designed to minimize the impact of Hancock and Levine on the court if they turned out to be particularly hostile to Cuomo's policies is something upon which we can only speculate.

H. Prior Judicial Experience

Cuomo nominated only two individuals to the Court of Appeals who had no prior judicial experience. One was Kaye, whom Cuomo seemingly liked from the outset, and whom Cuomo wanted to appoint to fulfill his promise of appointing the first woman to the Court of Appeals. The other was Bellacosa, Cuomo's close friend and someone who at least had knowledge about the inner workings of the court through his tenure as Chief Administrative Judge.

Beyond those two outliers though, Cuomo's selections not only had judicial experience, but tended to have a relatively extensive

record as both a trial court judge and an appellate court judge. Other than Kaye and Bellacosa, only one of Cuomo's picks—Ciparick—had never served on one of the departments of the Appellate Division.⁵²⁵ All nine of Cuomo's appointments with judicial experience had served for ten years or more as a judge by the time they were selected by Cuomo. Interestingly, Cuomo's selections came solely from New York State courts. Although he received several short lists that contained names of highly ranked federal judges, Cuomo never appointed a federal court judge to the Court of Appeals bench.

As with other categories examined here, the data is somewhat skewed in that many of the names on the short lists were individuals with substantial judicial experience. However, Cuomo at least indicated that he considered prior judicial experience to be important for a Court of Appeals judge. Often, he would make relatively detailed comments about the writing style exhibited by the various judges whom he appointed, indicating that he had studied their judicial opinions in at least some depth.⁵²⁶ Given that Cuomo was a former Court of Appeals clerk, and is a man who to this day often speaks about the respect he holds for the judiciary, this interest in appointing high court judges who had significant previous experience judging cases does not come as a shock. However, by the appointments of Kaye and Bellacosa, Cuomo also exhibited willingness to overlook an utter lack of judicial experience when other factors, in his mind, outweighed an individual's lack of time presiding over a courtroom.

I. Previously On Short List

Cuomo appointed nine new judges to the Court of Appeals during his time in the Governor's Mansion.⁵²⁷ Of those nine individuals, four—Kaye, Alexander, Bellacosa, and Smith—had never appeared on a short list before. Two of those judges, Titone and Ciparick, had

⁵²⁵ Ciparick's tenure was solely as a trial court judge in New York City. However, she also had gained a solid reputation in this role, and was known to be liberal, facts which certainly weighed in her favor—along with the pressure exerted on Cuomo to select a Hispanic for the court.

⁵²⁶ Cuomo seemed particularly familiar with the judicial writings of Judge Levine at the time of Levine's appointment. See Sack, *supra* note 448.

⁵²⁷ Cuomo made eleven total Court of Appeals appointments, but two of them—elevating Wachtler to Chief Judge and then later raising Kaye to this same position—promoted judges who were currently on the court rather than selecting a new judge for the court.

appeared on one short list previously and been rejected.⁵²⁸ The remaining three judges, Simons, Hancock, and Levine, each had appeared on at least two short lists previously and been rejected, with Levine leading the way with six rejections before Cuomo appointed him to the court.⁵²⁹

One could argue that these figures demonstrate a slight willingness by Cuomo to lean toward appointing individuals who had appeared on prior short lists. Notably, the four judges appointed by Cuomo who had never appeared on a previous short list all were, in a sense, “special interest” selections: Kaye to become the first female on the Court of Appeals, Alexander to become the court’s first full-term African-American, Smith to replace the seat vacated by Alexander, and Bellacosa because of his deep friendship with Cuomo. This does not, of course, take away from anything that these four jurists accomplished before, during, and after their Court of Appeals tenure. It merely suggests that there were other interests at work which likely led Cuomo to appoint them at the first chance he had, knowing that he might not have another opportunity to accomplish these particular goals. On the other hand, with Levine, one can imagine that the six previous rejections of the highly tenured Third Department justice may have at least entered Cuomo’s mind when he was deciding on this selection.

However, there are also signals that appearances on previous short lists were not a guarantee for selection. Several individuals—chief among them Joseph P. Sullivan and Bertram Gelfand—appeared on multiple short lists but were never chosen by Cuomo for the court. Thus, if a previous short list appearance (or appearances) was a factor considered in any way by Cuomo, it was afforded only slight weight, outmatched by other demographic characteristics discussed in this article.

J. “Friendship Factors”

As mentioned earlier, plenty of commentators took note that many of Cuomo’s governmental appointees were graduates of St.

⁵²⁸ Titone had appeared on the short list from which Cuomo ultimately selected Simons; Ciparick had appeared on the short list from which Cuomo ultimately selected Smith. *See* CANDIDATES NOMINATED FOR APPOINTMENT, *supra* note 141, at 1, 3.

⁵²⁹ Simons had appeared on all three of the short lists prior to his appointment in 1983. Hancock had appeared on two short lists prior to his appointment, the 1983 list from which Cuomo chose Kaye and the 1985 list from which Cuomo chose Alexander. As for Levine, he appeared on virtually every short list between 1985 and 1993. *See id.* at 1–3.

John's University and/or the St. John's University School of Law.⁵³⁰ So much discussion revolved around the so-called "St. John's Connection" that Cuomo, in light of his nomination of Bellacosa, specifically stated to *The New York Times* that simply going to St. John's "can't get you on the Court of Appeals."⁵³¹

Of course, three St. John's graduates did receive appointments from Cuomo to the Court of Appeals: Titone, Bellacosa, and Ciparick. However, other factors seemingly also played large roles in their nominations, including the Italian-American heritage of Titone and Bellacosa, and the Hispanic race of Ciparick. The more intriguing "friend of Cuomo" appointment seems to be the promotion of Wachtler, a Republican, to the position of Chief Judge. Wachtler was known throughout Albany as somebody who was close to Cuomo, but also appeared to be positioning himself to become Cuomo's political rival. The notion that Cuomo's decision to elevate Wachtler to Chief Judge was both a gesture of friendship and an act of self-protection—the chance to reward a friend while staving off a potential political challenger—is certainly too logical to ignore here. That being said, the fact that Wachtler had gained tremendous respect from other judges and possessed the obvious leadership traits necessary to be a successful Chief Judge certainly did not hurt either.

In the end, Cuomo clearly found room on the Court of Appeals for some of his friends. Yet the information collected in the previous section also shows that he appointed many judges whom he did not know on a personal level—and, in several instances, barely knew at all.⁵³² The fear that a court remade by Cuomo would be filled with his political cronies never did come to pass. Indeed, while it seems that friendship with Cuomo may have helped some of the nominees, particularly Bellacosa,⁵³³ other factors such as political strategy and diversity outweighed basic friendship lines in the end.

⁵³⁰ See Kolbert, *supra* note 138.

⁵³¹ *Id.*

⁵³² For instance, Cuomo had few, if any, dealings with Simons before appointing him to the court. Likewise, he seemed to have few, if any, interactions with Kaye, before appointing her to the court.

⁵³³ Commentators seemed to focus on Bellacosa's friendship with Cuomo more than they did for any of Cuomo's previous nominees. See, e.g., Kolbert, *supra* note 138 ("But to watchers of the court, the selection of Judge Bellacosa, a longtime friend of the Governor and a fellow graduate of St. John's Law School, was no surprise."); Schmalz, *supra* note 356 (stating in the lead sentence of the article that Bellacosa was "a longtime friend of Governor Cuomo"); *Replacing Judge Wachtler, With an Eye on Politics*, *supra* note 368 (noting the frequency with which Cuomo, Bellacosa, and Wachtler had lunch together).

K. Judicial Record/“Pet Causes”

Just as Cuomo appointed a court that was quite balanced in terms of party affiliation, he also appointed a set of judges who were varied in their prior judicial records and their interests in various legal or political “causes.” However, certain commonalities do appear to stick out. Virtually all of the judges appointed to the court by Cuomo had some demonstrated interest in issues of judicial ethics.⁵³⁴ Also, practically all the judges appointed to the court by Cuomo had established a pretty clear record on criminal cases involving the rights of the accused, showing a tendency to vote either pro-prosecution or pro-defendant in their decisions.⁵³⁵ Several, although certainly not all, of his nominees also had shown an interest in protecting the rights of minorities and underrepresented groups in civil cases.⁵³⁶

Overall, though, there are no obvious cases of Cuomo passing over a potential nominee simply because he did not approve of his or her stance on a particular issue. While the backroom machinations of these decisions will forever be far from clear, a number of Cuomo’s appointments to the court—particularly Simons, Hancock, and Levine—certainly indicated a proclivity to vote against some of the causes that Cuomo held dear.⁵³⁷ Other nominees, particularly Kaye and Bellacosa, were largely unknown quantities, individuals whose views seemed vague and who were not seen as a guaranteed vote for

⁵³⁴ The true epitome of this characteristic, of course, was Judge Simons, who devoted much of his time and attention to ethical concerns, including his work on the panel that heard Fuchsberg’s case. It was also especially true for Alexander, who served on the Commission on Judicial Conduct prior to being appointed to the Court of Appeals. Yet this attribute appeared even in the appointees whose judicial leanings were unknown, such as Kaye and Bellacosa.

⁵³⁵ As noted, Wachtler, Alexander, Titone, and Ciparick were known to be pro-defendant judges at the time that Cuomo appointed them to the court. This was generally true for Smith, although his leanings were not believed to be as markedly pro-defendant as some of the others. Also, by the time Kaye was nominated for the position of Chief Judge, she had established a record that was generally pro-defendant, although her voting certainly was not uniform in this regard. On the other side, Simons and Levine were both regarded to be steadily pro-prosecution at the time of their appointments. Ironically, it was Bellacosa, whose leanings were unknown at the time of his appointment, who ended up being the most predictable pro-prosecution vote of all of them.

⁵³⁶ For instance, Wachtler had demonstrated this tendency on the Court of Appeals at the time when Cuomo appointed him Chief Judge, including the decision that struck down the “marital exception” to New York State’s rape law. Titone certainly exhibited a tendency to vote this way, as did Ciparick. Alexander and Smith also were assumed to be rather predictable votes for minority interests at the time of their appointments to the court.

⁵³⁷ As noted above, though, Hancock proved to be surprisingly “Cuomo friendly,” particularly in his rulings protecting the rights of the accused.

anything at the time of their appointment. For these choices, and potentially for others as well, it appears that factors other than the candidate's record on legal matters may have won out in Cuomo's mind.

On the "Cuomo Court" itself, many cases on major issues reached outcomes of which Cuomo likely approved. Chief among these were various decisions striking down the death penalty,⁵³⁸ the cases expanding the rights of same-sex couples,⁵³⁹ decisions allowing greater protection for criminal defendants in New York than what the federal Constitution recognized,⁵⁴⁰ and cases supporting an array of individual civil liberties.⁵⁴¹ Of course, a number of cases did not go Cuomo's way too, particularly as the court inched toward the right in the late eighties and early nineties. Overall, though, it seems from this birds-eye observation that even on this court that was largely ideologically balanced, the majority of cases were decided in ways that Cuomo probably liked.⁵⁴²

VII. CONCLUSIONS AND FINAL THOUGHTS

The question of what the former governor might say to the current one about remaking the court remains a tantalizing query. From the history examined here, it appears that Mario Cuomo might speak to his son about two concepts: political shrewdness and balance, and how the two can be intertwined. Cuomo reached across party lines more than any of his successors ever have in Court of Appeals appointments.⁵⁴³ He created a Court of Appeals that achieved something close to a complete balance in ideological leanings and party affiliation, a court that was known nationwide as an intellectual leader in state constitutional adjudication rather

⁵³⁸ See, e.g., *supra* notes 215, 409, 505.

⁵³⁹ See, e.g., *supra* notes 216–17. Even *Hernandez v. Robles*, the case in which the court did not recognize a right for same-sex couples to marry, was a backhanded sort of victory for Cuomo, thanks to the stinging dissent written by Kaye and joined by Ciparick. See *supra* note 218.

⁵⁴⁰ See, e.g., *supra* notes 291, 323, 346, 509.

⁵⁴¹ See, e.g., *supra* notes 214, 250, 290, 347, 507.

⁵⁴² See John Caher, *Pataki Needs Years to Remake Cuomo Judiciary*, TIMES UNION (Albany, N.Y.), Nov. 10, 1994, at B2 (stating that it would take Pataki three consecutive terms as governor to recast the state's judiciary, particularly the Court of Appeals, both in terms of members and attitude). A comparison of the decisions listed in *supra* notes 538–41—and, indeed, the bulk of the cases by Cuomo appointees discussed in this report—with Cuomo's hallmark values described in Part I of this paper also demonstrates this to be true.

⁵⁴³ See *supra* note 20 and accompanying text (noting that no subsequent governor has appointed a Court of Appeals judge from the opposing party, and observing that this partisanship has eroded New Yorkers' faith in the judicial appointment system).

than just a collection of party hacks.

At the same time, Cuomo left the Court of Appeals as a far more diverse body than it was when he arrived in office, particularly in terms of race and gender. He had managed to find room for a couple of his closest friends—and also one of his potential rivals—on the court's bench. He had appointed a number of judges who were young enough that they could serve for a full fourteen-year term without hitting the mandatory retirement age, virtually guaranteeing that his impact upon the court would be felt for a long time to come. And he succeeded in building a court that, although intellectually diverse, commonly ruled on major issues in a manner that Cuomo probably felt was correct and just.

The elder Cuomo also would probably tell his son that no renovation project happens without a couple of unexpected twists. Certainly, the extremely conservative voting record of his friend Bellacosa was one of those surprises for Mario Cuomo. Wachtler's sudden rightward shift—and his mesmeric ability to draw others on the court with him in that direction—was another one, as was Wachtler's sudden disintegration and the whirlwind that followed the Chief Judge's arrest. Alexander resigning from the bench for a Deputy Mayor post, and the pressure that followed for Cuomo to appoint another African-American to fill the vacancy, was still another unplanned turn of events. Yet there were also changes that Cuomo probably found pleasantly surprising, such as Hancock's rather liberal turn on criminal cases. You cannot build a house, the father would likely tell the son, without having to change the blueprints at least a few times along the way.

Now, the blueprints are in the hands of the son. A new Cuomo in the Governor's Mansion seems on the verge of doing what his father did before him, leaving an imprint on the Court of Appeals that could impact New York State for many years. And as he embarks on this challenging work, Andrew Cuomo could do far worse than to sit down and have this chat with his father, and learn about the unique balancing act that occurred during those years when his dad reached across the aisle.