EDITOR’S FOREWORD

Vincent Martin Bonventre*

Victoria A. Graffeo is finishing her fourteen-year term on the New York Court of Appeals as this issue is being published. She has served on the state’s highest tribunal with great distinction and unsurpassed dignity. As a judge whose uncompromising and tireless dedication to the judicial role has been a major factor in maintaining the Court of Appeals as the nation’s premiere common law court, we admire her and are enormously grateful for her contributions to the administration of justice and the law. As an alum of our law school, we could not be more proud or more inspired by her example. As a devoted friend and supporter of our school, and especially our students, we regard her as family with deep affection.

This issue of the Albany Law Review’s State Constitutional Commentary is dedicated to Judge Graffeo as the slightest measure of that admiration and affection. Robert McIver, the law review’s executive editor for this issue, has penned a tribute duly expressing appreciation for Judge Graffeo’s judicial and administrative work. He notes her “fastidiously crafted opinions that produce clear rules of law, but also demonstrate the important role of the judiciary as the dutiful interpreter of law.”¹ He similarly lauds her “remarkable contributions” to court administration, recognizing that her work has “been monumental and will be enduring in providing equal justice.”²

As part of our tribute to Judge Graffeo, we also dedicated this year’s Chief Judge Lawrence H. Cooke Symposium to her. There was a catch, however, to that dedication. She was recruited to moderate the discussion, by an exceptionally distinguished panel from around the country, on the topic of state high courts

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¹ Robert McIver, Dedication, 77 ALB. L. REV. 1243, 1244 (2014).
² Id. at 1243.

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“Exceeding Federal Standards.” Of course, she performed her moderator duties marvelously. And speaking of marvelous, that too is an apt description of the symposium introduction of Judge Graffeo by New York’s Chief Judge Jonathan Lippman, who was in China at the time, but appeared via recorded video.

Having charged Judge Graffeo with the development and implementation of some of his boldest and most challenging initiatives, the Chief Judge praised her for “do[ing] it all with a full heart and tremendous organizational and managerial skills that get things done. No ands, ifs, or buts....” And in addition to embracing her as “a wonderful colleague and rare human being, who is... collegial, warm, funny, and caring,” he declared her to be “one of the great judges in the luminous history of our court... a legal and judicial craftsman, whose insights and analytical and written work has had a lasting impact on the jurisprudence of our state...”

Although it was my privilege to introduce the panelists at the symposium, I did not get to speak about Judge Graffeo because that was left to the Chief Judge. So let me repeat some of what I have said and written about Judge Graffeo on many occasions elsewhere—in the specific context of her departure from the Court of Appeals:

[I]t will take some time before Judge Graffeo can be “replaced” in any sense of experience, wisdom, and well-earned esteem. She has evolved over the course of her 14 years on New York’s highest Court to rank among the most admired Judges of the modern era. Those seasoned jurists who understand the judicial role; exercise it with insight, independence, impartiality, and exquisite judgment. . . .

More importantly... the Court of Appeals, and indeed New York State for which it decides the most fundamental issues, is now denied the judicial services of a truly fine Judge. An experienced and wise Judge. (Let alone a wonderful, committed, caring human being—also pretty good qualities for a Judge.) A judge who has served on New York’s high court with exceptional distinction. Who brought great credit

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4 Id. at 1253.
5 Id.
6 Id. at 1252–53.
to the Court, enhanced its reputation, set an example of extraordinary dedication, and leaves a record that is worthy of this nation’s best courts and best Judges.7

Thank You Judge Graffeo. This issue of *State Constitutional Commentary*, as was this year’s symposium, is dedicated to you.

... “Exceeding Federal Standards,” the eighth annual Chief Judge Lawrence H. Cooke Symposium, brought another extraordinary panel to Albany Law School. In past years, this signature event hosted such American judicial icons as Wisconsin Chief Justice Shirley Abrahamson, Connecticut Chief Justice Chase Rogers, and then-Chief Justice Christine Duram of Utah for a wide-ranging discussion of issues facing state judiciaries nationwide.8 Another year it was now-retired Chief Justices Margaret Marshall of Massachusetts and Marsha Ternus of Iowa, together with Chief Justice Jean Toal of South Carolina, to celebrate some of the great women judges of America.9 Twice, the Cooke Symposium hosted the entire Court of Appeals—once, presided over by then-Chief Judge Judith Kaye, in which each of the court’s members discussed their favorite judges in the court’s history;10 and on the second occasion, presided over by Chief Judge Jonathan Lippmann, in which each of the judges shared some “secrets” of decision-making at the high court with another standing-room-only audience.11

This year the panel, jointly moderated by our honoree, Judge Graffeo, and myself, explored the role of state high courts in protecting rights and liberties independent of, and beyond, federal Supreme Court standards. Judge Graffeo discussed her recent majority opinion enforcing New York’s robust reporter’s privilege against an out-of-state subpoena.12 Ohio Chief Justice Maureen O’Connor, noting that ninety-five percent of all cases filed in the United States are in state court, spoke about “overreliance on federal decision-making [being] much the same as having the tail wag the dog.”13 Chief Justice Stuart Rabner of New Jersey proudly

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highlighted his court’s recent decision, built upon a body of his court’s case law, protecting privacy against advancing technology—and despite the Supreme Court’s “third party doctrine”—by recognizing a legitimate expectation of privacy in communications and information, even where others might have access.\(14\)

Oregon’s Justice Jack Landau outlined the genesis and underlying philosophy of his court’s “first-things-first” doctrine, in which federal law is only considered if state constitutional law doesn’t initially provide an adequate answer.\(15\) Justice Richard Palmer of Connecticut then discussed the development of his court’s contrasting approach, which first considers justifications for resorting to the state constitution to reach a different result than the federal Supreme Court.\(16\) New York’s solicitor general, Barbara Underwood, concluded the individual presentations by taking issue with the stated topic of the symposium itself, explaining her view—which is shared by state constitutional scholars and many of the more respected state high courts—that “Supreme Court decisions are about as relevant as another state’s decisions to the question of what a state constitutional provision means.”\(17\)

A lively exchange among the panelists, as well as a question and answer period with an engaged audience, brought this enormously enlightening and enjoyable symposium to a close.

The transcript of the symposium is followed in this issue by last year’s Hugh Jones Lecture, delivered by former Court of Appeals Judge Carmen Beauchamp Ciparick, in which she shared her insights into the impact of selection by election on judicial independence.\(18\) Next, leading the articles section, is the final piece of scholarship authored by the late New York Court of Appeals Judge Stewart Hancock—literally completed on his deathbed.\(19\) This follow-up to his first article on state constitutional law in the pages of this law review\(20\) highlights the progress, since that article,
of independent state-based jurisprudence at New York’s highest court.\(^\text{21}\)

Oregon Supreme Court Justice Jack Landau warns that strict adherence to stare decisis by state high courts often results in marching “lockstep” with the federal Supreme Court, if the state’s precedents pre-dated independent state constitutionalism.\(^\text{22}\) Former Delaware Chief Justice Myron Steele and attorney Peter Tsoflias argue that expansive interpretation of the federal Constitution by federal courts misaligns federalism and has the unfortunate consequence of limiting state experimentation.\(^\text{23}\)

Canisius College Professor Emeritus Peter Galie and attorney Christopher Bopst decry the oddities, anachronisms, and incoherence in New York’s “bloated, disorganized” constitution which, they show, needs a meticulous cleaning as much as did the newly restored state capitol building.\(^\text{24}\) Attorney Stephen Clark cites recent decisions of the Kansas and Missouri supreme courts to illustrate that courts of last resort should adopt transparent and impartial procedures for selecting temporary judges to fill-in for an absent member.\(^\text{25}\)

Thomas Cooley Professor Caroline Levine comments on a Florida Supreme Court decision limiting the rights of an accused, who is represented by counsel, to make his own strategic decisions in his defense.\(^\text{26}\) Recent Albany Law School graduate and former \textit{Albany Law Review} editor, Andrea Long, surveys the Court of Appeals’ application of its landmark 1976 \textit{De Bour} ruling which imposes restrictions on police encounters, even those short of stops based on reasonable suspicion.\(^\text{27}\)


\(^\text{25}\) Stephen R. Clark, \textit{Avoiding the Appearance of Impropriety: Missouri and Kansas Supreme Court Decisions on the Constitutionality of Caps on Noneconomic Damages Demonstrate the Need for Objective Procedures in the Selection of Special Judges}, 77 \textit{Albany L. Rev.} 1441 (2014).

\(^\text{26}\) Caroline Johnson Levine, \textit{Balancing the Sixth Amendment on the Scales of Justice: Is the Lawyer or the Client in Control of the Proceedings?}, 77 \textit{Albany L. Rev.} 1455 (2014).

Cardozo Professor David Carlson comprehensively explores the flaws in New York’s statutory scheme of money judgment collection, particularly the C.P.L.R. provisions governing restraining notices.28 And this issue of State Constitutional Commentary ends with a comment by Executive Editor Robert McIver on the responses of various state supreme courts, under their own law, to the Supreme Court’s 1990 decision in Oregon v. Smith, which effectively reduced the First Amendment protection of religious free exercise to routine judicial scrutiny.29

That same Robert McIver, as the 2013–2014 Executive Editor for State Constitutional Commentary, is largely responsible for having organized the “Exceeding Federal Standards” symposium, as well as soliciting and assembling the contents of this issue. He was immensely effective in carrying out his responsibilities, and he was a joy to work with all year. Mention should also be made of both the 2013–2014 Editor-in-Chief, Bryan Gottlieb, and his successor, Joseph O’Rourke—two exceptionally talented editors and leaders who have insured the continuing high quality and reputation of this law review—the nation’s oldest student edited legal journal. Finally, there are the managing editors, as well as the other editors and members of the law review, whose long hours and meticulous work have helped to make all four issues of Albany Law Review, Volume 77 so exceptional. Thank you—it is my honor to be your faculty advisor.