

EDITOR'S FOREWORD

*Vincent Martin Bonventre**

This joint issue of the *Albany Law Review*—including both the tenth annual edition of *New York Appeals* and the twenty-fourth of *State Constitutional Commentary*—once again reflects our purpose to serve as the foremost venue for exploring issues confronting New York State's appellate courts and developments in state courts and state public law across the nation.

The first half of this joint issue, the *Anthony V. Cardona New York Appeals*, continues the *Albany Law Review's* intent to offer a varied range of subject matters with which this state's appeals courts have been dealing. New York's hurdle-filled election law is addressed by Craig Bucki. He critiques two recent appellate division decisions which, despite the 1996 Ballot Reform Act that was intended to mitigate the consequences of hyper-technical election law requirements, nevertheless invalidated potential candidacies for highly technical reasons.

Thomas Dickerson, a beloved retired justice of the Appellate Division, Second Department, who passed away while his article was being prepared for publication, provided the third installment of his examination of class actions under CPLR Article 9. Despite the current U.S. Supreme Court's evident hostility to class actions, New York's consumers, workers, and tenants have a better chance of bringing such actions in this state's courts, since the Court of Appeals' 2014 *Borden* decision. Next, Michael Hutter and Mark Powers examine the question of personal jurisdiction over a foreign corporation doing business in New York, for injuries suffered by a state resident out of state. They analyze the implications of the Court of Appeals' 2017 *D&R Global* decision which liberally construed transaction-of-business as a basis for jurisdiction under the CPLR.

Burton Lipshie analyzes the ramifications and unanswered

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questions of the U.S. Supreme Court's 2014 *Daimler* decision on New York's traditional "at home" jurisdiction over corporations doing business in the state. *Daimler* undercut the New York rule, formulated by then-Judge Cardozo in his opinion for the Court of Appeals in the 1917 *Tauza* decision, and significantly narrowed a state court's authority to hear claims against businesses incorporated elsewhere. Edward Markarian urges civil practitioners who take appeals in New York to familiarize themselves well with the governing rules. Despite some commentators' claim that an appeal in New York is the "easiest step" in civil practice, the author surveys some of the "numerous obstacles" in the state constitution, statutes, the CPLR, and court rules that must be overcome.

The New York Court of Appeals' and Second Circuit's recent decisions in *Global Re* are the subject of Thomas Newman's examination. According to the author, those courts' recent disavowals of their previous rulings, which threatened "disastrous economic consequences" for insurers, brought the law in line with generally accepted reinsurance practice. Patricia Youngblood Reyhan explores the widespread inclusion of choice-of-law and choice-of-forum clauses in multi-jurisdictional contracts. The author then focuses on the implications of the Court of Appeals' recent decisions on New York's status as a center for the litigation of multijurisdictional commercial disputes.

Paul Shechtman unabashedly criticizes the Court of Appeals' 2018 decision in *People v. Morrison*, reversing a rape conviction on a rigid application of one of the court's automatic reversal rules. The trial judge's failure to make a record of his sharing a rather ministerial jury note with defense counsel, who was concededly aware of the note and at least its gist, resulted in an unsigned memorandum reversing the conviction over a three-judge dissent. In the final contribution to *New York Appeals*, Yuval Simchi-Levi criticizes New York's *De Bour* rule which requires certain preconditions to justify police encounters and questioning of civilians. He recommends that *De Bour* be abandoned and that a simple reasonableness standard be adopted.

The *State Constitutional Commentary* half of this joint issue presents, as is customary, a wide array of topics on state courts and state public law in our federal system of government. Bruce Ledewitz argues that state constitutional decision-making today is healthier than federal jurisprudence. He contrasts the Pennsylvania Supreme Court's "common sense, value laden judgments" with the "reign" of "value skepticism" at the federal high court. Indiana Chief Justice Loretta Rush and Marie Forney Miller decry the continuing failure

of litigants to adequately argue—or even raise—state constitutional claims. The authors urge practicing lawyers, law professors, and state court judges to advocate and embrace the role of state constitutional law as a guarantor of rights.

The future of religious liberty in state courts is the focus of Paul Baumgardner and Brian Miller. The authors point to the Iowa Supreme Court's creative formulation of current federal free exercise jurisprudence to provide protection for religious objectors from seemingly neutral, generally applicable laws. Next, Cynthia Boyer tackles immigration policy and politics in the Trump era and the prerogatives of state courts. Dual sovereignty in our federal system provides latitude for states to take an independent approach to the treatment of undocumented persons. Patrick McGinley then looks at state constitutional "open courts" clauses as an optimal illustration of state courts as possible laboratories of democracy. He addresses the substantive jurisprudence of protecting causes of action as a shifting of policy-making from legislatures to the judiciary.

Joshua Kastenbergh examines the standards of judicial behavior from a holistic perspective. He argues that discriminatory conduct, whether on or off the bench, should more readily result in the sanction of removal. Judicial misbehavior is also the subject addressed by Bernard Perlmutter, specifically trial court rulings and appellate opinions with undercurrents of anti-immigrant sentiment. He bases his disheartening—if not infuriating—observations on his nearly three decades of advocacy on behalf of migrant children in Florida courts.

Richard Briffault tackles the "deeply problematic" single-subject rule included in most state constitutions. Although state courts have used the rule to invalidate questionable laws dealing with hot-button issues, the determination of what actually constitutes a "single-subject" has been anything but clear and is often simply in the eye of the beholder. Finally, in our last article, Kevin Morrow offers an empirical analysis of the Arizona Supreme Court during the tenure of Rebecca Berch as Chief Justice. He investigates the diverse possible reasons for the infrequency of dissenting opinions for the five years Berch sat in the center seat.

This joint issue was, of course, possible only because of the magnificent efforts of the fine students of the *Albany Law Review*. Ryan Whelpley and Mary Ann Krisa, as the Executive Editors of *New York Appeals* and *State Constitutional Commentary*, respectively, were primarily responsible for soliciting the articles and overseeing their preparation for publication in their separate special annual

offerings of the *Law Review*. An enthusiastic congratulations to each of them for such superb work. Additionally, 2018–19 Editor-in-Chief, Stephen Maier, deserves a great deal of gratitude for his leadership in overseeing the entire volume 82. His successor, Jay Oddi, has also been invaluable in the final preparation of this joint issue for publication. And this Foreword cannot close without mention of the hugely successful Chief Judge Lawrence H. Cooke Symposium, State Courts in the Trump Era. Moderated by former New York Chief Judge Jonathan Lippman, this annual event, sponsored by *State Constitutional Commentary*, was only possible this year through the efforts of Executive Editor Mary Ann Krisa who attended to every detail that such events entail. It has been an absolute pleasure for me to work with her all year, as well as with the entire *Law Review* membership, as Faculty Advisor. Thank you.