TRANSCRIPTS

CHIEF JUDGE LAWRENCE H. COOKE EIGHTH ANNUAL STATE CONSTITUTIONAL COMMENTARY SYMPOSIUM:

EXCEEDING FEDERAL STANDARDS

ALBANY LAW SCHOOL
Dean Alexander Moot Courtroom
Thursday, April 3, 2014, 2:00pm

Moderator: Victoria A. Graffeo
Jack L. Landau
Jonathan Lippman
Maureen O'Connor
Richard N. Palmer
Stuart Rabner
Barbara Underwood
Vincent M. Bonventre
Robert McIver

I. WELCOME & OPENING REMARKS

ROBERT MCIVER: Hello everyone, and thank you for attending. My name is Robert McIver and welcome to the Albany Law Review's eighth annual Chief Judge Lawrence H. Cooke spring State Constitutional Commentary symposium. We are absolutely thrilled to be joined by such a tremendous and prestigious panel, including Judge Graffeo of the Court of Appeals, Justice Landau of the Oregon Supreme Court, Chief Justice O'Connor of the Ohio Supreme Court, Justice Palmer of the Connecticut Supreme Court, Chief Justice Rabner of the Supreme Court of New Jersey, and the Honorable Barbara Underwood, the New York State Solicitor

General. The topic tonight is exceeding federal standards and the panel will spend the next three hours discussing the impacts of state constitutions in providing greater protections than exist under the federal Constitution. Given the numerous brilliant opinions to be discussed tonight. I think it is easy to take for granted the role of state courts in protecting our rights and liberties. This was not always the case. This year, the Albany Law Review was particularly humbled and honored to publish the late Stewart F. Hancock's article on this exact topic. Judge Hancock was on the court at a time when the judges argued at length, and even dissented as to whether it was ever proper for state courts to deviate from the guidance of the federal Supreme Court. In his article, Judge Hancock proudly remarked as to the progress in New York State in that

> state constitutionalism has been unquestionably accepted and is now a frequently and routinely applied approach to resolving issues of fundamental rights in New York. State constitutional law—and especially its reestablished legitimacy and unhesitating use by judges at all levels of New York judiciary—have helped make the New York judicial system the leading and, in [his] opinion, the best in the nation.

I think tonight's panel and the opinions and ideas that are to be discussed over the next several hours are a special and fitting tribute to how correct Judge Hancock was when he envisioned the role state of courts and state constitutions. I know I speak for the Albany Law Review when I say that we're honored to listen to the discussion on this topic. I also would like to take a moment to thank everyone that helped with this event, including all the members of the Law Review that dealt with my late-night e-mails, particularly, April Corrigan, Danielle Quinn, our faculty advisor, Professor Bonventre, and of course our wonderful and supportive Dean Penny Andrews. I'd also like to thank Tammy Weinman, Dave Singer, and Evette DeJesus for their tireless efforts, without which this simply would not have been possible. I would now like to introduce our faculty advisor, Professor Bonventre, for some introductions. Thank you everybody, and enjoy the symposium.

PROFESSOR VINCENT BONVENTRE: Thank you, Bob. Welcome to all of you and again thank you to the Law Review and especially to Bob McIver, this year's State Constitutional Commentary editor for putting together a fabulous program and

being such a fabulous editor. Thank you, Bob. Well, again as you know, this is one of the signature events at Albany Law School. I don't think anybody else has anything like this. Each year we bring some of America's great judges to Albany Law School, and despite the legal education's preoccupation with federal law and the federal Supreme Court, the fact of the matter is, most of America's great judges are on America's state high courts. In past years, we brought them here, whether Chief Justice Margaret Marshall of Massachusetts, Chief Justice Christine Durham of Utah, Chief Justice Shirley Abramson of Wisconsin, Chief Justice Chase Rogers of Connecticut, and our own former Chief Judge Judith Kaye, of the Court of Appeals. We've also had some men here, Chief Justice Jim Hannah of Arkansas, our own Chief Judge Jonathan Lippman, Chief Justice Norcott of Connecticut, and last year, I know many of you were here, we had the entire New York Court of Appeals in this moot court room.

Today's lineup is another, in the words of Dean Penny Andrews, another spectacular cast of characters. So this is a very, very special event and talk about special, that's what all of us at Albany Law School, and it seems like absolutely everyone on the bench and the bar in New York State, think about Judge Graffeo, our own special honoree. I must confess that I do think it would've been appropriate for our special honoree to just sit back, relax, and just hear all of us talk about how absolutely wonderful she is, how much we admire her and love her, but I must say that I shamelessly said to Judge Graffeo look, we're going to dedicate this year's State Constitutional Commentary to you and the symposium because we love you and admire you all, and by the way, while I have your ear, can you also give a presentation, and on top of that, could you also moderate the event, but she graciously said yes, but it was particularly shameless of me. I know, Jonathan Lippman that has told me himself, that he does come up with all these great proposals, but the reasons they get done because he hands them over to Judge Graffeo out to get them done and she's extraordinary at getting them done and getting them done well. To lighten Judge Graffeo's role, I've volunteered to do this terribly burdensome task of introducing our panelists and Judge Graffeo will be introduced afterward by another special guest. Let me, very briefly, introduce our panelists without going any further. I'm not going to be reading from the bio blurbs, there are some blurbs about the justices in your brochures. I'm not going to be dealing with that.

Let me talk first about the Justice Jack Landau of the Oregon Supreme Court, and he's been on the Oregon Supreme Court since 2011. Before that he was on their intermediate court for eight years. What attracted us, among other things, to Justice Landau were a couple of his law review articles: *Hurrah for Revolution: A Critical Assessment of State constitutional Interpretation*.[1] Another one: *The Unfinished Revolution: Interpreting the Oregon Constitution*.[2] That seemed pretty cool. I also saw an Oregon editorial when he was running for the Oregon Supreme Court and this is what the editorial had to say about him. After eight years on the intermediate court,

> he's still cranking out opinions and polishing his reputation as a good judge with an analytical bent, a scholarly sensibility and an independent judicial philosophy . . . . People who've worked with Landau describe him as focused, courteous, self-assured and highly productive. They admire his ability to follow the law to its logical conclusions, which makes him hard to pigeonhole . . . . Landau is the clear winner.[3]

And clearly we're glad you're here with us today.

From Ohio we have Chief Justice Maureen O'Connor. Justice O'Connor just so happens to be apparently the most popular judicial vote-getter in recent Ohio history. She won by a landslide to the Ohio Supreme Court in 2008 and another landslide in 2010 to be the Chief Justice. She has been on the forefront in Ohio when seeking reforms for the selection method for judges in Ohio. O'Connor's approach is that, unfortunately, fitness for judicial office often matters not at all in judicial elections. But not only in judicial selection and judicial elections, Chief Justice Maureen O'Connor has been a powerful voice and engine for reform in lots of different ways in the Ohio judiciary and we are honored to have her here as well.

From Connecticut, we have Justice Richard Palmer. Justice Palmer served as United States Attorney for Connecticut. He was then the chief state's attorney for the state of Connecticut. He was

---

[1] Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000).

[2] Jack L. Landau, "The Unfinished Revolution: Interpreting the Oregon Constitution," *Oregon State Bar Bulletin*, November 2001.

[3] Editorial, *Elect Judge Jack Landau to the Oregon Supreme Court*, THE OREGONIAN, Apr. 20, 2010.

selected by Governor Weicker in 1993 to the Connecticut Supreme Court, and appointed several times since then. He also teaches criminal law and ethics at Quinnipiac, and I like those two subjects, I teach them as well. But among other reasons we're thrilled he's here is that he definitely has a prominent place in Connecticut judicial history because he's the one that authored the majority opinion in the *Kerrigan* case in 2008, invalidating that state's ban on same-sex marriage, and he will be speaking to us about that as well. Thank you for coming, Justice Palmer.

Justice Stuart Rabner of New Jersey. In 2002 when, now Governor Chris Christie of New Jersey was the United States Attorney, he put Stuart Rabner in charge of that office's new terrorism bureau. Then he made him the head of the criminal division. Stuart Rabner was then was appointed Attorney General of New Jersey in 2006. The very next year, 2007, former Governor Corzine nominated Stuart Rabner to be Chief Justice of the New Jersey Supreme Court and apparently some state senator tried to hold up the nomination. Now Governor Christie jumped to Rabner's defense, calling him a fabulous choice and criticizing the hold up as typical rotten politics. Well, we hope Governor Christie has that very same attitude when Chief Justice Rabner comes up for reappointment during his tenure on the New Jersey Supreme Court. He has kept that court, as it has been for quite a while, in its position as one of the great courts in America on the front of a lot of issues. Thank you for being here, sir.

Finally, New York State Solicitor General, our fabulous solicitor general, Barbara Underwood. Barbara Underwood was born in that demographically homogeneous town of Evansville, Indiana. But she now lives in that racially, ethnically national melting pot of Brooklyn, the capital the world. That's what Brooklynites call it. On this sixtieth anniversary of *Brown v. Board of Education*, I also want to mention that she clerked for Justice Thurgood Marshall. Not only that, she has argued over twenty cases before the United States Supreme Court. She's also served in the offices of district attorneys for three different counties in New York City, and she was chief assistant United States Attorney and later counsel for the U.S. Attorney for the Eastern District. She was appointed in 2007 to her current position as solicitor general of our state. As the New York Times said not too long ago, even, really, really smart people describe Barbara Underwood as intimidatingly smart. Thank you for visiting.

Well that's our panel and we have one more to go, and that's Judge Graffeo and we have somebody to introduce Judge Graffeo.

CHIEF JUDGE JONATHAN LIPPMAN (on video): Regrettably, I am unable to join you personally today as I am in Beijing, China. Nevertheless, I am delighted to speak to you by video, as you begin this year's Chief Judge Lawrence H. Cooke State Constitutional Commentary symposium. It's been my pleasure in the past to participate in this event and this year is no exception. First, let me say what an honor it is to speak at any event, named after my predecessor Chief Judge Lawrence H. Cooke who is the leader on state constitutional issues. As Chief Judge Larry Cook also was a strong advocate and leader in the field of court administration, not only in New York, but nationally, as the head of the conference of chief justices of the United States. Today's subject, "exceeding federal standards," is a natural for Judge Graffeo and the state supreme court judges on the panel. I am particularly pleased to welcome to Albany, my colleagues and good friends, Chief Justice Stuart Rabner of New Jersey, Chief Justice Maureen O'Connor of Ohio, along with Justices Palmer and Landau, and our terrific solicitor general, Barbara Underwood. I wish I was there personally to greet all of you, but I will have to settle for welcoming you electronically.

My primary role today is to introduce your moderator, Senior Associate Judge Victoria A. Graffeo, to whom this year's Albany Law Review State Constitutional Commentary will be dedicated. Judge Graffeo is the perfect person to moderate a discussion on state constitutionalism, a topic reflected in the decisions of all the members of this panel of high court judges, who have written about the subject and the decision to depart from federal precedent and law. Judge Graffeo has had vast experience in the law and in all three legislative branches of government in the state. She has been a private practitioner, assistant counsel in the New York State Division of Alcoholism and Alcohol Abuse, chief counsel to the Assembly Minority Leader, Solicitor General, and counsel to the New York Attorney General, where she was directly responsible for the management of the state, federal, and appellate litigation, and a justice of the supreme court and the appellate division of the supreme court and now senior associate judge of our high court: the Court of Appeals. She has a skill set beyond compare for a high court judge in our state or country. In my view, she is one of the great judges in the luminous history of our court whose exceptional

work has brought great credit and honor to our court and our state. She is in every sense a legal and judicial craftsman, whose insights and analytical and written work has had a lasting impact on the jurisprudence of our state that will continue for many, many years to come. On top of her extraordinary skills as a jurist, she is a wonderful colleague and rare human being, who is a delight to serve with on the court. She is collegial, warm, funny, and caring. I also would be remiss if I did not mention her unwavering commitment to equal justice in our state. Vicki Graffeo's decisions attest to that fact. As well as being amply demonstrated by her selfless service as chair of our efforts to implement New York State fifty-hour pro bono requirement for law students, the rule that allows pro bono work by in-house counsel, and our new pro bono scholars program. I always wondered as to how she's been able to take on these demanding roles and so many others, in addition to a core responsibility and do it all with a full heart and tremendous organizational and managerial skills that get things done. No ands, ifs, or buts about it. In everything she does, she goes above and beyond the call of duty with an overriding commitment and belief in the need for access to justice for all in New York. I thank Judge Graffeo for all that she does and know that this panel on exceeding federal standards is in very good hands, indeed, with Senior Associate Judge Victoria A. Graffeo as moderator. Congratulations to Albany Law Review, my good friend, Professor Vincent Bonventre, and of course our great Dean, Penny Andrews, and to all those involved in this year's Chief Judge Lawrence H. Cooke State Constitutional Commentary symposium. Warmest wishes for what I know will be a great evening.

JUDGE VICTORIA A. GRAFFEO: Thank you, well now that I am thoroughly embarrassed, and can't possibly live up to the expectations of all these introductions, let me just say.

ROBERT MCIVER: Actually, we'd like to embarrass you one more time. We also want to dedicate the State Constitutional Commentary Issue to Judge Graffeo. When Professor Bonventre asked me whom I wanted to dedicate the issue to, it was one of the easier decisions I would have to make in my role. Judge Graffeo's commitment to the court and court administration has improved our court system and the administration of justice in our state. Also, she is from Guilderland and Altamont, which are also my hometowns, so if I can play to my bias there, I am happy to do so. Thank you, Judge.

II. PANEL DISCUSSION

JUDGE GRAFFEO: Thank you and thank you so much, Robert, and to all the members of the Albany Law Review and the great work that you do, it's quite a task in addition to your school work and we're most appreciative. I want to extend a special thanks to Professor Bonventre because, as a state court judge, I am so pleased that the Professor and this institution recognizes the importance of our state courts and our system of justice. I know that all of the other judges who are on this panel would agree, most litigation in this country occurs in our state courts, and they are really critical to the administration of justice, and I'm very, very proud that Albany Law School has always had a close relationship with our state judiciary. I know you had the Third Department here about a week ago, they did their oral arguments here in this room, and I think there's many opportunities for you to engage with the state judiciary because I know many of us are here on a regular basis and I think that that's just such a critical component of legal education. So my thanks to Dean Andrews and Professor Bonventre, and to all of you for your interest in the program.

This year, Albany Law School has invited, as you heard, such a distinguished panel of judges with us today to discuss a specific category of appellate decisions: cases in which our state courts saw the need to exceed relevant federal standards. The cases that will be discussed illustrate instances when federal precedent, usually U.S. Supreme Court precedent, was viewed as inadequate to protect the rights and interests of citizens of our states. Typically, this occurs when a state court concludes that our federal Constitution does not afford adequate protection, causing the state court to examine the breadth of protection afforded in its state constitution.

The New York Court of Appeals has undertaken this exercise many times on civil topics ranging from free speech and privacy rights, and in the criminal arena, across a broad spectrum of issues such as the indelible right to counsel and search and seizure. I will be highlighting a recent case in which the Court of Appeals did not, strictly speaking, interpret the New York State constitution, but where we were called upon to interpret a New York statute in a manner that protected the ability of a New York citizen to exercise rights of a constitutional dimension due to the absence of a clear and controlling federal Constitutional precedent providing such

protection.

This past December, the New York Court of Appeals issued its opinion in the case of James Holmes against Jana Winter,[4] which implicated one of the cornerstones of New York law, freedom of the press. It pitted New York's well-established policy of protecting the confidentiality of news sources against another of our state interest's in discovering the identity of persons who violated a gag order in a high profile murder trial. A serious crime was committed in 2012 in the state of Colorado. It resulted in James Holmes being charged with shooting and killing twelve people and injuring seventy others. These folks are all viewing a Batman movie in a theater.

So how did a Colorado murder case make its way to the high court of New York? During the murder investigation, the Colorado police had discovered that Holmes had mailed a notebook to a psychiatrist at a local university which apparently contains incriminating statements and information pertaining to the crime. In light of the intense media attention that surrounded this mass murder, the trial judge entered an order precluding the police from revealing the discovery or contents of the notebook. But that same day that the gag order was issued a FOX News investigative reporter Jana Winter published an online article describing the contents of the notebook and she also indicated that she had acquired the information from two unnamed law enforcement sources.

Not surprisingly, this caused defendant Holmes to move for sanctions in the trial court, claiming that the law enforcement officials had violated the gag order by revealing information to the reporter, and that such disclosures had undermined his right to a fair trial. At the hearing, fourteen working police officers who had familiarity with the notebook all denied having spoken with her and claimed they didn't know who had revealed the information.

Having no success in identifying the source of the leak, Holmes next sought to compel Winter's testimony under Colorado's version of the Uniform Act to Secure the Attendance of Witnesses from Without the State in a Criminal Proceeding. Congress likes to put really long titles of their acts. I'm just going to call it "the Uniform Act." It's been adopted by all the states. The Uniform Act sets forth a two-step procedure for acquiring the attendance of a witness situated in another state. The first step requires the issuance of a

[4] Holmes v. Winter, 3 N.E.3d 694 (N.Y. 2013).

certificate and the Colorado court did so on the basis that Winter was the material and necessary witness and she was the only person who possessed the information regarding the identity of the leak. Since Winter works and resides in New York, Holmes had to initiate the second step in the Uniform Act procedures in New York State. He had to commence a proceeding in the New York Supreme Court, which is our trial level court in New York, seeking the issuance of a subpoena to compel Winter to travel back to Colorado to answer questions about her confidential sources under New York's reciprocal Uniform Act statute.

Given the interstate nature of this dispute, one would expect that Winter would search for protection and case law precedent derived from the First Amendment of our federal Constitution. But federal law on the question of whether Winter could be compelled to reveal her sources, whether said she could rely on what is commonly referred to as the "reporter's privilege" to cloak the anonymity of her sources, was less than clear.

That uncertainty emanates from the United States Supreme Court decision in 1972 in *Branzburg v. Hayes*.[5] That was a five-four decision in which the court declined to quash a number of subpoenas that had been issued to journalists by grand juries that were engaged in criminal investigation. In each of those cases, the journalists had asserted a First Amendment right and refused to answer questions pertaining to the confidential sources. Four of the justices, comprising a plurality, rejected the request to quash for various reasons, including the view that journalists had no right to break the law or to protect others who had violated the law in their presence. In a concurring opinion, Justice Powell, who cast the fifth and deciding vote emphasized the limited scope of the majority holding stating that the Court had not decided that journalists were without constitutional rights regarding the gathering of news, or in safeguarding their sources. Hence, they would have what he said to be access to the courts where legitimate First Amendment interests require protection.

But exactly what did that enigmatic statement mean? Commentators and courts around the country have debated this point for more than forty years. Since the Supreme Court has not revisited this issue, we are left with that transfer decision. Although the journalists in *Branzburg* were denied protection, in

[5] Branzburg v. Hayes, 408 U.S. 665 (1972).

the years since, some of the federal circuit courts have interpreted the Powell concurrence as creating a balancing test that permits reporters to assert a privilege that insulates them from being compelled to reveal confidential sources in the context outside of grand jury inquiries. As a result, the level of protection has varied from jurisdiction to jurisdiction. But more recently, in some circuits, there appears to be a trend retreating from the federal recognition of the First Amendment privilege and that situation adds even greater instability to an already muddled area of law for journalists. Consequently, there have been attempts made to resolve the issue through federal legislation. Bills have been proposed in Congress to establish a national journalism privilege and, last year, such legislation passed the Senate but was stalled in the House. To date, legislative efforts to clarify federal law on this topic have not been successful, further efforts have also been made to try to protect the interests of news gatherers through other means, such as the recognition of the journalist's privilege under the federal common law through Federal Rule 501. The New York City Bar Association has been active in promoting this approach, but again, little progress has been made. In any event, such an approach would not have helped someone like Jana Winter, since it would only apply in federal courts.

Now, I gave you this background on the federal landscape to set the stage and to provide some context for the dilemma that reporter Winter faced when she was confronted with the demand for her return to Colorado. Needless to say, the absence of a clear and cogent federal policy on the extent of the journalist's privilege, whether constitutional or otherwise, caused this controversy to move into New York State.

Returning to the events in the *Holmes* case, after the Colorado court issued the certificate under the Uniform Act, Holmes then initiated a proceeding in the New York Supreme Court, seeking the issuance of a subpoena. Anticipating that Winter would invoke New York's Shield Law, which is our state statute that protects journalists and reporters from being compelled to divulge their confidential informants, Holmes argued that under the principles of comity, privilege issues should be determined by the courts of the demanding state. In this case that would be Colorado, rather than the sending state, which was New York, relying on a 1993 decision

by the New York Court of Appeals, in a case called *Matter of Codey*.[6]

Holmes contended that when New York State acts as the sending state under the Uniform Act, any issues pertaining to testimonial privilege can't be considered by the New York court since comity dictates that the, that Colorado as the demanding court, should get to resolve the merits of a claim of privilege.

The *Codey* case—because it's hard for you to understand this if I don't give you some facts and actually it's quite interesting—the *Codey* case involved a New Jersey—which I'm sure you're familiar with—grand jury investigation into gambling and illegal point shaving in college basketball and a New York news organization was subpoenaed under the Uniform Act because it had broadcasted the story using comments from the player who had worn a disguise in the interview. Although that player later voluntarily testified, he couldn't remember everything that he had said during the interview, so the grand jury was seeking to obtain the video outtakes and the reporter's notes.

Following uniform procedures, New Jersey asked a New York court to issue a subpoena to the broadcaster. The two lower state courts that reviewed this request reached different conclusions, so the case arrived at the Court of Appeals. The court upheld the subpoena and directed the newsgroup to turn over its materials to the grand jury in New Jersey. It found that it would be inconsistent with the design of the Uniform Act to permit states to resolve questions of privilege, that are better, best left to the state in which the evidence is sought to be used. But that opinion left open the possibility that this general rule might not apply in all cases. The decision states "Our holding should not be construed as foreclosing the possibility that in some future case a strong public policy of this State, even one embodied in an evidentiary privilege, might justify the refusal of relief" under the Uniform Act, and as you know, one of the axioms of law school is for every general rule, there's what? An exception.

Having lost in the lower courts, Winter argued in our court that her situation was just such an exception, as envisioned in *Codey*. She pointed out that Colorado provided significantly less protection under their state's statute to journalists than in New York, and therefore it would violate long-standing public policy for New York court to force her to travel to another state to face these inquiries.

[6] Codey v. Capital Cities, Am. Broad. Crop., Inc., 626 N.E.2d 636 (N.Y. 1993).

The critical issue, then, before our court was whether it would violate New York's public policy for a New York court to issue a subpoena directing a New York reporter to appear in a judicial proceeding in another state, when there was a virtual certainty that she would be required to disclose the names of her confidential sources or face contempt of court, which could obviously mean possible imprisonment. By a slim margin—it was a four-to-three decision in our court— the majority agreed with her.

In answering this question, we examined New York's rich tradition of providing, I'm sorry, of protecting the anonymity of confidential sources. We trace our respect for freedom of the press back to the colonial era. We cited the famous 1735 trial of John Peter Zenger, who refused to disclose his source for an article he authored that was critical of the colonial governor, not a situation entirely distinct from the predicament that Winter found herself in more than three hundred years later. That case is viewed as the first recognition in the American colonies of the important connection between the need to preserve the anonymity of sources and the maintenance of free press. As a result, in our country's early years, New York became a haven for journalism and the publishing industry.

After reviewing the historical perspective, we turn to New York's constitutional provision guaranteeing free speech and free press. Our constitutional provision was originally adopted in 1821, long before the federal First Amendment was made applicable to the states. The drafters of our state constitution chose broader language in the First Amendment. The wording of our provision is "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."[7] And that was found in article 1, section 8. This language is consistent with New York's policy of providing the greatest possible protection to the gathering and dissemination of news and the exchange of ideas that is so fundamental to a democracy.

We next considered New York's relevant statute. The Shield Law, which was enacted in 1970, and which grants an absolute privilege that protects journalists and newscasters from being forced to disclose their confidential sources. It does this in two

[7] N.Y. CONST. art. I, § 8.

ways: it prohibits a New York court from holding a journalist in contempt for refusing to disclose the identity of sources, and it makes any evidence that falls within the ambit of the statute inadmissible before a tribunal. The legislative history which we frequently look at in New York, of the Shield Law confirms that in the state legislature found such protections necessary to preserve the ideals of the democratic society.

It has a very interesting bill jacket. That's the accumulation of all the documents that pertain to a piece of legislation. It included affidavits from a number of prominent reporters, including Walter Cronkite and Mike Wallace. Hopefully some of you aren't so young that you don't know who Walter Cronkite is. They claimed that the ability of journalists to uncover information would be severely chilled if reporters faced contempt charges and jail time. In his approval message, then-Governor Nelson Rockefeller indicated that the new statute would make New York State the nation's principal center of news-gathering and dissemination, the only state that clearly protects the public's right to know.

But in addition to all of this information that we looked at, our Court had to address the *Codey* precedent, and we determined that Winter's situation was distinguishable for several reasons. First, since the New York broadcaster in *Codey* had relied on New Jersey Shield statute, it had made sense for New Jersey to resolve any privilege issue under its own laws. In contrast, Winter was relying on New York's Shield Law. There was also no claim disparity between New Jersey and New York's shield protection. But in Winter's case there is a significant difference between the laws of the two states. Unlike New York's absolute privilege, Colorado employs a balancing test to decide whether a reporter may be compelled to reveal the source and it also looks at whether that individual is the only repository of that information, which in this case, Winter was. Lastly and most importantly, the New Jersey grand jury in *Codey* did not need a subpoena to discover the identity of the source because the basketball player had stepped forward and had testified. The grand jury there was merely trying to get additional information pertaining to his interview. That third point was particularly relevant in Winter because it was clear from the Colorado certificate that the purpose in requiring Winter to appear was to force her to give up her sources. Undeniably, the Colorado court had a true interest in discovering who had violated its gag order so that it could consider sanctions and I'm sure if I had been

the trial judge in Colorado, I would've also issued a certificate, but this chain of events is precisely the type of harm that New York Shield Law was designed to protect against. It is the fear of reprisal that clamps mouths shut and hinders the investigative efforts of reporters. So for all of these reasons, and in light of the wide disparity between the New York and Colorado law on privilege, the majority concluded that Winter was entitled to have the Shield Law adjudicated in New York before any subpoena could be issued.

I should mention that the three-judge dissent was concerned with the extraterritorial reach of the majority's decision, and it applied a conflict of laws analysis. This case demonstrates an important instance where based on our state's history, our constitution, and the statutory framework, New York's public policy in protecting journalists and their confidential sources was more firmly developed than the federal law and precedent and prevented a New York court from granting a subpoena to compel Winter to travel to Colorado. Of course, this has been a very controversial decision and Holmes has recently filed a petition for certiorari with the U.S. Supreme Court. So the story is not yet concluded, but I want to thank you and I appreciate the opportunity to share the work of our court with you and I also hope that you're going to find all these other presentations, I know you're going to find them, to be of most interest.

We will now begin with the next presentation, I'm going to ask the Chief Justice of the great state of Ohio, Justice O'Connor, please come up to the podium.

CHIEF JUSTICE MAUREEN O'CONNOR: Thank you very much Judge, and thank you to the Law Review for the invitation, and to Mr. McIver, who was relentless in his efforts to secure participation, and I thank you very much for that, it's a great opportunity for me to be here.

Now, why is this an important subject when state courts exceed the protections that are handed down by the United States Supreme Court? Well, I want to put it in context, I think I want to start by telling you that, you know, of all the cases that are filed in the United States, ninety-five percent of those cases are filed in state courts. In other words, the federal judiciary, the federal system deals with less than five percent of the cases and I think that the analogy is an overreliance on federal decision-making is much the same as having the tail wag the dog, and I know that some people may think that that's a little heretical to describe the federal courts

as such, but believe me, from my vantage as a justice on the Ohio Supreme Court, having been there since 2003, I think that that is exactly the case and I think that you get agreement amongst the judges of our state court.

The second question, is why should this matter? Why should it matter to you as future practitioners within the court system and what are the practical applications that you can take away from the symposium? I think one of the practical applications is to rely on your state constitutions when you are filing cases within your state courts. Obviously, it's not going to do a whole lot of good, it may be persuasive, if you're in federal court, but think about it. Ninety-five percent of your cases are going to be in the state courts, so rely on the constitutions of the state courts when you're arguing something that appropriately addresses protections that should be afforded to your client, or the contrary, depending on what side of the argument that you're on. You go with the state court constitution in every state case, not the U.S. Constitution. Now, one of the practical applications of that is that if your case is reliant upon your state constitution and the judge or the justice that is writing the opinion concludes that it is the controlling authority for the resolution or the controlling authority for the opinion and relies on the state constitution, that pretty much guarantees that you're not going to have federal review for reliance on your state constitution. Certainly there will be exceptions to that, but more often than not, given the limited number of cases that make their way to the Supreme Court for review, a case that is founded upon, grounded upon, and argued upon a state constitution will pretty much make it bulletproof for review by the federal system and I believe that's absolutely appropriate.

I'm going to talk very briefly about the case that I was invited to speak on, and that was the *City of Norwood v. Horney*.[8] This decision came out in 2006 and by looking around the room, you were probably juniors, seniors in high school, maybe, at the time, maybe not even contemplating law school, so I hope this brief discussion is going to make it relevant to you. It's a well-known case for its holding that a governmental taking purely based on economic benefit does not satisfy the public use requirement for eminent domain purposes, and the decision is well-known as the first post-

[8] City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006).

Kelo[9] decision deliberately availing itself of *Kelo*'s invitation to view the federal Constitutional protections in the taking area as a minimum and not a maximum, but in so doing, *Norwood* provides "an unusually detailed and thoughtful analysis of the relative roles of the judiciary and the legislature in eminent domain matters."[10]

As with its analysis of the public use requirement, the court's opinion on judicial review of legislative decisions in takings cases is an important aspect of state constitutional law including Ohio's strong separation of powers doctrine. This case pretty much has it all. It's got the review of the, as I said, maximizing not minimizing the protections that are afforded property owners. It talks about the void for vagueness doctrine, and it really hits home on the separation of powers issues within the confines and the relationship of the Ohio Supreme Court or court system in general, and the legislature. The doctrine was instrumental in striking a takings statute that forbid appellate courts from issuing stays that prevented the razing of properties and taking of properties by the government. And lastly, *Norwood* presents, the rarely used, as I said, the largely dormant void for vagueness doctrine and makes clear that the doctrine indeed still has utility in its eminent domain cases and possibly others that implicate fundamental constitutional rights.

Let me just give you a very basic outline of what the facts of this case were about. There was a community outside of Cincinnati in Ohio and this community was a blue-collar, working-class community. Over the years, the community had changed somewhat and one of the biggest reasons for the change in this working-class community that was single resident homes and in some cases, duplexes, as well as small businesses, was the establishment of I-71, which pretty much bisected the community and changed the landscape or many aspects of it. There were a lot of dead-end streets that lead up against where the interstate came through. There were other changes. There was a rerouting of traffic not going through the community, not going through the business district, so there was a deterioration in the economic base of the City of Norwood and so it found itself in the early 2000s as being a community that was economically challenged, and along comes a

[9] Kelo v. City of New London, 545 U.S. 469 (2005).

[10] Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243, 268 (2012).

development company called Rookwood Development, and Rookwood Development says to the city fathers, we would like to take this community of Norwood and would like to establish a multi-use development there, where we'd have residential and we'd have commercial buildings, and we could offer you an enhanced tax base, something that you don't have now with these homes.

Now, keep in mind, that the City of Norwood was not filled with homes that were defaulting in their taxes or deteriorating, but this was just "a better use of the property," they said to the city, please take this property for us, give it to us, and use your authority of eminent domain to do so. The city said, not so fast, why don't you just try to buy up as much of the property as you can and then come back and talk to us. So they did that. Rookwood did and they ended up, you know, buying the area that they needed but for a few pieces of property, owners who refused to sell their property to Rookwood for this development.

So Rookwood goes back to the city and said, please institute eminent domain proceedings so that we can get this last handful of properties that we want in order to complete our development, and the city acquiesced and did that. Well, there was a lot of testimony before the trial court in the proceedings and the city had two standards, two codes within the city, on when they can use eminent domain to acquire this property. One is if it was deteriorated, which was, you know, another name for saying it was a slum and if the property was a slum, there would be little objection to using eminent domain.

They also had another nebulous classification and that was a "deteriorating community." In other words, it's not a slum now, but according to some evidence, it may be heading towards a deteriorating quality to it. And the criteria, what made a community deteriorating instead of the actual deteriorated and slum-like quality, was classified in the opinion is being a "standard-less standard." It was completely nebulous and vague, and many, many communities in urban areas within our state and certainly within the United States would've classified as such. So the case is brought before the trial court. The trial court finds that it's not a *deteriorated* community, is not slum-like, so you can't take it, city under that provision of the city code, but you can under this *deteriorating* statute and the trial court decided that what they would do would be to defer to the city council's finding on its deteriorating status and the application of that city code. So, that's

what the trial court did. The city prevailed and it went to the appellate court.

There were two things that have to be decided in the appellate court, the First District Court of Appeals in Hamilton County. One was, was this an appropriate taking, in other words, was it done for the appropriate reason for the public use, and that's extremely, that is the measurement, that is the standard to be utilized. The public use, and whether or not there was just compensation. When we're not talking about the compensation, because that wasn't even in a part of the review that came up to our court or the appellate court.

But the Ohio General Assembly had enacted a piece of legislation that said, in these type of cases, in an eminent domain taking case, that there was no possibility for a stay in the appellate court, while the case was on review. Once there was a deposit of the money, by Rookwood this case, deposit the money that it would pay for these properties, and that precluded a stay being issued by the appellate court to benefit the property owners while this case went through the review process. So, in other words, they would be able to go in there, Rookwood would be able to go into the community raze the homes that were the subject of the lawsuit, and the only thing that was left to do would be pay them the compensation, and that immediately came to the court, the supreme court, and we issued a stay in the face of the revised code. We did issue a stay, and that was going to be part of the decision that we would review, you know, many months later, but in order to preserve the integrity of the properties that were at issue here, the supreme court immediately issued a stay of that prohibition.

So fast-forward, then the Court of Appeals has upheld what the trial court did in that case, it becomes an issue for the Ohio Supreme Court. As I said, the decision that was on the books at the time from the United States Supreme Court was the *Kelo* case. I'm sure you're all familiar with the *Kelo* case, which basically said that the city, in that case, was New London, Connecticut, could take property under the use of eminent domain for the public use, and that public use would be defined by the ability to just have a better use for the property, that the economic benefits to the community, to the city, and thus the community, was sufficient rationale for allowing eminent domain to be used in that way. But the Supreme Court at that point also issued the invitation that this may be viewed differently in state courts, given the vagaries of what happens in state courts. Well, in Ohio, we were the first case, or

rather the first court to take that up, post-*Kelo* and, I might add, came to the exact opposite opinion. And, in employing the Ohio Constitution, found that the proceedings in the lower courts did not meet the test for public use, that economic redevelopment or economic benefit was but one factor that needed to be taken into consideration, but it was not the paramount factor that needed to be taken to consideration when defining the public use. It made a distinction between the public use and the governmental use, and realizing public use means "the public," it means the public in general, it means the population of the community, not necessarily, the government of that entity here, Norwood and Norwood's increased tax base.

So that was, you know, one of the reasons or one of the bases for us to find the exact opposite the *Kelo* case. I might add, you know, just as an aside, there were like people handicapping what was going to happen with the *Norwood* case in Ohio in light of the fact that we were the first, you know, first court out of the gate to consider this and a lot of people like to handicap how the supreme court's going to rule, not just the Ohio Supreme Court, but any state supreme court, and of course the United States Supreme Court. There are all the pundits that are out there that are using the criteria that, let's see, the majority of the court's Republican so they are obviously going to go with the big business interests, here, which is Rookwood development and then the benefits to the community. So their predictions were that the Ohio Supreme Court would fall in line with United States Supreme Court's decision in *Kelo* and the little guy, the property owner, would lose.

Well, I'm very pleased to say that we were a court that was united 7-0, just the opposite. And it really caused a lot of confusion amongst the political pundits and court watchers as to why that that was the case, but I also would like to use this particular case to point out something that I think is very important when you're dealing with these kind of constitutional issues—state constitutional issues—and that's the unanimity of the court in making a decision. I think it is extremely important for a court to come together, and that's one of the things that I emphasize, as Chief Justice, to minimize concurring opinions and to minimize, if at all possible, dissenting opinions.

When a court is going to speak on something as important as a property rights case such as *Norwood*, I think it is important, not only for the benefit of the court, but it's also for the benefit of other

courts that are reviewing these and applying these decisions, but also for law students and for lawyers and for common pleas court judges and other judges within our state, and even outside of the state, to speak with one voice.

When I first wrote this opinion, there were several concurring opinions, and I did not want to see concurring opinions in this case because of my belief that we should speak with one voice, because that's how important this case was. So, as a tribute to my colleagues and also a tribute to my law clerk, Pierce Read, who worked on this case with me, we were able to fashion a decision that touched all the bases, as I said, we talked about eminent domain, we talked about the prevalence of the Ohio Constitution. We talked about our history of deviation from United States Supreme Court decisions. We talked about the history of the Ohio Supreme Court with regards to property rights. We touched on the void for vagueness and established that as a very useful school that was alive and well in Ohio, and I was able to garner the one hundred percent buy-in from my six colleagues on the court, so that we didn't have a splintered opinion. We didn't have an opinion that has some concurring opinions, which I think sometimes are more detrimental than useful to those who rely on our opinions, and as I said, it was a great testament to the workings of the court to be able to work together to put out an opinion such as this and put it out in a manner that I think was extremely clear. You set guidelines. There is no confusion in the state of Ohio, with regards to the use of eminent domain and what needs to be taken into consideration when doing so and, I again, emphasize the separation of power.

Remember that I started out by telling you about the General Assembly having a piece of legislation that courts, you can't stay proceedings were going to go in there with our bulldozers were going to go in there with our a heavy equipment to raze the property and so it's almost anti-climatic, when the property owner wins the lawsuit and you won your lawsuit and yes, your house is gone, but here's your check, because it was just a matter of money. If it was just a matter of a check, we wouldn't be hearing the case because the property owners never would've gotten to us, just based on the issue of whether the check was large enough. It was much bigger than that and that's what this case emphasizes: that it was a use of the Ohio Constitution to preserve the property owner's rights in the face of a contrary United States Supreme Court decision and to, I think, expand on the rights of the property owner and, as I said,

preserve them.

The rest of the story is that once they've won, it was kind of a Pyrrhic victory. One of the property owners passed away due to cancer, due to the length of time, and, you know, his estate sold the property to the Rookwood development, and so too did one of the other property owners, so eventually Rookwood ended up getting the property just because circumstances had changed in the number of years that it took to get through the system, which is now a little bit disheartening when you look at what we do as lawyers and what we do as judges, and you see the real consequences to human beings. You'll always hear this phrasing from your clients, "time is money," well not always is time money. Sometimes time is just time and as you move on and people's lives, we have to be very mindful that and realize the consequences are very real to the parties involved and are not just names on a page. These were real people who were fighting for their rights and they knew eventually, because if you look at the evidence that was submitted to the court in the situation, there were several homes that were left standing and every home around these several homes was razed. It looked like three or four homes on the moon, because there was no other property that was left standing and there were no utilities. They had taken out the utilities so that they could not even live in their homes while this battle was going on, and yet they refuse to give up, because they had faith that they were on the side of right, and the supreme court would do what we did for the benefit of the property owners. So, thank you.

JUDGE GRAFFEO: Thank you, Justice O'Connor. I think that her informative remarks really highlight the fact that often our state courts have greater sensitivity to the needs and concerns of our communities and I think the refined test that your court came up with is very practical. So, thank you very much. Next, we're going to hear from Chief Justice Rabner, from the great state of New Jersey.

CHIEF JUSTICE STUART RABNER: Thank you, it's a privilege to be here for this symposium today and to be the company of this very fine panel. I want to congratulate Judge Graffeo on the wonderful honor and also thank you for alerting me to a problem that exists in New Jersey. I never thought I'd be able borrow a line from *Casablanca* at a law review symposium. Gambling? I'm shocked . . . shocked to hear that there's gambling going on in our state. I promise to look into it and get back to you as soon as

possible. [LAUGHTER] I also want to thank the Albany Law School for organizing this event and giving us an opportunity to discuss the question that is something justices and judges in the state court system wrestle with on a regular basis, whether and when to depart from federal precedent and I'll speak about it in the context of whether there's a privacy interest in the location of one cell phone, a case that was decided just last term by the New Jersey Supreme Court in *State v. Earls*.[11]

To frame the discussion, let's talk about a couple of basic concepts relating to privacy and privilege in some cases that go back thirty, thirty-five years in the United States Supreme Court and in the New Jersey Supreme Court. Whether we're thinking about what constitutes a reasonable expectation of privacy, or privileges in our evidence rules, there is an overlapping common principle that communications or information that may be intended to remain private, loses that confidential status, if you bring a third-party into the mix. So take as an example, if you go to a lawyer and meet in the privacy of your attorney's office to discuss a legal issue, get advice, speak about an upcoming trial, that conversation in all likelihood will remain privileged, but if you have the very same conversation in a crowded restaurant within earshot of others who are seated near you, the privilege will likely be defeated. That's true in other areas as well. Marital communications lose their status as confidential communications made in confidence if spouses are speaking in the presence of a friend, a third-party, and if they write one another and leave the letter out in the open for others to see, or copy yet another person on the letter. And that notion about losing protection or privilege found its way to the case law when discussing legitimate expectations of privacy as well.

Take as an example a case that the United States Supreme Court decided in 1979, called *Smith v. Maryland*[12] and that's at the cornerstone of the third-party doctrine and federal law. It involved the police installing a pen register device and the question was whether that involves a protected privacy interest in the federal Constitution. A pen register records the numbers that you dial and the length of the phone call as well. Supreme Court in a 5-3 decision, said no, no privacy right. The majority said a number of things. First, and I quote, "we doubt that people in general

[11] State v. Earls, 70 A.3d 630 (N.J. 2013).
[12] Smith v. Maryland, 442 U.S. 735 (1979).

entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company." After all, we all know that if you want to use the phone company, you've got to sign up.

Think back in 1979, you've got a sign up, they're going to keep track of the calls that you make and the amount of time for each call so they can come back and bill you for those services. The Court said, "it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret." And second, this is important, the Court went on to say, if somebody harbors a subjective expectation of privacy that's not something that society is prepared to recognize as reasonable, because as they explained, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." And we'll come back to that notion of voluntariness in next few minutes.

They cited to a 1976 case, *United States v. Miller*,[13] which held that a bank depositor has no legitimate expectation of privacy vis-à-vis the bank, because they conveyed that information about their banking transactions to the bank in the ordinary course of business, and they brought a third-party into the mix. There were two dissents that strongly disagreed with where the majority was headed. First was a dissent written by Justice Stewart, I'll just read one passage that's quite passionate. He wrote:

> Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

A second dissent, one of the justices wrote that people are entitled to assume that the numbers they dial in the privacy of their home will be recorded, if it all, by phone companies purely for the phone companies' business purposes. Barbara, you may not be surprised to know that Justice Marshall penned the second dissent and joined in the first one.

So come with me to the beautiful garden state. Let's travel south

[13] United States v. Miller, 425 U.S. 435 (1976).

120 miles, and I will tell you how that doctrine has played out over the last thirty years in New Jersey, beginning with a case of *State v. Hunt*[14] in 1982 that addressed a very similar issue. The question of whether police getting telephone toll records, billing records, whether they can do so from a phone company without getting any process first. The court said, first, telephones are essential. They're essential to the way that we carry on our daily personal affairs in life and the only way—remember this is 1982—the only way that you can use a telephone in the privacy of your home, is by signing up with the phone company and they keep records of what you've done in order to be able to provide you the service and bill you for that service. Picking up on some of the themes in the dissent in the *Smith* case, the New Jersey court said, where disclosing information of customers in order to get service, but were not doing so in order to allow for the release of private information to others, information that offers details about our personal lives and for those reasons, the New Jersey Supreme Court took a different approach and didn't follow the third-party doctrine under federal law and said people have a privacy interest in the numbers that you dial on your home phone that's protected under the state's constitution and it's not waived because you have to go to a service provider in order to be able to use a phone. That's not a voluntary disclosure of information, and in the typical sense, and the police want to get that information, they have to obtain some process before they can go to the phone company.

Move along next to a case called *State v. McAllister*[15] in 2005, which used similar reasons and the New Jersey Supreme Court held that individuals have a legitimate expectation of privacy in bank records under the state constitution and again rejected the third-party doctrine, and said that we give information to banks, with the understanding, the legitimate understanding, that that information will remain confidential. The question arose again in 2008 with a concept that is much more modern in our and our context today and I know that's true looking around at some of the devices on display in the room here today. It's called *State v. Reid*[16] and it dealt with whether subscriber information that we provide internet companies, Comcast and others, in order to gain access to

[14] State v. Hunt, 450 A.2d 952 (N.J. 1982).
[15] State v. McAllister, 875 A.2d 866 (N.J. 2005).
[16] State v. Reid, 945 A.2d 26 (N.J. 2008).

the Internet, has a privacy interest attached to it. Stop and think about the importance of that for a moment. If someone has your subscriber information, then they can translate the IP address that we leave behind every time we search a page in a website and you can then identify the actual user and the amount of time that the person spent on all of the sites that you searched on the Internet. Following state court precedent, the supreme court said a number of things. First, there's no waiver here. This is the way the internet operates. You need to provide that information in order to access the web. Second, that the state constitution encompasses a reasonable expectation of privacy in the type of information that would otherwise be made available through turning over subscriber information. Third, that if the police want this information, they should get a grand jury subpoena in order to go forward. That takes us to *State v. Earls*, that was decided last year.

In *Earls*, the police were trying to locate a suspect wanted in a string of burglaries, and also looking to see if they could find his girlfriend. There were concerns about her safety because she hadn't been seen in the last day after she had spoken with law enforcement about the investigation. They contacted T-Mobile on three instances during the course of one evening to try to find the location of the suspect based on the cell phone that the suspect was believed to be using that night. The question was, whether the defendant had a privacy interest in the location of his cell phone. Building on precedent, Supreme Court of New Jersey reached a different decision than what would be called for under federal law. Now, just by way of background, and out of curiosity, many of us, including me, have cell phones here. If you use cell phones and, I'm not going to ask how many of you know, that every seven seconds the phones in your possession, so long as they're on, you don't have to be using them, are registering, are reaching out and contacting the nearest cell phone tower, and that cell phone providers are keeping a record on a real-time basis of all of those contacts, twenty four-seven. Now, with advances in technology, if the area has relatively or particularly dense cell tower coverage, and there are more than three hundred thousand cell towers throughout our nation today, actually maybe more, that was accurate as of 2012, you can pinpoint the location of the phone within the building, sometimes within the floor of the building or even within a room. Somebody with access to that information, of course, can reconstruct with great precision, a person's movements. You can learn a great deal about a person by

the location of a cell phone, where they travel, which stores they went, which doctor's they visited, which religious services they attended, which political rallies they may have decided to attend, when they did so, for how long—remember, it's every seven seconds there is a registration that takes place—and which persons they chose to associate with. I'll ask for a show of hands: about how many of you are now a little bit less comfortable about the cell phones that are in your possession? Again, under the third-party doctrine, federal law would say, I believe, that you're deemed to have waived your privacy concerns because you've provided this information voluntarily to the service provider, to T-Mobile and the like.

When the New Jersey Supreme Court looked at this issue, we touched on a number of the same themes we've already discussed. First, the court acknowledged the obvious, that cell phones are indispensable to modern life. There are, as of 2012, more than three hundred and twenty-five million wireless devices in the United States. More than ninety-one percent, I think it was ninety-one percent at the time, of adults had cell phones. Second, people make disclosures, to cell phone companies, to providers in order to be able to purchase and use cell phones, but that's not a voluntary disclosure in the traditional sense, and it's not done to promote the release of information about ourselves, personal information to outsiders. The court also noted that although some people may have a general awareness that our cell phones may be tracked in some way, that we don't reasonably expect that phone companies will share detailed information about our whereabouts with the police. We buy phones to talk on them, to access the internet, for other purposes as well, but we don't expect, reasonably don't expect, that law enforcement will be able to have access to our cell phones and use them as tracking devices on a twenty four-seven basis. The court concluded that information about the location of one cell phone is more revealing than toll billing information, than subscriber information, than bank records and that it too, because of the nature and the degree of the information that is available and the degree of intrusion that people have a legitimate privacy interest under the state constitution in the location of their cell phone, to obtain that information, law enforcement officers have to get a search warrant or be able to demonstrate that an exception to the rules about obtaining a search warrant applies, such as exigent circumstances.

I want to echo something that Chief Justice O'Connor just mentioned, the importance of speaking with one voice on our opinions of this sort where you're divergent. The *Earls* decision may not have started out as unanimous decision, but it is a 7-0 decision as well. And as you said, and I'll shortcut, if that requires some effort, for courts to come together and make an important statement of that sort. *Earls* was released last July. This February, the Massachusetts Supreme Judicial Court, citing to it and other precedent, issued a similar ruling under the Massachusetts state constitution. Some federal cases at the lower court level have been critical of the third-party doctrine. I don't know whether we'll see that reevaluated at the Supreme Court level, because so many of these decisions now are keyed toward statutory law and statutory rights, and you don't reach the constitutional question if you can resolve the case on statutory grounds. That, in a nutshell, is the path that we traveled in New Jersey to reach the outcome in *Earls* and also the reasons for doing so reflects a long history of a long tradition under the state constitution of protection of privacy interests and a well-developed body of precedent that extends over a number of decades as well. Thank you for the chance to speak on this.

JUDGE GRAFFEO: Thank you, Chief Justice Rabner. Certainly the right to privacy is a very fertile area of state litigation, and I often think that our state constitutional protections are identified, long before the federal court even addressed some of these issues. Next, I think our prize this afternoon to the jurist who's come the furthest to join us today. I want to introduce you to Justice Landau, from the great state of Oregon, and we appreciate the trip that you made from the West Coast to be with us. Thank you.

JUSTICE JACK LANDAU: Thank you Judge Graffeo, and thank you for providing me the wonderful weather to come to. It rained two inches in a single day the day I left, so I was very happy to see this. Let me begin by saying thank you to Robert McIver and the Albany Law Review for asking me to participate in this program. It's an honor to be here and to be among such distinguished jurists and scholars. I also want to thank Professor Bonventre for that wonderful introduction. I can say out of all the introductions I've ever received, that is, certainly the most recent. [LAUGHTER] All seriousness aside, my charge is to speak about Oregon state constitutionalism generally, and a case or two in

particular, in which our supreme court departed from federal precedent concerning parallel provisions of the federal Constitution as interpreted by the United States Supreme Court. I will say right at the outset, my purpose here is not to be critical of the United States Supreme Court. I've always followed the adage that you don't criticize someone until you walk a mile in their shoes. That way if they don't like the criticism, you're a mile away and you've got their shoes. [LAUGHTER]

On the subject of state constitutionalism in Oregon, there is much to discuss. Oregon was at the forefront of what has been called the state constitutional revolution, the new judicial federalism, led by my friend and mentor Justice Hans Linde,[17] the Oregon Supreme Court was among the first in the nation to rediscover the state constitution as a source of rights independent from the federal Bill of Rights.

Beginning in the late 1970s, the Oregon Supreme Court began consistently to give independent significance to its state constitution in many areas, such as: search and seizure, free expression, free association, equal privileges and immunities, jury trials, confrontation, right to counsel, venue, cruel and unusual punishment, and religious freedom, among many others. As my colleague, Judge David Schuman, who, in the small world department, actually clerked for Hans Linde and taught constitutional law at the University of Oregon before he became my colleague on the Oregon Court of Appeals, proudly remarked back in the 1980s, "a report from Oregon is not from some provincial and primitive venue, but—with respect to state constitutional law—from the capital of the future itself."[18] But having said that, I have to say that the question that posed by this particular program is odd for those of us in Oregon because we don't see things quite that way, we don't ask the question whether or when it is appropriate to depart from the federal Constitution. We don't ever ask ourselves whether the federal Constitution provides adequate coverage or adequate remedy and then, if not, go ahead and look at the state constitution. Oregon instead follows a much more robust, aggressive, and depending on who you talk to, a version of state constitutionalism, we follow what is known as the first-things-first doctrine, or the

[17] *E.g.*, Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980).

[18] David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES ST. CONST. L. 275, 275 (1989).

primacy doctrine. Under Oregon law, we always consider what the state constitution says first. Then, only if the state constitution does not provide an adequate answer to the issues at hand, then do we look at the federal Constitution, and I can say that rarely happens.

In my eighteen years on the Court of Appeals, my three and a half years on the supreme court, I have written over 1,200 published opinions, and I can count on the fingers of two hands the number of those opinions that turn on an issue of federal law. The rationale for the first-things-first doctrine—rationales, I should say, there are actually three—are historical, doctrinal, and pragmatic. Historical, Justice Linde is so finely fond of reminding us, because the state constitutions came first, we had state constitutions before we had the federal Constitution and, in fact, the Bill of Rights is largely based on state constitutions. Doctrinal, because as Justice Linde explained in a very well-known Oregon case, *Sterling v. Cupp*,[19] the federal Bill of Rights only applies under the doctrine of incorporation through the due process clause of the Fourteenth Amendment, if there is then a denial of due process, and if state law affords a complete remedy, there has been no denial of due process and no occasion to look at the federal Constitution. And, pragmatic because, as Chief Justice O'Connor explained, under the doctrine of *Michigan v. Long*, if a state court decision is predicated solely on state law, it is for all practical purposes, immune from federal review.

So, with that in mind, let's look at one of the areas in Oregon jurisprudence that perhaps most starkly illustrates the differences between, at least as a doctrinal matter, the way the federal courts look at an issue, and the ways that the state Supreme Court of Oregon looks at the issue. That issue is in the area of freedom of expression, and in particular the area of the regulation of obscenity. As we all know, the First Amendment declares that Congress shall enact no law abridging freedom of speech or of the press. A long line of United States Supreme Court cases have given the First Amendment something other than the literal interpretation of its unqualified phrasing, determining whether a government regulation violates the First Amendment usually reduces to a two-step process.

The first step requires that you identify the character and the

[19] Sterling v. Cupp, 625 P.2d 123 (Or. 1981).

magnitude of the injury to the First Amendment rights, and then the second step requires you to determine whether there is an adequate justification for the infringement of those rights. Depending on the nature and character of the injury, there may be a kind of a thumb on the scale, there need be more or less strict scrutiny, more or less of a compelling justification that is required in order to uphold the regulation. It is a balancing process, if you will, between individual and state interests at stake.

A couple of examples, in *Roth v. United States*,[20] the United States Supreme Court said that obscenity is not speech at all, within the meaning of the First Amendment, and so, you have a one-step process in that case, because it's simply not protected speech. In yesterday's decision in *McCutcheon*,[21] for example, that shows kind of the full analysis, the full two-step: is a limitation on aggregate contributions, for political purposes, speech? The Court says categorically yes, then the question is, was there a sufficient justification for it? The Court said no because of the nature of the injury. It is political speech, it's entitled to something like strict scrutiny, the government didn't meet its burden of establishing a compelling justification for it. Oregon charted a different course. At the outset, I should say that Oregon state constitutional free expression guarantee is very broad. It sounds a lot like New York's. It is Article One, Section Eight, "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever."[22]

In the early part of the twentieth century, the Oregon courts, like most courts around the country, interpreted article one, section eight of the state constitution to mean essentially the same thing as what the U.S. Supreme Court said the First Amendment means. That changed in 1983, with a landmark decision, Oregon *State v. Robertson*,[23] authored by then Justice Linde. In that case, the court, for the first time, read the state free expression guarantee without reference to the First Amendment.

The First Amendment is not mentioned in that case. Instead, Justice Linde's opinion starts with the sweeping wording of Oregon's constitution. He says the wording is categorical. The state constitution does not say no one can abridge the right of free

[20] Roth v. United States, 354 U.S. 476 (1957).
[21] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).
[22] OR. CONST. art. I, § 8.
[23] State v. Robertson, 649 P.2d 569 (Or. 1982).

expression, unless that right has been justified by a compelling justification. There's no balancing at all. You either have the right or you don't, said Justice Linde. Accordingly, the Robertson opinion holds that any state regulation based on the content of speech is unconstitutional. They couldn't quite go that far because that would be impossible, some of his colleagues said, he explained to me at lunch some years later, because that would mean that various crimes, fraud, solicitation, coercion, would be unconstitutional and clearly the framers of the Oregon Constitution didn't intend that, and so the court recognizes, a very narrow, what they call historical exception. The court recognizes that a regulation of speech based on its content is unconstitutional, unless you can demonstrate that the framers of the Oregon Constitution would've understood that the particular kind of regulation at issue would have been an exception, would been excepted from the otherwise sweeping guarantee of the state constitution.

In a 1987 case, *State v. Henry*,[24] the court demonstrated just how far that constitutional analysis would depart from the federal analysis. At issue in that case was the constitutionality of a state statute that made it a crime to distribute obscene publications. The answer, the court said, was easy. The constitution protects the right to speak, write, or print freely in any subject whatever. Obscenity is a subject under *Robertson*, the regulation of that right to speak, write, or print about that subject, is unconstitutional, unless you can find a basis for saying that the framers would've understood that that regulation would been excepted, the court found no such exception and declared unconstitutional.

The regulation of obscenity, arose again the following year in *City of Portland v. Tidyman*.[25] In that case, the City of Portland adopted an ordinance—a zoning ordinance that prohibited adult bookstores within a certain distance of schools. The supreme court, applying *Robertson* and *Henry*, said the regulation clearly targeted speech on any subject, based on the content of that speech. It didn't prohibit all bookstores, it ordered book stores that sold certain kinds of books based on their content. Finding no evidence that the framers of the state constitution intended that there be an exception for adult bookstores, it declared that the ordinance was unconstitutional.

[24] State v. Henry, 732 P.2d 9 (Or. 1987).
[25] City of Portland v. Tidyman, 759 P.2d 244 (Or. 1988).

Recently, in a case *State v. Ciancanelli*,[26] the court applied that same analysis to a statute that prohibited the public performance of sexual acts. The court again found the answer easy. Performance, the court said, is an act of expression just like writing, printing, and speaking, and the regulation was based on the content of that expression, sex. There was no evidence the court said that the framers of the Oregon Constitution intended to exempt public sexual conduct from the protections of the Oregon Constitution. It follows, the court said, that that regulation is unconstitutional.

Now, the Oregon Supreme Court's decisions have not been uncontroversial. Critics complain that cases like *Henry* and *Ciancanelli* and *Tidyman* have made Oregon a haven for strip clubs, beach shows, lingerie modeling shops, adult bookstores, adult video emporia. According to one article I recently read, Portland has far more nude bars than Los Angeles, a city with six times the population. A weekly newspaper recently dubbed Portland "Pornucopia" as a result of the supreme court's expansive reading of the state constitutional free expression guarantee. On more than one occasion, there has been initiatives—we out west have this thing called the initiative and referendum, direct democracy, and provides all sorts of work for the courts—and one of the most popular for a while was a proposed initiative to limit the state constitution guarantee for expression to the extent of protection recognized by the United States Supreme Court under the First Amendment, and no further, but today those have all failed. The state supreme court's analysis also has its critics within the legal and academic community. In particular, critics have complained that the court has ignored the historical understanding of the guarantee, which they say simply confirmed a kind of Blackstonian notion that it is unconstitutional to engage in prior restraint, that is, censorship, but after the fact, the state retains authority to regulate speech in the interest of public health, safety, and morals. To date, however, the Supreme Court has adhered to the *Robertson* framework, leaving Oregon's Constitution among the most protective of free expression in the nation. With that, I will close. Thank you very much for the opportunity to talk.

JUDGE GRAFFEO: We want to thank Chief Justice O'Connor for participating today. She's got a plane to catch, so we're going to say goodbye and thank you very much. Thank you Justice Landau,

[26] State v. Ciancanelli, 121 P.3d 613 (Or. 2005).

you know, it points out that we get some really racy topics in the state court, and we get really interesting records sometimes on these cases, [LAUGHTER] but it does point to the fact that sometimes we have to issue decisions that the populations of our states don't always understand why we do this, but our job is the protection of rights. With that, we're now going to hear from Justice Palmer from the great state of Connecticut, thank you for joining us.

JUSTICE RICHARD PALMER: My pleasure, thank you. I don't know if Bob is here, I think he stepped out with Chief Justice O'Connor, thank you. I want to thank him for the efforts he made to make this possible for me. I wanted to just respond to a point you made about the third-party doctrine. A number of years ago, we had a case that involved the federal Constitution, not the state constitution, and the issue is whether police can go into a pharmacy and simply ask for and obtain medical prescriptions, and I ended up writing the opinion. I was quite distraught that it came out the way it did. We said that under the third-party doctrine, and the federal Constitutional standard, the police could actually walk into a pharmacy, ask for these prescriptions and that was the end of it, and I think that's still the law under the federal law today under the third-party doctrine. It doesn't seem right to me, but that was the law. Now that's a situation where I think that under the state constitution, there might well have been a different result, but the criminal defendant in that case did not make a claim under the state constitution.

One other comment about the *Kelo* case: that emanated out of New London, Connecticut and first went to my court. I didn't write the opinion but I was on the panel and it was a very, very unpopular opinion in Connecticut and around the country, and I think most people thought that the Supreme Court would reverse what we had done. Just two sort of anecdotal points about it: one is that we were deciding the case essentially under the federal Constitution, so we were following, we were trying to predict what we thought the U.S. Supreme Court would do, and it turns out we were right, but when that Court came down with its decision, it was even more unpopular because now the whole country was bound by this decision and what we thought we had done was predict what, I think it was Justice Sandra Day O'Connor had said in some prior cases about what the eminent domain provisions actually said. It turns out that, I guess, according to the Supreme Court, anyway, we

were right in terms of evaluating those decisions, but Justice O'Connor wrote a rather vehement dissent explaining how we and her colleagues on the Supreme Court had misinterpreted the opinions that she had written earlier. There's one other aspect of the case that I won't forget either. I was appointed directly to the supreme court; I'd never been a judge before. Over the years, it's always been sort of a mystery to me as to why it is the trial judges, that is the lower court judges, are so concerned about being reversed. Not all of them, but many of them, they don't like to be reversed, and I thought, one needs to have much thicker skin and that, and we're usually right, because we're last and that may be the only reason. But, trial judges and appellate court judges need to understand that from time to time we're going to disagree with them. Then along came *Kelo*, which is the first time that I actually had a case that I was on reviewed by a higher court and, I must say for the first time in my career, I kind of understood the anxiety that the lower court judges feel when they're being judged by a higher court, and I was relieved that the Court ruled the way it did, not just because I thought it was the right decision, following prior case law, but because I was not on a panel that was reversed, so I think that's the only case, my record is one hundred percent still [LAUGHTER].

I thought I would just take a few minutes to discuss the Connecticut Constitution in the context of what we're talking about today. Although Connecticut has had a written constitution since 1818, until roughly thirty years ago, cases involving state constitutional claims were rare, and cases involving claims of the state constitution that actually provided greater rights than the federal Constitution were even rarer still. The dearth of state constitutional litigation until that time, I think, was due to the fact that the lawyers simply did not view the state constitution as embodying rights above and beyond those protected by the federal Constitution and, the second reason is my court, I think, in that timeframe did really little or nothing to suggest otherwise. In 1977, however, and in a case called *Horton v. Meskill*,[27] we paraphrased a then-recent California Supreme Court case, and expressly recognized, and I quote,

> In the area of fundamental civil liberties which includes all protections of the declaration of rights contained in article

[27] Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

> first of the Connecticut constitution we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law.

Now, in the *Meskill* case, we were considering a specific state constitutional provision that grants to Connecticut citizens the right to a free public elementary and high school education, and so our conclusion that education was a fundamental right under the state constitution, in contrast to a relatively recent federal Constitutional case, was not a practically radical one, because, as I said, we had a completely different provision. In 1985, perhaps for the first time, we made it clear that our court was free and, in some instances, inclined to interpret the state constitution as affording greater rights than the federal Constitution, even when there is no express or independent state constitutional provision that may be viewed as granting that greater protection. In that case, *State v. Kimbro*,[28] we concluded that article first, section seven of the state constitution, although cast in terms virtually identical to the Fourth Amendment, provides greater protection than the Fourth Amendment, with respect to probable cause determinations based on information supplied to the police by unnamed informants. We explained that federal law, whether based on statute or constitutions, the Constitution establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments reporting higher levels of protection for such rights, and the Connecticut courts clearly have the power to construe the Connecticut constitution in accordance with our particular analysis of the specific right in issue. This express acknowledgment of the potential independent import of any number of state constitutional provisions prompted Connecticut lawyers to look more carefully at the state constitution as a possible source of

[28] State v. Kimbro, 496 A.2d 498 (Conn. 1985).

enhanced rights and protections, and spawned significant state constitutional litigation, much of it in the area of criminal law and procedure.

Almost immediately, my court again demonstrated a willingness to recognize greater rights in the state constitution. For example, in 1988 in *State v. Stoddard*,[29] we concluded that although police have no federal Constitutional obligation to inform a suspect in custody of attempts by counsel to contact him or her, the suspect's prior waiver of rights may be nullified if there are police engaging in that kind of behavior. In Connecticut, the court reasoned again that the constitution should provide greater protections, because the contrary federal precedent was based, in part, on federalism concerns that were really not applicable and because Connecticut has long recognized the importance of the right to counsel, having determined that such right existed well before *Gideon*, and having been the first state in the Union to adopt the modern public defender system.

It's fair to say, however, that at this stage of our state constitutional history, we had really followed no particular model or approach. Rather, we identified and applied the principles and considerations that appeared to be the most relevant to the case at hand. In 1992, however, we issued an opinion *State v. Geisler*.[30] In that case, we attempted to identify the factors that a court should consider, and that the parties should identify in all cases involving a claim that the state constitution provides greater rights in the federal Constitution, and we held that "[i]n order to construe the contours of our state constitution and reach reasoned and principle results, the following tools of analysis should be considered to the extent applicable, [first as a] textual approach,"[31] which is known about the specific language of the provision. Second was to be the holdings and dicta of the state supreme and appellate courts. Third is federal precedent. Four, sister state decisions or sibling approach. Fifth, a historical approach, including the historical constitutional setting and the debates of the framers of the state constitution. And finally, economic and sociological considerations.[32] We later clarified with respect to the second, third, and fourth considerations that this, Connecticut sister state

[29] State v. Stoddard, 537 A.2d 446 (Conn. 1988).
[30] State v. Geisler, 610 A.2d 1225 (Conn. 1992).
[31] *Id.* at 685.
[32] *Id.*

and federal precedent, that due regard must be given to the persuasive value of that precedent and not merely be based on a recitation of the number of cases decided one way or another in those jurisdictions. As we also later explained, and I quote,

> The *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party—the state or the defendant—can respond; and they encourage a principled development of our state constitutional jurisprudence. Although in *Geisler* we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven.[33]

In *Geisler* itself, we determined that, in contrast to the federal Constitution, the state constitution applies the exclusionary rule to exclude evidence discovered outside of its home, that is, the fruit of that suspect's illegal arrest inside the home. In arriving at this conclusion, we look to prior Connecticut Supreme Court cases that had emphasized the sanctity of one's home. We characterize Justice Marshall's persuasive dissent in the 1990 case of *New York v. Harris*[34] as highly persuasive, where the majority in that case had gone the other way, and we also look to some sister state precedent to support our determination.

Since *Geisler*, my court has issued a number of opinions, in which we've interpreted the state constitution as affording greater rights than the federal Constitution, and I won't discuss them all, of course, but I'll mention just a few to get a representative sampling of the kinds of issues involving the manner in which the court decided them. Not long ago, in 2010, my court decided a case called *Connecticut Coalition for Equal Funding in Education v. Rell*.[35] In that case, a plurality determined that the Connecticut Constitution mandates that:

> [P]ublic schools provide their students with an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise to contribute to the

[33] State v. Morales, 657 A.2d 585, 589 n.10 (Conn. 1995)
[34] New York v. Harris, 495 U.S. 14 (1990).
[35] Conn. Coalition for Justice in Educ. Funding, Inc. v Rell, 990 A.2d 206 (Conn. 2010).

state's economy.

New Jersey has had a long history of dealing with that substantive provision of a right of education, I know. We concluded that, after extensive *Geisler* analysis, that the following factors supported our conclusion; prior holdings by my court indicating the existence of a qualitative minimum expectation concerning the extent to which the public education system must be effective, Connecticut's historical and documented dedication to public education, sister state decisions, including New Jersey interpreting their own constitutions to mandate that the public school systems meet specific what benchmarks, and we had a lot of cases from your court to look to as I recall, there was extensive litigation over that and the importance, generally, of public education.

In *State v. Miller*,[36] a 1993 case, our court determined that it's unlawful for police to perform a non-inventory search of an impounded vehicle without a warrant, even if they have probable cause to do so. We relied, in part, on what we thought was a persuasively written opinion by the Oregon Supreme Court in coming to that conclusion and explained why we thought that the reasoning of the U.S. Supreme Court in the same context was far less convincing.

Another case is *State v. Marsala*,[37] in which my court rejected the good faith exception to the exclusionary rule for search warrants authorized by a court, but ultimately found to be lacking in probable cause. We refused to adopt the good faith exception that'd been recognized by the U.S. Supreme Court in *United States v. Leon*,[38] primarily because we believed, as we explained, the benefits of encouraging careful and thoughtful drafting and review of search warrant applications outweighs the state's interest in having available evidence that, while seasoned in good faith, had been obtained without probable cause.

Just one or two more. In *State v. Linares*,[39] a 1995 case, we addressed an over-breadth challenge to a statute that criminalized the intentional interference with the legislative process. The defendant in that case had gone to the legislature, had protested vocally inside the chamber, thereby disrupting it, and was charged with breach of the peace. We concluded that under the state

[36] State v. Miller, 630 A.2d 1315 (Conn. 1993).
[37] State v. Marsala, 620 A.2d 1293 (Conn. 1993).
[38] United States v. Leon, 468 U.S. 897 (1984).
[39] State v. Linares, 655 A.2d 737 (1995).

constitution, we ought to apply the so-called compatibility test to state action restricting speech on public property, rather than the narrower forum-focused approach that the United States Supreme Court had, at that point, recently adopted.

Thereafter, in a case called *Leydon v. Town of Greenwich*,[40] we relied on the *Linares* case in holding a local ordinance limiting access to a town park and beachfront to town residents and their guests, violated freedom of expression protections in the state constitution. We also said it violated the First Amendment, but we first determined that the beach park in question, which included shelters, ponds, a marina, parking lot, open fields, a nature preserve, walkways, trails, library book drop, etcera, was a traditional public forum under the First Amendment framework.

We next concluded that the ordinance was not a reasonable time, place, or manner restriction on the use of the forum because its broad restrictions on the forum's use were not narrowly tailored to any substantial governmental interest. I remember I actually wrote that opinion, and my parents, who are still alive, have a cottage on the shore, not in Greenwich, but a somewhat less well-to-do town on the Connecticut shore, and when they found out that we decided this case, and I had written it in particular, they were rather upset with me that their quiet, sleepy little private beach in Westbrook soon be would be overrun by people from neighboring towns who wouldn't really have to do anything except show up and be able to get on the beach. Fortunately for me, that never happened, nobody did. It never happened in Greenwich and never happened in Westbrook, the whole case just fizzled.

Finally, in *Kerrigan v. Commissioner of Public Health*,[41] which is a 2008 case, we reaffirmed our reliance on federal equal protection analysis for purposes of the state constitution, and upon applying that analysis concluded that gay persons constitute a quasi-suspect class for purposes of the state constitution. Using that traditional equal protection analysis, and taking into consideration the various *Geisler* factors that I mentioned to you, we struck down the state statute that banned gay marriage. It was a state statute that created civil unions, so I think we were the third state in the country to strike down a ban on gay marriage, but certainly the first to do it in the context of legislation that created civil unions. We

[40] Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001).
[41] Kerrigan v. Comm'r on Pub. Health, 957 A.2d 407 (2008).

concluded that discrimination on the basis of sexual orientation was impermissible under the state constitution, absent a strong governmental justification, and we found the state's rationale for barring same-sex unions did not meet that test. We acknowledged that the contrary precedent was overwhelming numerically. We explained that, in our view, that precedent, both state and federal, was unpersuasive, especially in light of recent developments, including the U.S. Supreme Court decision in *Lawrence v. Texas*, in which the court held that the Texas anti-sodomy law was unconstitutional. I'm happy to talk more about *Kerrigan* if anybody has any questions about it.

Of course, there are a good number of cases in which the litigants have raised the state constitutional claim and we've rejected those claims, probably more than have been found to be successful, but on balance, I think our court has been very receptive to state constitutional arguments and we've not hesitated in deviating from federal Constitutional precedent, when presented with a case that warrants that result. With that, I thank you for your attention.

JUDGE GRAFFEO: Thank you. It is very interesting to hear about the history of right to counsel in your state. Who funds *Gideon* rights in New York is a hot political topic and has been for a number of years. In New York, the counties bear the bulk of the burden of paying for assigned counsel, so there's been a real effort by our local governments to ask the state to take over that expense, and also we have had a fair number of cases in our court regarding the fees that are paid to assigned counsel and there's, I think, shortly there is a trial that's going to commence that's going to be examining how well we're providing right to counsel to defendants, particularly in our justice courts, because in many instances, these arraignments are occurring before defense counsel are assigned, so it's still an issue to be dealt with, I'm sure by all of our states.

It's now my distinct pleasure to introduce to you the Solicitor General of the State of New York, Barbara Underwood. I love to call her General Underwood, because I think that's a really cool title. I know I missed that title, Barbara. You know there's a lot of Honorables, but there's not a lot of Generals. So with that, General Underwood.

SOLICITOR GENERAL BARBARA UNDERWOOD: First, I'm so pleased to be part of this symposium honoring Judge Graffeo. She has consistently, I guess I may be the only one here who has litigated before her, consistently been a voice of reason on the New

York Court of Appeals, not that I always agree with her, but I have always found her balanced and thoughtful, and to the point here, attentive to the concerns underlying the distinctive features of the law of New York, and so this symposium is really a very fitting tribute to this fine judge.

We've been talking about how state courts make the decision, or at least, having that as the title of this event, how state courts make the decision to depart from Supreme Court precedent in interpreting a provision of the state constitution that looks a lot like a provision of the federal Constitution or maybe looks exactly like it, but I don't know why that's the right question at all and I think maybe our friend from Oregon has a similar view of this.

The Supreme Court of the United States has the last word on the meaning of the federal Constitution, but it really has no authority at all, nothing whatsoever, to say about the meaning of the state constitution. So it seems to me that Supreme Court decisions are about as relevant as another state court's decisions to the question of what a state constitutional provision means. The Supreme Court is just another high court interpreting words that appear in its Constitution, in the Constitution it is charged with interpreting or having the last word on. So what he has to say is persuasive, perhaps, but not at all authoritative on the question that faces the state court interpreting similar or even identical language in its own constitution.

I haven't always seen the matter this way. I want to take you back a few decades to a somewhat forgotten episode in New York constitutional history, from the point of view of a litigant rather than as a judge in this territory. In the late 1980s and early 90s, the New York Court of Appeals was issuing a lot of opinions, some of them for individual judges, not opinions of the court, setting forth criteria for when it was appropriate for the New York Court of Appeals to depart from Supreme Court precedent in interpreting a constitutional provision that had an exact or close counterpart in the federal Constitution.

Different judges have different formulations. It almost seemed like a competition in theory—for who had the best theory of when it was appropriate to depart. It made it challenging for litigants to try and combine all the different theories to make it work. But the essence that was with all of them was that the Supreme Court interpretation was presumptively to be followed and a special reason had to be given for departure. Typically, either a long-

standing distinctive body of state constitutional law, like New York's highly-developed and somewhat idiosyncratic right to counsel, or a well-recognized distinctive state interest, like New York's solicitude for the First Amendment that Judge Graffeo was talking about earlier, deriving from its role as a center for journalism, theater, film, and so forth.

Okay, so in the 1980s, I was Chief of Appeals in the Brooklyn District Attorney's Office and we had a case involving a warrantless inspection authorized by state statute of the books and the premises of a motor vehicle dismantler, commonly known as a chop shop. The New York Court of Appeals had held that the use of warrantless inspections, which were commonly conducted to find the parts of stolen cars that had been dismantled, was an unconstitutional search, oddly under the U.S. Constitution. The defendant raised this by the state and the federal Constitutional challenge, but the New York Court of Appeals decided this only on federal Constitutional grounds, violating the first-things-first rule that Oregon has since developed. On our cert petition, the Brooklyn District Attorney's Office took this case to the Supreme Court, the Supreme Court reversed because, of course, the decision on the federal Constitutional point was not immune to review, saying the administrative inspection of this pervasively regulated industry was just fine and there was a diminished expectation of privacy in the books on the premises of a vehicle dismantler, which was indeed pervasively regulated.

The case was *New York v. Berger*, 482 U.S. 691, it was decided in 1987. I didn't argue it, I second-seated the District Attorney who did, and on remand, to consider the state constitutional claim. Well, the defendant absconded that we got his appeal dismissed because he wasn't there to comply with whatever order might ensue and he didn't get to litigate his state constitutional claim. But things have a way of coming around again.

A few years later I went to the Queens District Attorney's Office as the executive in charge of Appeals, and lo and behold, there was another chop shop case pending in the state Court of Appeals raising the claim, same lawyer, different client, raising the claim that the warrantless inspection of the books and premises of a vehicle dismantler violated the state search and seizure clause, which uses pretty much the same language, maybe exactly the same language, as the federal Constitution. Well, we already knew what the New York Court of Appeals thought of this practice, from their

recently reversed federal Constitutional decision. They didn't like it. They'd said so. So we put all our efforts into showing the court that under their established precedents on when to depart, there was no reason to depart here. New York didn't have a tradition of greater privacy from warrantless searches than the rest of the country. New York didn't have a special interest in protecting the chop shop industry, and although it is an important industry in New York [LAUGHTER] and we went through what everybody on the Court of Appeals had ever had said about when it's appropriate to depart, and there was no basis for departing here. I would say the argument was irrefutable, or at least the defendant did not even try to refute it. It was quite interesting, in the argument he just ignored his line of inquiry.

And what happened? The court decided that warrantless searches, by these warrantless inspections, violated the state constitution. The dissenters said, and they were absolutely correct, that the court was violating all its carefully crafted rules on when to depart from federal Constitutional precedent and when not to, but Chief Judge Kaye said—and this was not a unanimous opinion, we were talking about the value of unanimity here—there was a dissent and then there were concurring opinions. Chief Judge Kaye said, concurring with the majority, she felt obliged to defend from this attack. The majority just ignored it, that when state court judges think the Supreme Court is wrong, the state court has a responsibility to make the right decision, as a matter of state law. She didn't quite say wrong, she was too diplomatic for that. She said "where we conclude that the Supreme Court has changed course and diluted constitutional principles,"[42] I think that means wrong [LAUGHTER], then the state court has an obligation to get it right and as much as it pains me to say so, I thought she was right and I still think so today. That decision is *People v. Scott*, 79 N.Y.2d 474. It was actually two consolidated cases, two different search and seizure points, and the court departed from federal precedent in both of them. The chop shop part was really written separately by it. It was *People v. Keta*, and it actually begins partly into the majority opinion. The reason I'm talking so much about the opinions, is there was a remarkable amount of passion in these opinions, not so much passion about the Fourth Amendment analysis of whether the searches were good or not, but whether, the

[42] People v. Scott, 593 N.E.2d 1328, 1347 (Kaye, J., concurring).

dissent was just boiling over the refusal to adhere to principles about when to depart, and Judge Kaye's opinion was equally passionate in a different style in responding and explaining that it is really important, sometimes just to do the right thing. They're worth reading, you don't often read this much passion on an issue of that character of when to depart from federal Constitutional precedent.

Now, to be sure there is an advantage to uniformity. I mean, it's just more complicated when you have several different interpretations of the same set of words in that there's more to keep track of. That's one of the reasons why courts sometimes follow courts in other jurisdictions. Another reason is they think the other court is right, that's a good reason, but I don't think that we should be talking about the decision to depart as if the presumptively right course is to follow the Supreme Court of the United States. There's no reason for such a presumption. Now there is force to the idea, which I think is true about search and seizure, and may not be true about the First Amendment, that the two provisions were intended to mean the same thing, that there's a reason why they use the same language, that they had in mind that the codifiers of one constitution had in mind that they were codifying really exactly the same thing as the codifiers of the other, but that isn't really enough to solve the problem, because a state court judge who thinks: one, the state constitution and the federal Constitution should mean the same thing; and two, the federal Constitution has been wrongly interpreted, that judge can't follow both principles, they have to pick one and the judge has to choose between the consistency principle and the getting-it-right principle, it's not obvious to me, even if consistency is important, I don't know why it's more important than getting it right or anything else.

This problem of consistency versus what the actual result is, is, in structure, is a little bit like a puzzle that has faced the Supreme Court itself from time to time, and I think of a case called *Apodaca v. Oregon*,[43] which maybe you and I are the only people who remember, I was clerking at the court at the time and you because it's Oregon or whatever else may cause you to remember that, but that was a 1972 case and the problem I am about to describe has occurred in more than one case, the question was whether the constitution requires states to provide criminal defendants with a

[43] Apodaca v. Oregon, 406 U.S. 404 (1972).

unanimous jury verdict, whether the jury has to be unanimous. Eight justices, eight of nine justices thought that whatever the role is, it's the same for federal courts, and for state courts, the Sixth Amendment directly imposes whatever the right rule is for federal courts and its incorporated and made applicable to the states by the Fourth Amendment in exactly the same form. But one Justice, Justice Powell, thought the right answer was that the Sixth Amendment requires unanimity, but the Fourteenth Amendment—in federal court—but the Fourteenth Amendment doesn't require in state court and so that became the rule just because there were four justices who thought that the Sixth Amendment, and that the rule should be unanimity everywhere, and there were four justices who thought that the rule should be that unanimity was not required everywhere, and then there was justice, who made and made a majority for unanimity in federal court and against it in state court. And so the principle of consistency shared by eight justices, that's not the rule and that's not because any one person decided it shouldn't be the rule. It's just because of the way the vote counts work, but it illustrates that consistency between two rules is kind of a second-order principle about rules, it's a rule about rules, and it often yields and, I think appropriately, to doing your best to get it right in the case before you.

This topic of whether to defer and when to depart, and the importance of consistency, which was so much discussed in the New York Court of Appeals for a certain period of time there in the in the eighties and in the early nineties, seems to have disappeared from view on the New York Court of Appeals, although I gather from this symposium today than it is alive and well, or at least turns up from time to time in other states, and I suppose it may return to New York if the Supreme Court of the United States and the New York Court of Appeals start pulling apart from each other on important issues. I suppose it doesn't arise unless the state judges think maybe they should follow the federal Supreme Court, but they don't want to because they think it's wrong and then that's when this tension arises.

I think I would like to sum up on this by saying that I don't agree, again, with Justice Kennedy about everything, but that I do think the genius of our federal system is that we have, in our federal system, split the atom of sovereignty—that was his phrase—and that means that not only that each state is governed by two

legislatures and two executives, but also by two high courts and they are entitled to equal respect, each in their own sphere and, of course, federal can sometimes preempt state law, there is supremacy clause, but where the state courts have a state constitution or state statutes to interpret, that they are authoritative and they should be regarding it as their principal job to get it right and I think that's what our court in New York has been doing and I'm happy to see that that's been happening elsewhere as well. Thank you for the chance to participate in this symposium.

JUDGE GRAFFEO: We definitely want to thank all these terrific panelists. We really had many thought-provoking presentations, and you can see the amount of work that went into this for this symposium. So thank you so much, all of you.

We're now going to do some question-and-answers for the panelists and Chief Justice O'Connor had to leave, but she talked about, and I'm going to pick up on what General Underwood just talked about, about speaking with one voice, the unanimity. Let me ask Chief Justice Rabner, what's your philosophy on the need for unanimous decisions of a constitutional dimension and how do you go about attaining that if you feel that it is something important.

CHIEF JUSTICE RABNER: I think it's very important as I mentioned in describing getting to the end result in the cell phone case that I talked about, and the way you get there, I think is by being a very good and respectful listener. We conference our cases and I'm sure that's no different than any other court and you know, there are different ways that people approach it. Some will believe that my view is absolutely right and I can't deviate one bit from what the clear principle I'm articulating is. Others will do their very best to try to incorporate what their colleagues are thinking and keep in mind that you're writing not for one, but in the case of the New Jersey court, you're writing for seven and that if you want to get a unanimous opinion, you have to listen with care and adjust a draft after it circulates and you hear from others, in order to bring people under the tent, and it is an effort and it's one that I think is worthwhile.

PROFESSOR BONVENTRE: Are you speaking about this, generally, or just in those very, very important cases? Because there's another side, of course, of that, which is a side that I take, of course, I'm never in your position, I never have the responsibility of doing what you do. But it just seems to me too oftentimes when

there's a unanimous opinion, it's such a patchwork and as there's such fudging over of differences that there actually must be, in a court of last resort in these difficult questions, that ultimately you get an opinion that just doesn't really stand for too much. Are you just talking about the important cases or just generally?

CHIEF JUSTICE RABNER: I'm speaking mostly about the important cases where I do believe it's important to come out with a strong voice and a strong message and I hope that I can point to a couple cases I'll do later where I don't think we came up with a patchwork, but we ended up without a lot of dissenting and concurring opinions that really didn't go to the core, and by perhaps whittling down the issues and not softening the principles we were able to achieve unanimity. I do believe that there is great value in the sense though. And I don't think that courts should go about their business seeking unanimity in all cases because sometimes the dissent lays the groundwork for majority opinions down the road where there is no amount of tweaking around the edges that will matter, you just have core principles that are colliding and you can't possibly speak with one voice.

JUDGE GRAFFEO: Justice Landau, do when you find that the attorneys in your state are well-versed in the use of state constitutional issues, or are you sometimes frustrated that they don't add those points to their briefs?

JUSTICE LANDAU: Fair question. Because we've been doing state constitutional law so long, I mean there's been an entire generation of lawyers that have grown up not knowing anything else, we find that everybody comes prepared. Everybody assumes that the first thing the court is going to be asking you is: what does the state constitution mean? It's a very rare case when we ask somebody about the state constitution, when in fact, the state constitution has not been raised. It has been suggested, in fact, although I don't think there is actually a case that holds it, that it is malpractice or constitutionally inadequate assistance in a criminal case, to fail to raise the state constitutional grounds for the claim of error on appeal and going only to the federal. That's the just culture in Oregon. So it is really, really rare when we see somebody not prepared to talk about the state constitution.

JUDGE GRAFFEO: Is that true in Connecticut as well?

JUSTICE PALMER: Yeah I don't think we have quite as deeply embedded a tradition or as long-standing a tradition, perhaps, but especially the litigants and the criminal matters are by and large,

there a lot of public defenders and then there's the chief state's attorney's office you know, so they tend to litigate these cases over and over again and there they really are well-versed in it.

I would say that the bulk of our state constitutional claims tend to be in criminal cases. And I say, I suppose that a greater number of such claims are criminal cases rejected just because there are so many, but over the years, litigants have become pretty familiar with the nature of the state constitution and the importance of those claims. I should say we had a Chief Justice a number of years ago, her name was Ellen Peters, who was a professor at Yale Law School when she was appointed to my court, and she was really at the forefront, I think, perhaps not quite at the same position as Hans Linde, but right up there as far as her interest in state court litigation, and has written about and that sort of thing.

JUDGE GRAFFEO: General Underwood, along with being a well-respected appellate attorney, you're the manager of a large appellate staff of attorneys. How do you train or handle your cases so that these points are raised?

GENERAL UNDERWOOD: I have wonderful deputies, one of whom is here today to help me make sure that people are aware of the issues that should be raised, or since we're litigating for the government, we're not usually raising claims of right, we're in a position responding to them. Although there are certainly constitutional issues, not bill of rights kind of issues.

JUSTICE PALMER: So you're constantly trying to limit the constitutional rights of citizenry, aren't you? [LAUGHTER]

GENERAL UNDERWOOD: I wouldn't dream of suggesting that! [LAUGHTER] I'm trying to help the court find its way to the correct answer to the questions before it [LAUGHTER]. And I have a wonderful staff of lawyers who help me in that way.

JUDGE GRAFFEO: Do you consider the issue of attempting to preclude the use of cert petitions to the federal system by incorporating state constitutional issues? Is that something that's a frequent consideration in framing the state's posture?

GENERAL UNDERWOOD: Well I guess what I say because of the same reason about where we are in the litigation, it's more likely about what we will be raising in opposition to the cert petition is that the decision below rested really on state constitutional grounds or state law grounds, and is not amenable to the federal review. We get involved in this federal/state issue, not just in the Supreme Court. But in Section 1983 litigation, in various kinds of

federal litigation where the question is, is what happened, a violation of federal rights or is it just a violation of state rights that are not cognizable under the federal Constitution?

PROFESSOR BONVENTRE: Can I build on something the Solicitor General mentioned just before? Several years ago there was a student of mine who was clerking for the Massachusetts Supreme Judicial Court, but I've seen episodes like this and lots of course, even in your court, where the advocate for somebody seeking some constitutional protection just goes to the court and just argues federal Supreme Court precedent. And when that advocate is asked, "do you want to raise state case law?" the advocate will say "well I raised the Supreme Court's decision." And your court says, "well, are we bound by the Supreme Court's decision?" Then the advocate looks at the court like, "are you crazy? Of course, we're bound by the Supreme Court's decision. That's the highest court in the land, then that's the supreme law of the land. So we have to follow the Supreme Court. Then, of course, the Massachusetts Supreme Judicial Court renders a decision based on federal law and dropped a footnote in that case saying that the result might have been different but the state constitution was never raised. And I think it's because most lawyers coming out of law school today, and maybe it's always been that way, don't understand what you are pointing out, that the Supreme Court really is just another high court. If there is an actual conflict, of course they'll win, but most of the time, especially with this court, there's not an actual conflict.

JUSTICE LANDAU: That's a really interesting point because one of the things that Oregon experienced in the early days, the late 1970s and early 1980s, are cases in which counsel either neglected to raise the state constitutional issue below or purposefully waived reliance on state constitutional claims. The Oregon Supreme Court said in both cases, one is *State v. Clark*,[44] and *State v. Kennedy*,[45] that you can't do that, that lawyers can't paint the Oregon courts into the position of having to decide federal claims unnecessarily. So whether or not somebody actually raises the claim, in *Clark*, the lawyer said "no, I'm not relying on article 1, section 20," the court said, tough. We have to look at what the state constitution means first. We would be helped if you raised it and briefed it so that we would be better able to sort through the arguments, but we're not

[44] State v. Clark, 630 P.2d 810 (Or. 1981).
[45] State v. Kennedy, 666 P.2d 1316 (Or. 1983).

going to let you paint us in a single corner.

GENERAL UNDERWOOD: And you don't get met by the government or by the other side about preservation?

JUSTICE LANDAU: Oh the state didn't like it at all, there's no question. [LAUGHTER].

GENERAL UNDERWOOD: More than not liking it, can the Oregon Supreme Court—the New York Court of Appeals has a fairly robust jurisdictional bar on reaching issues that weren't raised below.

JUSTICE LANDAU: The Oregon courts have simply said that preservation isn't a bar and that that first-things-first doctrine takes precedence.

JUSTICE PALMER: Is that the case even when the record is adequate for review? Or should I say, when it's inadequate for review? For example, if there was a claim that was not brought up at the trial court below about an unconstitutional jury charge, when the jury charge, is obviously there, it can be reviewed, so on appeal it can be raised. But what sort of doctrine do you have in circumstances where a constitutional claim is not raised at trial, you may look at it and say it's a good claim, but the record is inadequate to review?

JUSTICE LANDAU: Then we can't look at it. You have to have an adequate record in order to base your analysis.

JUSTICE PALMER: You wouldn't send it back for rehearing or something in individual cases?

JUSTICE LANDAU: No.

GENERAL UNDERWOOD: In criminal cases we quite frequently, in criminal *habeus* practice in particular, we quite frequently see a defendant or a court trying to turn a state claim into a federal claim, a state claim that wasn't raised into a federal claim. I think it is federal ineffective assistance of counsel not to raise the state claim. And then we have these meta-levels of litigation because we then say "oh but he had good reason not to raise it because it wasn't preserved." And we have the federal judge say "ah but it was preserved" and then they're debating about what it takes to preserve a claim.

JUDGE GRAFFEO: I was just going to say, in my fourteen years on the court, I have not seen as many claims of ineffective assistance of counsel as we've had the last couple of years. That seems the new de jure way of raising issues that were not preserved below. But, I did want to pick up on something that Justice Palmer

said, at least, New York—I tend to agree—I think over the last several decades, because our state constitutions are so well-defined, so many issues in the criminal arena that our bar is very accustomed to using our state precedent, state constitution, particularly, when it comes to the rights of defendants, it's well-established, although there's always new issues that pop up because there's always something new in criminal law, but I do think that the bar in New York State is well-versed in the use of the state constitution.

PROFESSOR BONVENTRE: In fact, often times at the New York Court of Appeals in search and seizure cases, right to counsel cases, nobody talks or mentions state constitutional law, because everybody knows its New York Court of Appeals case law.

JUSTICE RABNER: I think, going back to your question earlier, I think the way that we can talk about this relationship between the two constitutions is the United States Supreme Court, set the floor, but it doesn't set the ceiling, and state courts have the ability to go beyond. I smiled when I listened to the factors in Connecticut, because there's a beautiful, elegant opinion that a justice in New Jersey wrote, a concurring opinion, in which they went through virtually those same ones and a few more and then is the school of thought that, well that's a beautiful opinion, but it's a concurring opinion, it never garnered the vote of the court, and if you think about constitution, New Jersey's first constitution was from 1776. Why would you bother looking at a document that was created later to try to figure out what they meant? And today's constitution is from 1947, where we have six volumes of legislative history and we have a pretty good idea of what the framers of what the New Jersey Constitution were talking about because it's on our book shelves. Why would we look to something from the late 1700s, when we're trying to figure out, what was meant, even if there's principles.

But I want to add one practical concern about why you'd want to think with extra care about what the federal Constitution has to say, even as a separate sovereign sitting on the state supreme court, particularly in the area of criminal law. Our Fourth Amendment is identically worded, the same article 1, paragraph 7 is identical to what the Fourth Amendment says, and yet I think it's worth stepping back and pausing before writing an opinion that would differ. For this reason, especially today, there are federal-state task forces that address a lot of serious, serious crimes, whether it is gang violence, or gun violence, or drug trafficking, and you need to

at least ponder what's going to happen if you write a decision that requires an entirely different procedure, because it could lead to the dismantling of these joint efforts that take place. If, when I think about writing a wiretap, it's got to be different, about whether to get a search warrant, it's got to be different. Whether to get this kind of process or that, so that goes to the need for consistency, but it can't, of course, override the need for getting it right. I think what it means, in practical terms is, if you're going to branch out relying on the state constitution, it should be in an important area, where it matters, and in the end, whether it's the cell phone case or others that we've taken on, consistency can't trump the correct interpretation of the constitution, but we should step back and think with great care before making a ruling that will depart substantially.

JUDGE GRAFFEO: And lawyers need to think about the ramifications of what they're suggesting. We ask a lot of hypotheticals, a lot of questions, about the future effects of issuing a new rule like that. So I think we all do at our level of court.

We're to change topics a bit, because I thought maybe as students you should be interested to know a little bit about the courts that these judges sit on. So, Justice Landau can you explain to the students how judges are selected in your court and the term of office?

JUSTICE LANDAU: Judges in Oregon trial court—we have three levels in Oregon—of course not all states have intermediate courts of appeal. We do, we have 170 trial for six counties around the state and we have an intermediate court of appeals. There are thirteen judges, they sit, statewide, we do not have districts or divisions, there is one court. It sits in panels of three. The odd person is the Chief Judge and sits as the administrator of the court. We have the seven justices on state supreme court. We are all elected, to nonpartisan six-year terms, the practicalities of it, though, are that probably eighty to ninety percent of the judges first arrive at their judicial careers by way of appointment because the sitting judge usually retires, steps down, before the end of his or her term. The governor then makes an appointment and the appointee has to run for retention, if you will, and then be up for election at the next general election and then every six years after that. I was appointed in 1992, I was appointed to the court of appeals, then had ran in 2004, or excuse me, in 1994 and then in 2000 and 2006, and it was in 2010 that my predecessor on the supreme court left,

retired, at the completion of his term leaving an open office and so there was a contested election and so I was elected onto the supreme court.

JUDGE GRAFFEO: And about how many written opinions a year does your court issue?

JUSTICE LANDAU: The supreme court writes probably seventy-five or eighty opinions.

JUDGE GRAFFEO: So you're close to what the U.S. Supreme Court does.

JUSTICE LANDAU: Right with, you know, one-tenth the staff. [LAUGHTER]

JUDGE GRAFFEO: Chief Justice Rabner, if you want to explain the system that New Jersey uses for judicial selection?

CHIEF JUSTICE RABNER: Sure, I'll start with the structure as well. We have about 375 trial court judges, thirty-five in the intermediate appellate court, and seven on the supreme court. All of the judges throughout the system are appointed by the governor, who has sole authority of the appointment process, and much like the federal system, the senate has to confirm individuals that the governor nominates for the position. You are appointed to a seven-year term and you come up for reappointment. If reappointed, re-nominated, and reaffirmed, you sit until age seventy and that's the mandatory age of senility as many of my colleagues have said. And we write about seventy-five to one hundred opinions.

JUDGE GRAFFEO: Let me turn to Connecticut.

JUSTICE PALMER: Actually ours is identical to New Jersey, except that they're eight-year terms and one has to continue to be nominated and confirmed in our state by the senate in the house every eight years, and mandatory retirement at age seventy as well.

JUDGE GRAFFEO: In New York, as I hope most of you are aware, since you're attending a law school in New York, we have over a thousand trial court judges in New York State. We have quite a spectrum of trial courts, but once you're outside of metropolitan New York, most of our trial court judges in New York State are elected. Our intermediate appellate court is our appellate division. There are four departments. They're situated in Albany, Rochester, Manhattan, and Brooklyn. Those judges have to be appointed by the governor from our elected supreme courts. So if you're a county court judge, a surrogate, a family court judge, you cannot sit on the appellate division, you have to be a supreme court judge. In contrast, our Court of Appeals, our state's highest court,

we of course have the confusion that always develops because our nomenclature does not match the federal nomenclature, or that of most other states. Our Court of Appeals has a different rule. You need not have any prior judicial experience to serve on the New York Court of Appeals. Our previous chief judge, Judith Kaye, was a commercial law practitioner in New York City, she had not been a judge before she came on the court, and one of my colleagues now, Robert Smith, was a litigator and we also have Judge Jenny Rivera, who was a law school professor who has recently joined our court. So you need not have been a judge previously. We serve fourteen-year terms. It is a gubernatorial appointment with senate confirmation, and that changed previously. Judges of the Court of Appeals were elected in New York until the late seventies, it was considered to be an election reform, to get money out of the selection of the judiciary and to go to a merit selection system. I think last year we did around 230 decisions, and I would say ninety-nine percent of our decisions are issued within six to eight weeks after the case is argued in our court. We do that by working really hard and very long hours, but we are very proud of the turnaround that we have because we think it's very important for the litigants to receive their decisions in a timely and efficient manner. It's very rare that we hold the case over for a month and almost never for more than two months, so it's a constant flow of cases that more or less I think reflects the fact that New York is a very litigious state and we have a lot of great lawyers. We have a lot of litigation.

JUSTICE PALMER: I'd like just to say that ninety-nine percent of our cases are not decided in six to eight weeks. [LAUGHTER] I completely agree with you for the need to do better, but that'd be daunting from our perspective.

CHIEF JUSTICE RABNER: And we're like Connecticut again in that regard. [LAUGHTER].

JUSTICE LANDAU: And we're like New Jersey. [LAUGHTER].

PROFESSOR BONVENTRE: Ok, do we have questions from the audience? Okay about some questions from the audience? Yes, Beau.

STUDENT: Why do you think that the system of state constitutionalism and dual sovereignty works so well?

PROFESSOR BONVENTRE: Come on Oregon, your state went first.

JUSTICE LANDAU: "Works so well" is kind of loaded. Let's see, it works well in the sense that it is more protective of individual

rights, because it has been said the federal Constitution and the supremacy clause only establishes a floor. That is not to say, and it's something that's important in terms of the way Oregon looks at it, we don't just interpret the state constitution when we think it means something more protective than of the United States Constitution. The state constitution means what it means and sometimes it's more protective and sometimes not. *Smith v. Employment Division*, a case that went from the Oregon Supreme Court up to the United States Supreme Court, was a case in which the Oregon Supreme Court said that the First Amendment rights at issue, rights of religious freedom, were less protective than what the First Amendments rights would be. Well, that happens.

So saying it works well depends upon what you mean by works well, but if your perspective is that it's more protective of individual rights, it works great in states like Oregon because it is such a robust and vigorous approach to constitutionalism. It is, however, a point of criticism in other quarters. Particularly, in the early seventies and in the late seventies, early eighties, when state constitutionalism first emerged, it's part of the reason that there were such passions in the opinions as General Underwood said, because critics saw this is just opportunism on the part of liberal state court judges reacting against the retrenchment of individual rights going on in the Burger Court in the seventies and eighties, and so they were crying foul, that some of their colleagues were simply taking advantage of the opportunity to be more protective, to be more liberal, if you will, under the guise of state constitutionalism. So it depends on your perspective about whether it was successful.

PROFESSOR BONVENTRE: Judge Graffeo?

JUDGE GRAFFEO: There's also a point to be made because very frequently, our state constitutions are far more detailed than the federal Constitution. Our New York State Constitution is a booklet and covers a great many more topics than the federal Constitution. Granted there are some clauses that are much more near, or practically identical to the federal Constitution, but there's a lot more meat on the bones in our state constitution and that is often what we hinge our decisions on.

JUSTICE LANDAU: Don't you have a provision in your state constitution mandating the width of ski trails? [LAUGHTER].

JUDGE GRAFFEO: Yes, in our "forever wild" provision on the Adirondack Park.

JUSTICE LANDAU: Just so you don't think I'm making fun of the New York State Constitution, the Oregon Constitution has a provision guaranteeing you the right to purchase liquor by the glass. [LAUGHTER].

PROFESSOR BONVENTRE: That's a good one. But also within the New York Constitution, we have some very meaty rights. Like, I mean the right to a public education and also the requirement of aid to the needy, which has caused a great deal of litigation. Mike, did you have a question?

STUDENT: We're actually running an article in the Law Review this year that talks about cleaning up the New York Constitution. I started to read it and I guess the constitution has over 58,000 words in it, and some other ones have over 300,000 words in it. So, I guess I was wondering, maybe General Underwood can speak to this, is that maybe the reason why litigants and judges may have been hesitant in the past to dig into these documents and provisions?

GENERAL UNDERWOOD: It's not a very persuasive explanation, I suppose it's a theory, but lawyers go digging into statutes that are much harder to read and are more arcane and harder to read than the federal Constitution. I think there's a fashion in these kinds of things, that is, the courts started recognizing state constitutional rights and lawyers started raising them. The lawyers then raise them more and the courts deal more with them. There's an interesting kind of historical inquiry that you could do about why people start paying attention to something. But I don't think it's because the constitutions are harder to read.

JUSTICE PALMER: State constitutional litigation is really very new, relatively speaking, it really doesn't begin until the maybe the mid-seventies and late seventies. And I remember just in preparing for today's symposium, I had a vague recollection that back in 1994, a year after I started, I wrote an opinion on a case involving an equal protection claim under the federal and state constitutions and I put in a footnote that said, the federal and state equal protection provisions provide the same rights and limitations. I quoted language from a case that we decided in the seventies and when I traced that back, the case went back to a case decided in the fifties, so it was just this kind of boilerplate language. When I put that language in this footnote shortly after my appointment, a lawyer who served as a commentator, who's written a book on state constitutional law, really took me to task for this, and said these are open-ended sort of provisions and they're broadly worded provisions

of the state constitution. It's really too bad that this young, perhaps not altogether qualified, new judge is relying on such boilerplate and sort of foolishness. Well, you know, he was clearly right in his assessment. Twenty years later, I ended up writing the *Kerrigan* case, which took a completely different view of the equal protection issue as it related to gay marriage.

GENERAL UNDERWOOD: Good that you didn't feel committed to what you said.

JUSTICE PALMER: I was quite embarrassed reading that back twenty years ago.

PROFESSOR BONVENTRE: I'm not sure about other states, but on that point. Actually, I think New York is very different because New York didn't start state constitutional law as a reaction to the Burger Court. The New York Court of Appeals has been doing this at least as early as the 1940s with *Leahman*, *Cuffport Pound*, certainly the U.S. Supreme Court was borrowing from Chief Judge Fuld. So, I mean the New York Court of Appeals has been doing this for a long time, and every once in a while they would say that what the federal Supreme Court says about the federal Constitution is irrelevant, what we're dealing with here, but most of the time they just never referred to the federal Constitution at all. They never mentioned it, they just went about doing their own business. Like the General was mentioning, I was at the court when it happened, something did happen in the mid-eighties, where suddenly the New York Court of Appeals became extremely self-conscious about the fact that it was looking to the state constitution, but who knows.

JUSTICE PALMER: Is it clear, Professor, that back in the forties and fifties the court actually was referring to state constitutional provisions?

PROFESSOR BONVENTRE: There is an excerpt from the Leahman case that I quote all the time, where he says, you know, the federal Supreme Court might have done something, but that's irrelevant because under the New York State Constitution, we've been protecting religious freedom a lot longer and to a lot greater extent than the federal Supreme Court has been doing.

JUSTICE LANDAU: It is interesting that you say that, because the same is true in Oregon. When I looked at the history of Oregon state constitutional decisions of the first hundred years, the Oregon Supreme Court just interpreted the state constitution and then somewhere along, around the Warren Court era, the Warren Court

jurisprudence kind of leap-frogged over some existing precedents and made state constitutional jurisprudence kind of a moot point because now the federal jurisprudence was so much more protective of individual rights than the state, and a whole generation of lawyers grew up thinking that's all there was to it, and we had to kind of learn it all over again in the separate states.

GENERAL UNDERWOOD: I think a point, rather than a point about what's hard to read, lawyers go where they think they are going to get what they are looking for, and if it looks as if the state constitution might give it to them, then that is where they'll go. I mean I see this is another area in preemption, there was a long period of time when the federal government was not very active in enforcing various business regulations and state law was more protective, and so business was arguing that state law was all preempted. But if politics change, as the federal government becomes more active, either in the future or in the past, I mean Karen Ferguson that reserved to the state the regulation of the insurance industry, they'll go where they think they can get what they want, I don't think there is high principle here.

JUDGE GRAFFEO: And sometimes there is a political reaction to the courts using the state constitution. In the eighties, I was working in the state legislature and there was a lot of discussion about whether New York should again hold a constitutional convention. For quite a while New York, every twenty years, regularly, pretty much had a constitutional convention. Then the philosophy became: it was very expensive, the voters were not adopting the constitutional provisions, so there had been kind of a lull, but all of a sudden in the eighties some people were getting upset with what the courts were doing, so there was a whole other movement about whether there should be a constitutional convention where the adoption of initiative and referendum, that type of thing, so the courts don't act in a vacuum, there is also a political environment that functions outside of our considerations.

PROFESSOR BONVENTRE: Grace, you had a question?

STUDENT: [inaudible question]

PROFESSOR BONVENTRE: Do you like the way my student calls it "our court"? [LAUGHTER]

JUSTICE PALMER: In part, in response to the concern that I, you know, sense from your question, is why we adopted this so-called *Geisler* test. These are six considerations that you kind of look to see their applicability in any given case, it is by no means

perfect, we may not keep it after all, but the point is, and the last consideration, the socioeconomic considerations, what that does is it forces us to identify the extent to which we're actually relying on that, compared to the analysis that takes into account prior precedent and that sort of thing. So, there are some cases that turn on the socioeconomic considerations. For example, in the gay marriage case, we concluded that gays and lesbians constitute a quasi-suspect class, and there are four considerations that led us to that conclusion—well though, one of them is their relative political power. We have to sort that out. We have to kind of decide that; we had no real record to sort that out, so we had to kind of just apply our judgment: what is relative, that they are relatively lacking in political power, what does that mean? So you looked at prior precedent to determine that, but to some degree, you know, it's a judgment call. That's not the best example of a policy determination, but at least, people might disagree with us, but the idea is that at least we are explaining what we are doing, so we are not saying we are relying on prior precedent, but we are really substituting our policy judgment.

PROFESSOR BONVENTRE: Chief, did you want to speak to them?

CHIEF JUSTICE RABNER: Yeah. I think you have to be careful about the assumption that these are policy-driven decisions. I'm thinking about, there is a long line of cases in New Jersey that do go back to about 1980 when this explosion did get underway in most states, and there are easily a half-dozen differences in the interpretation of the Fourth Amendment, whether it's, you know, consent searches or questions of standing, privacy interests in the garbage outside of your residence, and the various issues that I talked about today. If you look at the decisions that come out of our court, they really do build on the precedent. People aren't sitting around the table and saying: what do we think is the right outcome here, what do we think makes the most sense? It is a thoughtful precedential-guided way that we've gotten to the outcomes that we are reaching in these cases.

GENERAL UNDERWOOD: Could I just add to that—I second that from a different vantage point—when I talked about getting it right, cause I think that I injected that phrase into this discussion, I didn't mean getting it right in the sense of just coming out with what you think is the best policy outcome. What I meant was that sometimes a judge doing all the right judicial analytical things will

come up with one answer, but maybe the Supreme Court has come up with a different answer. Do you feel constrained to throw away or to set aside your judicial analysis because your first obligation is to follow the Supreme Court, or do you feel charged with making the determination yourself? It doesn't mean an unconstrained determination, but it just means one that isn't determined by what the Supreme Court has done in interpreting its constitution.

PROFESSOR BONVENTRE: We have time for one more question, John, I saw your hand up?

AUDIENCE MEMBER: How does each of your states' high courts determine which cases you're going to grant review of, and then once you make that decision, how do you assign the cases?

PROFESSOR BONVENTRE: Chief, you want to start?

CHIEF JUSTICE RABNER: Sure. We get about eleven hundred—we get our cases in two ways, or three ways—we have about eleven hundred to twelve hundred petitions for certification that come to the court, and that creates the bulk of our docket, we grant about six, seven percent of those cases. We look for, and its laid out in our rules, novel questions, important questions of constitutional law, decisions that differ, where you have different panels of the appellate division giving different rulings that require us to provide better guidance to the judges themselves, and to the bar, and generally important areas that will benefit, could be a newer statute, from additional guidance by the court. We get motions for leave to appeal, interlocutory issues that raise important questions for us that would seem evident that the court should take on, whether it's same-sex marriage, whether it's thorough and efficient education and matters that come directly to the court, sometimes. We take all cases, as a matter of right, where there is a dissent in the appellate division and there is no longer capital cases that used to come to the supreme court as well. How do opinions get assigned? If I'm in the majority, I'll assign the opinion. If not, the senior-most associate justice who's in the majority assigns the opinion. I try to look generally to balance the workload in terms of assigning criminal and civil complex cases and more straightforward cases so that everybody gets a fair taste of a variety of issues, and I also think that a court functions better when its members are happier about their work, so if I know that a particular justice expressed a strong interest in the way that they've presented or asked questions at oral argument, and I think that they want to do the case, I'll try to give it to them if I can. But it is

verboten to pick up the phone and say, you know chief, I'd really like to write that one, don't give me that clunker that deals with insurance law, I want to be writing a constitutional case. So, I hope that gives you a feel for it.

JUSTICE LANDAU: Ours is very similar, about a third of our court's caseload is direct review mandatorily assigned by the legislature. We take capital cases, ballot-title cases, we have interlocutory appeals by writ of mandamus, and certain election law cases come directly to the court. The other two-thirds is the discretionary docket, about eleven hundred or a thousand petitions for review, we take about six percent of those. We do that by vote of the court, it takes one fewer than a majority's, so if there's seven of us sitting on a case, three votes will get you a granted petition for review, much like what we just heard from the Chief. We look for cases that have significance beyond the particulars of this case. One of the things that is not very significant in our deliberations is whether we think the decision was correctly decided; it may or may not have been correct, but does it have significance beyond this case, is it going to effect a lot of other people, those tend to be cases involving constitutional issues, issues of statutory construction, significant common law doctrinal developments, and the like.

JUDGE GRAFFEO: We get thousands of criminal and civil leave applications, and we have two different tracks for deciding which cases to put on our docket. Civil leave applications are decided at conference, we vote on those cases, we need only two out of seven judges to vote to take the civil case. Criminal cases are not dealt with in conference, they are randomly assigned to us in chambers. And so, an individual judge decides which criminal cases we think are appropriate for the court to hear. We have a category of appeals that come to our court as of right; probably the most common avenue for those cases is where there are two-justices of the appellate division who have dissented. Those cases are going to come to us. Also the appellate divisions can send us interlocutory appeals, they can send us something that ordinarily we would have a jurisdictional bar to hear, but they're allowed to send that. Cases of significant constitutional dimension, which have no other issues involved, they can make a request of our court to skip over the appellate division, and come directly to the Court of Appeals—that type of thing. We also had the capital cases as well. We have a very different method of assigning our writings; we have a random assignment system, which is an old tradition of our court. When we

do oral arguments, we have no idea who is going to be writing that decision, so I think that's partially why we have such a robust exchange with the attorney, so that if there is something we want to know, if we happen to draw that case, we need to know it. Our Chief Judge does not assign out writings. Right after oral arguments, our chief clerk puts each—it's not very technologically advanced, but we have an index card with the name of the case on it—he takes all the cards, he shuffles them on the table, and then by seniority, we draw a card. And that means the next morning you will report on that case at conference, we'll discuss the precedent, what we think should be the disposition of that case, why we think that's the best decision for us to issue, and then we will go around the table and each judge will express their opinion. If you are fortunate enough to get at least three other colleagues to agree with you, then you'll be doing the initial draft of that writing. If not, it moves to the first judge to your right who it does garner three additional votes, and then during our intersession, we email our proposed writings, we can still change our votes, which sometimes happens, sometimes a concurrence or dissent will garner more votes and then the case will be reassigned and rewritten, and then when we come back the next month, we vote down—until we come back into conference the next month, no vote is casted in concrete, and then we will put those cases down and they immediately go out to the public on our website.

JUSTICE PALMER: Very much like New Jersey and Oregon. We get our cases from really three fundamental sources, most of them that we get are from having granted a petition for certification, three of seven votes will serve to grant it. We take a significant number of cases directly from the trial court which we think are, for whatever reason, important, either because it involves an interesting constitutional question or important one, or significant question of statutory construction, or there may be a claim that a particular decision of our court ought to be overruled; if it's a substantial claim, that doesn't really make much sense to have to go to the appellate court because the appellate court can't overrule us at all, so. And the third category of cases come directly to us. It's a very small number of cases, but capital cases are the prime example of that. The chief justice on my court assigns all cases, including cases in which she's not in the majority, unless she's disqualified in which case the senior associate justice on the panel would assign it. We also have, I should say, we have a

tradition in my court—right after the argument, we adjourn to our conference room and hear the two or three cases that were on for that day, and I didn't know this when I first started, I'd never been a judge, and my first day on the bench I was completely befuddled by, and there are some lawyers that would say I still am, but it was particularly daunting the first day, and after the second case, we went into the conference room, and I just was watching my colleagues to see what they were going to do, I thought that we were taking a break between the second and third case, and I thought everybody might get a cup of coffee for ten minutes, or read a newspaper, back then people smoked cigarettes, I guess, and I see everyone is sitting at the table getting ready, you know, moving their papers around and stuff, and I did the same thing, I didn't know why they were doing it, [LAUGHTER] and the person, Ellen Peters was the chief justice, but she wasn't in that day, and so Bob Callahan was the senior associate justice, and he was presiding, and he turned to me and I had no idea we were going to talk about the case then, I remember it was an uninsured motorist case. I'd spent most of my career in the federal system, and I did not know the difference between a workers' comp case and an uninsured motorist case at that point. So, he turned to me and he said well, we'll discuss the first case, consistent with our long-standing practice, Justice Palmer, why don't you tell us about the case and cast your vote. I almost fainted [LAUGHTER]. I really was not prepared to do that. I did my best. I could tell that the other members of the court were thinking: what has Lowell Weicker done to us [LAUGHTER], the governor who appointed me. I felt that way too actually, what did I—why did he do this? [LAUGHTER]. And Bob Callahan, who I said was the presiding judge that day, one of the nicest, recently passed away, the nicest people that you'd ever want to meet, we got to the second case, and he could see I was practically, you know, I was perspiring, and I was anxious, you know, it was embarrassing for him and for everybody else, and he said, you know, I think we'll dispense with this long-standing practice, I'll start out discussing the case. And I practically leapt over to kiss him when he did that, so [LAUGHTER]. But, the junior justice in my court starts the discussion, which I've always thought is a bit of bizarre practice, but that's the way it goes. Sometimes we'll deviate from that when it's a particularly complicated case or particularly important case where there will be some more robust discussion, before anybody actually expresses a view on it, so.

CHIEF JUSTICE RABNER: That's very interesting, we differ in two respects from that. We do not talk about the case after argument until the following week, and it's sort of frowned upon to have a conversation on the merits, so the people can go back, digest the arguments that they've heard, do a little bit of additional research and not force yourself in the moment to make decisions, which sometimes that can be a reaction of emotions of the argument. You go back, and get yourself in order, and we all come together without having any idea which case you can be presenting on, and the Chief Justice calls each case around the table and who's going to present the first one, and I try to share the wealth in the way that I do that. So everybody has to be on their toes, nobody else is allowed in the conference room, no law clerks, you know everything and be prepared for each case, because you never know what's coming.

JUSTICE PALMER: Kind of like the Socratic method in a way.

JUSTICE LANDAU: We do it very similar. The Chief Justice will randomly, and it is very random, the Chief Justice and I belong to the same book group and we read this book, *Thinking Fast and Slow* by Daniel Kahneman, about cognitive psychology and decision-making, and one of the points that is made is the person who speaks first has a disproportionate effect on the discussion that follows and so the chief picks somebody different every single time, more or less at random, both in post-argument conference and in opinion conference, and we start the discussion with somebody different every single time.

CHIEF JUSTICE RABNER: So come to us and you won't have to start if you're the junior person. [LAUGHTER]

JUSTICE PALMER: Well that sounds very good, but I'm now the senior person, so I'm perfectly happy with the circular method. I will say, that first day I did not have a disproportionate effect on anyone [LAUGHTER].

CHIEF JUSTICE RABNER: Maybe you did, just not in any way that you knew.

PROFESSOR BONVENTRE: Well it has really been an extraordinary afternoon. I really want to thank our spectacular panel, Solicitor General Underwood, Justice Palmer of Connecticut, Chief Justice Rabner of New Jersey, Justice Landau of Oregon, and of course, our special honoree Judge Victoria Graffeo from our court. Thank you very much.

JUDGE GRAFFEO: Thank you for having me.