

## CONSERVATISM IN THE SECOND CIRCUIT: AN ANALYSIS OF THE DISSENTING OPINIONS OF JUDGE DEBRA LIVINGSTON & JUDGE REENA RAGGI

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### INTRODUCTION

Since their inception, the courts in the United States have been bestowed vast power, capable of affecting the lives of citizens across the country.<sup>1</sup> “American courts . . . do not simply ‘announce’ the law; as much as any other set of institutions, they make policy.”<sup>2</sup> Throughout this country’s history, “the [courts have] become actively engaged in, among other things, the regulation of abortion, development of police procedures, . . . and even the determination of the 2000 presidential election.”<sup>3</sup> Sitting at the center of every conceivable public and private dispute, judges create precedent each and every day that is binding on the judiciary and citizens of future generations. Suffice it to say, members of the judiciary have an immense amount of power. As such, the nature of the judicial position requires judges to leave their political ideologies at the door and view each case through a lens of objectivity and fairness. The practice of adhering to objective reasoning is most important for judges who serve on the bench of a federal appellate court, as these courts provide guidance to lower courts and are often a court of last resort absent a grant of certiorari from the United States Supreme Court. With that in mind, there has been a notion that judges should think independently and base their decisions on what they objectively believe to be the correct result *under the law*. Despite

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<sup>1</sup> Gerald N. Rosenberg, *The Impact of Courts on American Life*, in THE JUDICIAL BRANCH 280, 306 (Kermit L. Hall & Kevin T. McGuire eds., 2005) (“Courts play a major role in policy making. Through statutory interpretation, tort and product liability cases, and constitutional adjudication, courts are involved with issues that have the potential to affect all Americans.”).

<sup>2</sup> Kermit L. Hall & Kevin T. McGuire, *Introduction* to THE JUDICIAL BRANCH, *supra* note 1, at xxii.

<sup>3</sup> *Id.* at xxi.

this maxim, there is an ever-growing body of evidence that suggests a judge's ideology plays an important role in the judge's decision-making. For instance, the media, along with many scholars, have been grouping justices of the United States Supreme Court into "liberal" and "conservative" blocks when analyzing high profile cases in an effort to predict voting patterns and an eventual outcome.<sup>4</sup> Even the method by which some justices employ their clerks is indicative of the pervasiveness of ideological stances in the judicial arena.<sup>5</sup> Despite the flood of research devoted to the link between ideology and Supreme Court jurisprudence, judicial scholarship seems to be devoid of similar studies focused on circuit court judges. Accordingly, this study focuses on two judges currently sitting on the bench of the United States Court of Appeals for the Second Circuit: Judges Debra A. Livingston and Reena Raggi.

The purpose of a high court study is "to discern possible jurisprudential, ideological, sociological, or other patterns and common threads in the court's . . . decisions, as well as in the opinions and voting records of the court's individual members."<sup>6</sup> The main purpose of this particular high court study is to create a profile outlining the ideology and voting trends of Judges Debra A. Livingston and Reena Raggi of the United States Court of Appeals for the Second Circuit through an analysis of the judges' decisions over the past five years.<sup>7</sup> This is accomplished through an examination of the nonunanimous opinions in which the judges participated over the past five years, with an exclusive focus on their dissenting opinions. The decision to use exclusively dissenting opinions in this study is because, unlike nonunanimous decisions, unanimous decisions "tell[] nothing of the conflicts around the judicial conference table, the alternative lines of argument developed, [and] the accommodations and the compromises which went into the final result."<sup>8</sup> Thus, a great deal of useful information

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<sup>4</sup> See, e.g., Jess Bravin, *Court Conservatives Prevail*, WALL ST. J., June 28, 2011, <http://online.wsj.com/article/SB10001424052702303627104576410051761796150.html>.

<sup>5</sup> See Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 6 2010, <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html?pagewanted=all> (describing Justice Clarence Thomas's requirement that one must have worked for a federal judge appointed by a Republican president in order to be considered for a clerkship).

<sup>6</sup> Vincent Martin Bonventure, *Editor's Foreword*, 60 ALB. L. REV. 1511, 1512–13 (1997).

<sup>7</sup> The precise time frame during which the data for this study was gathered was between August 1, 2006 and October 1, 2011.

<sup>8</sup> C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947* xii (1969).

can be gleaned from reviewing nonunanimous decisions of a court, as judges often convey their reasons for voting in a particular manner and their personal predilections for the matter at issue. Further, nonunanimous opinions “supply information about [judge’s] attitudes and their values which is available in no other way.”<sup>9</sup> Moreover, the dissent of a judge can be very important for a study like this. Although it holds no precedent and is completely useless as legal authority,<sup>10</sup> a dissent can prove particularly revealing because it is the mechanism by which the dissenter informs the majority that they reached the wrong result and the reasoning as to why;<sup>11</sup> it is the dissenter’s only chance to make his or her views public, and perhaps undermine the court’s majority in the process. As such, this study focuses exclusively on the dissenting opinions of Judge Livingston and Judge Raggi.

Part I of this study outlines the method by which the judges’ ideological conclusions have been derived. Part II provides a background of both judges, highlighting many personal endeavors and explaining how each judge’s personal history lead to her current position. Part III offers a set of data gathered for the study and draws some inferences from it in an attempt to shape an initial profile of each judge. Part IV goes beyond the mere numbers to examine a series of decisions in which the judges dissented, highlighting each judge’s stance on certain issues and propensity for leaning one way or another in a given situation. Finally, Part V offers some conclusions, insights, and what one may possibly expect if one’s case comes before the Second Circuit on appeal.

## I. METHODOLOGY OF THE STUDY

A judge’s ideology is a “latent” trait, and thus incapable of being examined directly.<sup>12</sup> As such, one must find a separate way by which to measure it. The methodology chosen for this study reduces the judges’ dissents over the past five years into empirical data outlining each judge’s dissent history. The dissents are then broken down into criminal and civil dissents in an attempt to draw

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<sup>9</sup> *Id.*

<sup>10</sup> Robert S. Smith, *Dissenting: Why Do It?*, 74 ALB. L. REV. 869, 869 (2010/2011).

<sup>11</sup> *See id.* at 872.

<sup>12</sup> See generally Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y 133, 142–54 (2009) (“Absent the ability to peer inside a judge’s mind and observe a thing called ‘ideology’ at work, the only way to measure ‘ideology’ is to focus upon some observable trait or behavior that is correlated with, or indicative of, ideology.”).

ideological conclusions which help to predict how the judges may vote in a particular situation. After the patterns are discerned from the data, a series of cases illustrative of the data are examined. These cases are further explored individually through an examination of the actual dissents, with the goal of determining why the judges voted the way in which they did.

There are a few points to note about the chosen method of this study. First, this study attempts to predict how the judges will vote in future cases. Therefore, this particular study relies on the assumption that the judges will continue to vote in a manner similar to that used in the past. Second, because the data in this study only consists of data taken from the past five years, any change to the dates used for the study has the possibility of altering the conclusions that can be drawn from a particular data set. Finally, this study in no way is intended to be biased one way or the other, but is merely intended to be a guide for federal court practitioners by offering an objective analysis of the recent dissenting opinions of the judges.

## II. JUDICIAL BACKGROUNDS OF JUDGE LIVINGSTON & JUDGE RAGGI

### *A. Background of Judge Debra A. Livingston*

President George W. Bush appointed Judge Livingston to the Second Circuit on May 17, 2007.<sup>13</sup> After graduating Phi Beta Kappa from Princeton University in 1980, Judge Livingston attended Harvard Law School, where she was member of the *Harvard Law Review*.<sup>14</sup> Upon graduation, Judge Livingston worked at the court to which she would eventually be appointed, the United States Court of Appeals for the Second Circuit, serving as a law clerk to Judge J. Edwards Lumbard.<sup>15</sup> After her clerkship, Judge Livingston served stints in both the public and private sector, working as an Assistant United States Attorney for the Southern District of New York from 1986 to 1991 and as an associate at a prestigious New York law firm from 1985 to 1986 and 1991 to 1992.<sup>16</sup> Thereafter, Judge Livingston entered the field of legal academia, joining the faculty of the University of Michigan Law

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<sup>13</sup> FED. BAR COUNCIL, SECOND CIRCUIT REDBOOK 2010–2011 33 (Jeanette Redmond ed., 2010).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

School from 1992 until 1994.<sup>17</sup> At Michigan, she taught evidence, criminal procedure, and a seminar on ethical issues in criminal law.<sup>18</sup> After teaching at Michigan, Judge Livingston joined Columbia Law School faculty in 1994.<sup>19</sup> Judge Livingston continues to teach at Columbia Law School, and she has co-authored a casebook on criminal procedure and has published numerous articles on various legal topics.<sup>20</sup>

### *B. Background of Judge Reena Raggi*

Judge Raggi's background is markedly similar to that of her colleague, Judge Livingston. Another George W. Bush appointee, Judge Raggi was appointed to the Second Circuit on October 2, 2002.<sup>21</sup> Judge Raggi began her legal career as a law clerk for Chief Judge Thomas E. Fairchild of the United States Court of Appeals for the Seventh Circuit.<sup>22</sup> Thereafter, she too worked as an associate at a prestigious New York law firm.<sup>23</sup> After working in private practice for two years, Judge Raggi spent seven years as an Assistant United States Attorney for the Eastern District of New York where she served as the head of the office's narcotics and special prosecutions unit.<sup>24</sup> In 1986, she was named the Eastern District's United States Attorney.<sup>25</sup> Before her appointment to the Second Circuit, Judge Raggi returned to private practice as a partner at another New York law firm.<sup>26</sup> Since her appointment to the court, she has served on many committees and has received many accolades.<sup>27</sup>

## III. THE "RAW DATA": AN EMPIRICAL OVERVIEW OF JUDGES

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<sup>17</sup> *Id.*

<sup>18</sup> University of Michigan Law School, *Faculty News*, 35 L. QUADRANGLE NOTES 4, 4 (1992), available at [http://www.law.umich.edu/historyandtraditions/faculty/Faculty\\_Lists/Alpha\\_Faculty/Documents/Law\\_Quad\\_Notes/Livingston\\_Debra\\_1992.pdf](http://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Documents/Law_Quad_Notes/Livingston_Debra_1992.pdf).

<sup>19</sup> FED. BAR COUNCIL, *supra* note 13, at 33.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 41.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Judge Raggi worked as an associate with Cahill Gordon & Reindel LLP from 1977 to 1979. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Judge Raggi was a partner in the law firm of Windels, Marx, Davies & Ives. *Id.*

<sup>27</sup> *Id.* ("Judge Raggi serves on the Judicial Conference Standing Committee on the Federal Rules. She is a member of the Federal Bar Council and, in 2007, received its Learned Hand Medal for Excellence in Federal Jurisprudence. In 2010–2011 she serve[d] as President of the Federal Bar Council American Inn of Court.").

**LIVINGSTON AND RAGGI'S DISSENTING OPINIONS OVER A FIVE-YEAR SPAN**

TABLE 1: 5-YEAR SUMMARY

Total Number of Cases Decided	11,940
Total Number of Cases in Which Judge Livingston Participated	59
Total Number of Cases in Which Judge Raggi Participated	83
Number of Cases in Which Judge Livingston Dissented	11
Number of Cases in Which Judge Raggi Dissented	7
Overlap in Dissents (cases in which both dissented)	4

Between August 1, 2006 and October 1, 2011, the United States Court of Appeals for the Second Circuit issued a total of 11,940 decisions.<sup>28</sup> Of those 11,940 cases, Judge Livingston participated in fifty-nine.<sup>29</sup> From those fifty-nine cases, Judge Livingston dissented

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<sup>28</sup> See TABLE 1. The cases were found using the search terms “COURT & da(aft 8/1/2006 & bef 10/1/2009)” and “COURT & da(aft 10/1/2009 & bef 10/1/2011)” in the Westlaw United States Court of Appeals for the Second Circuit database.

<sup>29</sup> Goodrich v. Long Island R.R. Co., 654 F.3d 190 (2d Cir. 2011); United States v. Plugh, 648 F.3d 118 (2d Cir. 2011); TradeComet.com LLC v. Google, Inc., 647 F.3d 472 (2d Cir. 2011); Whitley v. Ercole, 642 F.3d 278 (2d Cir. 2011); Wood v. Ercole, 644 F.3d 83 (2d Cir. 2011); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011); *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145 (2d Cir. 2011); United States v. Weingarten, 632 F.3d 60 (2d Cir. 2011); Anemone v. Metro. Transp. Auth., 629 F.3d 97 (2d Cir. 2011); Duarte-Ceri v. Holder, 630 F.3d 83 (2d Cir. 2010); United States v. Miller, 626 F.3d 682 (2d Cir. 2010); IMS Health Inc. v. Sorrell, 630 F.3d 263 (2d Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011); Myers v. Hertz Corp., 624 F.3d 537 (2d Cir. 2010); Famous Horse Inc. v. 5th Ave. Photo Inc., 624 F.3d 106 (2d Cir. 2010); United States v. Whitten, 623 F.3d 125 (2d Cir. 2010); Tracy v. Freshwater, 623 F.3d 90 (2d Cir. 2010); Byrne v. Rutledge, 623 F.3d 46 (2d Cir. 2010); *In re Zarnel*, 619 F.3d 156 (2d Cir. 2010); S. New England Tel. Co. v. Global NAPs Inc., 624 F.3d 123 (2d Cir. 2010); Rosario v. Ercole, 617 F.3d 683 (2d Cir. 2010); Stewart v. Comm'r of Internal Revenue (*In re Estate of Stewart*), 617 F.3d 148 (2d Cir. 2010); Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 617 F.3d 114 (2d Cir. 2010); Vivenzio v. City of Syracuse, 611 F.3d 98 (2d Cir. 2010); United States v. Whitten, 610 F.3d 168 (2d Cir. 2010); United States v. Awan, 607 F.3d 306 (2d Cir. 2010); Dobrova v. Holder, 607 F.3d 297 (2d Cir. 2010); L-3 Commc'n Corp. v. OSI Sys., Inc., 607 F.3d 24 (2d Cir. 2010); United States v. Sabhnani, 599 F.3d 215 (2d Cir. 2010); McDaniel v. Cnty. of Schenectady, 595 F.3d 411 (2d Cir. 2010); T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329 (2d Cir. 2010); Ortiz v. N.Y. State Parole, 586 F.3d 149 (2d Cir. 2009); Watson v. Geren, 587 F.3d 156 (2d Cir. 2009); McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92 (2d Cir. 2009); Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65 (2d Cir. 2009); Coal. on W. Valley Nuclear Wastes v. Chu, 592 F.3d 306 (2d Cir. 2009); Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009); Woods v. Empire Health Choice, Inc., 574 F.3d 92 (2d Cir. 2009); United States v. Daye, 571 F.3d 225 (2d Cir. 2009); Jaramillo v. Weyerhaeuser Co., 570 F.3d 487 (2d Cir. 2009); United States v. Fell, 571 F.3d 264 (2d Cir.

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a total of eleven times.<sup>30</sup> Judge Raggi has very similar numbers with respect to her decision-making while serving on the Second Circuit. Judge Raggi participated in eighty-three decisions over the past five years on the bench,<sup>31</sup> and in seven of those cases she issued

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2009); *United States v. Delis*, 558 F.3d 177 (2d Cir. 2009); *Kickham Hanley P.C. v. Kodak Ret. Income Plan*, 558 F.3d 204 (2d Cir. 2009); *Pettus v. Morgenthau*, 554 F.3d 293 (2d Cir. 2009); *Xiao Kui Lin v. Mukasey*, 553 F.3d 217 (2d Cir. 2009); *Ruiz v. Mukasey* 552 F.3d 269 (2d Cir. 2009); *United States v. White*, 552 F.3d 240 (2d Cir. 2009); *Tom Rice Buick-Pontiac, GMC Truck, Inc. v. Gen. Motors Corp.*, 551 F.3d 149 (2d Cir. 2008); *Mora v. Mukasey*, 550 F.3d 231 (2d Cir. 2008); *Vacold LLC, Immunotherapy, Inc. v. Cerami*, 545 F.3d 114 (2d Cir. 2008); *Estate of Landers v. Leavitt*, 545 F.3d 98 (2d Cir. 2008); *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008); *United States v. MacMillen*, 544 F.3d 71 (2d Cir. 2008); *Reddington v. Staten Island Univ. Hosp.*, 543 F.3d 91 (2d Cir. 2008); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101 (2d Cir. 2008); *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140 (2d Cir. 2008); *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Spool v. World Child Int'l. Adoption Agency*, 520 F.3d 178 (2d Cir. 2008); *Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126 (2d Cir. 2007).

<sup>30</sup> *Wood*, 644 F.3d 83; *Duarte-Ceri*, 630 F.3d 83; *IMS Health Inc.*, 630 F.3d 263; *Famous Horse Inc.*, 624 F.3d 106; *Whitten*, 610 F.3d 168; *Whitten*, 623 F.3d 125; *Stewart*, 617 F.3d 148; *Watson*, 587 F.3d 156; *Local 348-S*, 583 F.3d 65; *Price*, 540 F.3d 101; *Ricci*, 530 F.3d 88.

<sup>31</sup> *United States v. Roberts*, 660 F.3d 149 (2d Cir. 2011); *Cash v. Cnty. of Erie*, 654 F.3d 324 (2d Cir. 2011); *NML Capital v. Republic of Arg.*, 435 F. App'x 41 (2d Cir. 2011); *Harper*, 648 F.3d 132; *Walters v. Indus. & Commercial Bank of China*, 651 F.3d 280 (2d Cir. 2011); *Barclay's Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011); *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167 (2d Cir. 2011); *United States v. Brennan*, 650 F.3d 65; *United States v. Holmes*, 421 F. App'x 76 (2d Cir. 2011); *Cruz-Miguel v. Holder*, 650 F.3d 189 (2d Cir. 2011); *United States v. Clark*, 638 F.3d 89 (2d Cir. 2011); *United States v. Tejada*, 631 F.3d 614 (2d Cir. 2011); *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011); *Mei Fun Wong v. Holder*, 633 F.3d 64 (2d Cir. 2011); *United States v. Preacely*, 628 F.3d 72 (2d Cir. 2010); *United States v. Abu-Jihad*, 630 F.3d 102 (2d Cir. 2010); *United States v. Fuller*, 627 F.3d 499 (2d Cir. 2010); *Whitten*, 623 F.3d 125; *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010); *NML Capital v. Republic of Arg.*, 621 F.3d 230 (2d Cir. 2010); *United States v. Mazza-Alaluf*, 621 F.3d 205 (2d Cir. 2010); *Conn. Bar Ass'n v. United States*, 620 F.3d 81 (2d Cir. 2010); *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010); *Rosario v. Ercole*, 617 F.3d 683 (2d Cir. 2010); *Idea Nuova, Inc. v. GM Licensing Group, Inc.*, 617 F.3d 177 (2d Cir. 2010); *United States v. Heras*, 609 F.3d 101 (2d Cir. 2010); *In re Baker*, 604 F.3d 727 (2d Cir. 2010); *United States v. Kyles*, 601 F.3d 78 (2d Cir. 2010); *United States v. Basciano*, 599 F.3d 184 (2d Cir. 2010); *United States v. Stewart*, 597 F.3d 514 (2d Cir. 2010); *Trust for the Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.*, 591 F.3d 116 (2d Cir. 2010); *Almeida v. Holder*, 588 F.3d 778 (2d Cir. 2009); *Wilson v. Cent. Intelligence Agency*, 586 F.3d 171 (2d Cir. 2009); *United States v. Aguilar*, 585 F.3d 652 (2d Cir. 2009); *Watson*, 587 F.3d 156; *AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436 (2d Cir. 2009); *Lindsay v. Ass'n of Prof'l Flight Attendants*, 581 F.3d 47 (2009); *United States v. Pizzonia*, 577 F.3d 455 (2d Cir. 2009); *United States v. Parker*, 577 F.3d 143 (2d Cir. 2009); *Acosta v. Artuz*, 575 F.3d 177 (2d Cir. 2009); *Wong v. Doar*, 571 F.3d 247 (2d Cir. 2009); *Fell*, 571 F.3d 264; *United States v. Jass*, 569 F.3d 47 (2d Cir. 2009); *Natural Res. Def. Council, Inc. v. FAA*, 564 F.3d 549 (2d Cir. 2009); *Lewis v. Rawson*, 564 F.3d 569 (2d Cir. 2009); *ReliaStar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433 (2d Cir. 2009); *Conyers v. Rossides*, 558 F.3d 137 (2d Cir. 2009); *Garcia-Padron v. Holder*, 558 F.3d 196 (2d Cir. 2009); *Ericksson v. Comm'r of Soc. Sec.*, 557 F.3d 79 (2d Cir. 2009); *Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.*, 556 F.3d 100 (2d Cir. 2009); *New York v. U.S. Dep't of Health & Human Servs. Admin. for Children & Families*, 556 F.3d 90 (2d Cir. 2009); *United States v. Caverla*, 550 F.3d 180 (2d Cir. 2008); *Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Ajlani v.*

a dissenting opinion.<sup>32</sup> Based on these numbers, Judge Livingston dissents in roughly 18.6% of the cases in which she participates. Judge Raggi's dissenting frequency, on the other hand, is even smaller, at only 8.4% of cases in which she participates.

At the outset, several inferences can be drawn based on the foregoing data. First, it seems clear that both judges dissent sparingly. This, in turn, lends itself to suggest that both judges dissent only when they deem it necessary, or for an issue on which they may be very passionate. It also might suggest that both judges often agree with the majority of the judges on the bench of the Second Circuit, but such speculation is beyond the scope of this study. Further, the data seems to reveal that the two judges agree with each other quite often, which may suggest that they both share similar views on many issues.

#### IV. BEHIND THE NUMBERS: JUDICIAL INSIGHTS AND DISPOSITIONS

TABLE 2: CRIMINAL DISSENTS

	Judge Livingston	Judge Raggi
Criminal Dissents	3	4
% of Total Disents	27%	57%
Pro-Defendant Dissents	0	0
Pro-Prosecution Dissents	3	4
Percentage Pro-Defendant	0%	0%
Percentage Pro-Prosecution	100%	100%

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Chertoff, 545 F.3d 229 (2d Cir. 2008); United States v. Magassouba, 544 F.3d 387 (2d Cir. 2008); Barfield v. N.Y.C. Health & Hospitals Corp., 537 F.3d 132 (2d Cir. 2008); United States v. Jones, 531 F.3d 163 (2d Cir. 2008); Li v. Mukasey, 529 F.3d 141 (2d Cir. 2008); United States v. Martinez, 281 F. App'x 39 (2d Cir. 2008); *Ricci*, 530 F.3d 88; Islander E. Pipeline Co., LLC v. McCarthy, 525 F.3d 141 (2d Cir. 2008); United States v. Wexler, 522 F.3d 194 (2d Cir. 2008); ITC Ltd. v. Punchgini, Inc., 518 F.3d 159 (2d Cir. 2008); United States v. Verkhoglyad, 516 F.3d 122 (2d Cir. 2008); United States v. Shamsideen, 511 F.3d 340 (2d Cir. 2008); United States v. Quinones, 511 F.3d 289 (2d Cir. 2007); United States v. Rommy, 506 F.3d 108 (2d Cir. 2007); Phong Thanh Nguyen v. Chertoff, 501 F.3d 107 (2d Cir. 2007); Cohen v. JP Morgan Chase & Co., 498 F.3d 111 (2d Cir. 2007); Walczyk v. Rio, 496 F.3d 139 (2d Cir. 2007); United States v. Sabhnani, 493 F.3d 63 (2d Cir. 2007); Mizrahi v. Gonzales, 492 F.3d 156 (2d Cir. 2007); Zhong v. U.S. Dep't of Justice, 489 F.3d 126 (2d Cir. 2007); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007); United States v. Wagner, 219 F. App'x 35 (2d Cir. 2007); Spina v. Dep't of Homeland Sec., 470 F.3d 116 (2d Cir. 2006); Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219 (2d Cir. 2006); United States v. Thomas, 202 F. App'x 531 (2d Cir. 2006).

<sup>32</sup> See TABLE II. The cases in which Judge Raggi dissented are: *Preacely*, 628 F.3d 72; *Stewart*, 597 F.3d 514; *Whitten*, 623 F.3d 125; *Watson*, 587 F.3d 156; *Wexler*, 522 F.3d 194; *Ricci*, 530 F.3d 88; *Zhong*, 489 F.3d 126.

### *A. Insights with Respect to Criminal Cases*

With respect to dissents in criminal cases, the data suggests that both Judge Livingston and Judge Raggi share common views, leaning more frequently in favor of the prosecution. To illustrate, out of the eleven times that Judge Livingston dissented, three of the cases involved criminal matters and Judge Livingston sided with the prosecution all three times.<sup>33</sup> Judge Raggi's numbers are similar, with four of her eight dissents being criminal in nature and siding with the prosecution all four times.<sup>34</sup> Therefore, over the past five years, both Judge Livingston and Raggi sided with the prosecution one hundred percent of the time in their dissents in a criminal case.<sup>35</sup> In addition, Judge Raggi's criminal dissents comprise fifty-seven percent of her total dissents over the five-year span, which suggests that she is more apt to dissent in criminal rather than civil matters.<sup>36</sup> Moreover, the subject matter of the cases lend themselves to an inference that the judges will not vacate a sentence based on a legal technicality or overrule a lower court's conviction where the evidence heavily favors conviction or if error on the part of the trial court was trivial. Finally, both judges seem hesitant to stray from binding precedent when it comes to criminal cases. Two fairly recent cases, *United States v. Whitten* and *United States v. Preacey*, are illustrative of this point.

#### *1. United States v. Whitten*

*United States v. Whitten* involved the Second Circuit's denial of en banc review of the vacatur of five capital sentences imposed upon the defendant for the brutal murders of two undercover police officers.<sup>37</sup> Judge Livingston also dissented when the Second Circuit heard the case on appeal from the district court. At issue in the case was a purported Fifth and Sixth Amendment violation found by the majority of the court. Specifically, the majority determined that the defendant's Sixth Amendment rights were violated at trial

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<sup>33</sup> See TABLE II.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *id.*

<sup>37</sup> *United States v. Whitten*, 623 F.3d 125, 127 (2d Cir. 2010) (Livingston, J., concurring in part, dissenting in part). The defendant, Ronell Wilson, "shot and killed two undercover police officers at point blank range, murdering the first without warning and the second even as the young officer, a father of three, pleaded for his life." *Id.* at 126.

when the prosecutor argued that the defendant's allocution<sup>38</sup> was not credible, given the fact that it was asserted only after the jury returned a guilty verdict.<sup>39</sup> In a dissent authored by Judge Livingston and joined by Judge Raggi, Judge Livingston vigorously argued that the majority not only disregarded Court of Appeals precedent when making its determination, but significant Supreme Court precedent as well.<sup>40</sup> Judge Livingston further conveyed her concern with the majority's decision, observing that it may have serious future implications. She stated:

[T]he majority opinion creates conflict with the law of this Court and with that of the Seventh Circuit, and is in considerable tension with binding Supreme Court precedent. This alone provides sufficient grounds for *en banc* consideration of the Sixth Amendment issue in this case. I am further troubled, however, by the fact that the panel majority's Sixth Amendment analysis leaves district and state trial courts, who are already grappling with the difficulties inherent in trying capital cases, at a total loss to determine whether and how, if at all, the government may respond to a defendant's post-conviction assertion of remorse and acceptance of responsibility, an occurrence that is certain to repeat itself in [the] future . . . .<sup>41</sup>

The majority also opined that the defendant's Fifth Amendment right was violated when the prosecutor asked the jury to scrutinize the defendant's allocution carefully, "particularly given that '[t]he path for that witness stand *has never been* blocked for [the defendant].'"<sup>42</sup> Specifically, the majority argued that the prosecutor's phrasing of the question could have been construed by the jury as a reference to the defendant's guilt, due to the fact that the defendant never took the witness stand. Accordingly, the majority found that the district court erred when it did not formulate a "variant" instruction for the jury,<sup>43</sup> the failure of which warranted a violation of the defendant's Fifth Amendment right.<sup>44</sup>

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<sup>38</sup> The defendant asserted a claim of "acceptance of responsibility" as a mitigating factor. *Id.* at 127.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 129.

<sup>42</sup> *Id.* at 132 (citing *United States v. Whitten*, 610 F.3d 168, 198 (2010)).

<sup>43</sup> *Whitten*, 623 F.3d at 132.

<sup>44</sup> *Id.* Judge Livingston further stated:

[The defendant], contending that [the] assertion unlawfully burdened his Fifth Amendment rights, requested a curative instruction which the district court denied and

In responding to the Fifth Amendment error propounded by the majority, Judge Livingston summed up her argument by stating:

The panel majority's identification of reversible error in two, isolated statements—to which it ascribed, in both instances and without justification, the *most* negative and *most* damaging implications a jury possibly could have drawn from those comments—is thus starkly at odds not only with the law as it has heretofore been applied by this Circuit, but with the reality of trial practice that has informed the development of that law.<sup>45</sup>

## 2. *United States v. Preacely*

*United States v. Preacely* involved a defendant who pleaded guilty to possession and intent to distribute a controlled substance in a plea bargain after being apprehended for dealing crack cocaine.<sup>46</sup> Law enforcement officials had put the defendant's home under surveillance after a tip revealed that he was dealing the substance out of his residence.<sup>47</sup> When authorities observed the defendant leaving his home with another man, the police attempted to question both men.<sup>48</sup> The defendant fled, but his associate was apprehended and later divulged the whereabouts of the defendant to the police who subsequently apprehended the defendant.<sup>49</sup> Between the indictment and sentencing, the defendant went through serious rehabilitation, and the majority subsequently vacated and remanded his sentence based on “ambiguity” as to the district court’s understanding of the scope of its discretion to depart from the Career Offender Guidelines.<sup>50</sup> In other words, the majority argued that, instead of accounting for the good behavior and serious rehabilitation that the defendant went through after his indictment, the district court dwelled on the fact that the defendant

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*which the majority concedes was not a correct statement of the law.* Nevertheless, based on its determination that the jury could have construed that single sentence, which was advanced *solely* in the government’s discussion of Wilson’s purported “statement of remorse,” as a reference back to the *guilt* phase or to other aspects of the penalty phase, the majority found reversible error in the district court’s failure to craft and to give . . . a so-called “variant” instruction.

*Id.* (citing *Whitten*, 610 F.3d at 200).

<sup>45</sup> *Whitten*, 623 F.3d at 134.

<sup>46</sup> *United States v. Preacely*, 628 F.3d 72, 75 (2d Cir. 2010).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 87 (Raggi, J., dissenting).

was a repeat offender and imposed a sentence to reflect that status.<sup>51</sup> In her dissent, Judge Raggi argued that the Court of Appeals should have given “the district court an opportunity to clarify the purported ambiguity” instead of immediately vacating the sentence and remanding the case for resentencing.<sup>52</sup> Thus, her approach would have been to allow the district court to clarify its understanding of its sentencing discretion before vacating the sentence and remanding the case for resentencing. Much like Judge Livingston, Judge Raggi relied heavily on precedent to support her position; specifically, she stated that the Second Circuit “has applied a ‘strong presumption’ that district courts understand the scope of their discretion to impose sentences that depart or vary from the Guidelines,”<sup>53</sup> and the court “will deem [the] presumption ‘overcome only in the rare situation where the record provides a reviewing court with clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority.’”<sup>54</sup> Therefore, Judge Raggi would have preferred a more conservative approach, which afforded deference to the lower court, before vacating the sentence and remanding for resentencing.

### *B. Conclusions Drawn from Criminal Dissents*

A number of conclusions can be inferred through an examination of the judges’ dissents in criminal cases. First, the raw data, which shows a propensity for both judges to side with the prosecution, suggests that the judges can fairly be said to be pro-prosecution. In addition, through an examination of *Whitten* and *Preaceley*, it can be inferred that both judges display great deference to trial court convictions and are hesitant to overturn a conviction or sentence on appeal unless there was a major error on the part of the trial court. Finally, both judges appear to be ardent adherents to the rule of stare decisis. In both cases, the judges concluded that the majority’s holdings were contrary to existing precedent.

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<sup>51</sup> *Id.* at 86 (Lynch, J., concurring).

<sup>52</sup> *Id.* at 86–87 (Raggi, J., dissenting).

<sup>53</sup> *Id.* (citing *United States v. Brown*, 98 F.3d 690, 694 (2d Cir. 1996); *United States v. Legros*, 529 F.3d 470, 477 (2d Cir. 2008); *United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008)).

<sup>54</sup> *Preaceley*, 628 F.3d at 86–87 (quoting *United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008)).

TABLE 3: CIVIL DISSENTS

	<b>Judge Livingston</b>		<b>Judge Raggi</b>	
	# of Dissents	%	# of Dissents	%
Constitutional	3	37.5%	1	33.3%
Tax	1	12.5%	0	0%
Tort	1	12.5%	0	0%
Labor	1	12.5%	0	0%
Military	1	12.5%	1	33.3%
Immigration	1	12.5%	1	33.3%

### *C. Insights with Respect to Civil Cases*

With respect to civil dissents, the data on Judge Raggi does not seem to be particularly revealing.<sup>55</sup> Three of her total dissents were civil in nature, and she did not dissent on one particular issue more frequently than another.<sup>56</sup> Accordingly, this study does not attempt to draw any conclusions from Judge Raggi's civil dissents due to its small sample size.

The data on Judge Livingston, on the other hand, is somewhat more revealing.<sup>57</sup> Out of the eight times Judge Livingston dissented, three involved constitutional issues:<sup>58</sup> two First Amendment issues<sup>59</sup> and one Fourteenth Amendment equal protection issue.<sup>60</sup> She dissented once on a tax court issue,<sup>61</sup> once on a tort claim,<sup>62</sup> once regarding a labor law dispute,<sup>63</sup> once on a matter involving immigration law,<sup>64</sup> and once involving a review from the Department of the Army Conscientious Objector Review Board.<sup>65</sup> The most revealing statistic seems to be the percentage at which Judge Livingston dissents with respect to constitutional issues. Thirty-seven and one half percent of Judge Livingston's dissents

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<sup>55</sup> See TABLE III.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.*

<sup>58</sup> *Id.*

<sup>59</sup> *IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101 (2d Cir. 2008).

<sup>60</sup> *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008).

<sup>61</sup> *Stewart v. Comm'r of Internal Revenue*, 617 F.3d 148 (2d Cir. 2010).

<sup>62</sup> *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106 (2d Cir. 2010).

<sup>63</sup> *Local 348-S v. Meridian Mgmt. Corp.*, 583 F.3d 65 (2d Cir. 2010).

<sup>64</sup> *Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir. 2010).

<sup>65</sup> *Watson v. Geren*, 587 F.3d 156 (2d Cir. 2009).

involved a case where a constitutional right was implicated.<sup>66</sup> Sixty-six percent of the 37.5%, or 20% of her total dissents, involved a First Amendment issue.<sup>67</sup> Two cases, *Price v. New York State Board of Elections* and *IMS Health, Inc. v. Sorrell*, illustrate Judge Livingston's stance on First Amendment cases.

## 1. First Amendment Issues

### a. *Price v. New York State Board of Elections*

*Price v. New York State Board of Elections* involved a First Amendment challenge to a New York State election law, which expressly prohibited absentee ballots in county committee elections.<sup>68</sup> The plaintiffs in the case, consisting of a district candidate, two voters who wished to cast absentee ballots, and the Albany County Republican Committee, brought the action against the state claiming an infringement of their First Amendment right of association.<sup>69</sup> In determining that the statute employed an impermissible restriction on the plaintiffs' right to political association, the majority refused to apply rational basis review and instead applied a more stringent balancing test articulated in a prior Supreme Court election case.<sup>70</sup>

Dissenting from the majority, Judge Livingston contended that determining the correct standard of review, either rational basis review or the balancing test, is trivial, stressing that the statute should be upheld under either standard.<sup>71</sup> In a dissent which tends to suggest that Judge Livingston is a proponent of states' rights, she recognized that, since the regulation of elections lies within the province of the state, there would invariably be *some* burden that

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<sup>66</sup> TABLE III.

<sup>67</sup> See *supra* note 59 and accompanying text.

<sup>68</sup> *Price v. N.Y. State Bd. Of Elections*, 540 F.3d 101, 103–05. “In every county in New York, the political parties are each represented by a county committee. As a general matter, the party committees ‘prepare rules for governing the[ir] party within [their] political unit[s].’” *Id.* at 104 (quoting N.Y. ELEC. LAW § 2-114(1) (McKinney 2011)).

<sup>69</sup> *Id.* at 104.

<sup>70</sup> The court stated:

“A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.”

*Id.* at 108 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992)).

<sup>71</sup> *Price*, 540 F.3d at 112 (Livingston, J., dissenting).

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exists on an individual's right to vote and of association.<sup>72</sup> According to Judge Livingston, the statute should have been upheld because “[p]laintiffs neither alleged in the complaint nor came forward with evidence to show that the lack of absentee ballots for party committeemen elections in Albany County made voting impossible or even difficult for any voter.”<sup>73</sup> Thus, Judge Livingston determined that the plaintiffs in the case simply did not meet their burden under the standard due to the lack of evidence put forth with respect to absentee ballots. Judge Livingston continued:

[N]othing in the record indicates that it is difficult for voters generally to appear in person at the polls, nor that these particular plaintiffs would have suffered any burden more severe than a minor scheduling inconvenience had they simply remained within their precinct on election day and voted in person. On this record, if the plaintiffs have established any burden at all to their associational rights, it is no more than a peppercorn.<sup>74</sup>

Thus, because the inconvenience suffered by the plaintiffs was merely trivial, Judge Livingston refused to accept the majority's position that the statute was unconstitutional.

*b. IMS Health, Inc. v. Sorrell*

*IMS Health* involved a First Amendment challenge to Vermont's “prescription confidentiality law,” which makes it unlawful for pharmaceutical companies to use prescriber-identifiable (“PI”) data<sup>75</sup> in their marketing campaigns without the prescriber's consent.<sup>76</sup> Appellants were pharmaceutical “data miners,” who would purchase PI data from pharmacies and later sell the data to pharmaceutical companies.<sup>77</sup> The majority concluded that the PI data was protected commercial speech, and in so doing, determined

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 113.

<sup>74</sup> *Id.*

<sup>75</sup> Prescriber-identifiable data is “data which documents the prescribing habits of a particular doctor.” *IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 282 (2d Cir. 2010) (Livingston, J., dissenting). It “is exceptionally valuable to pharmaceutical companies, who make use of it to market their highly profitable brand name drugs through a process known as ‘detailing.’” *Id.* “[D]etailing involves the face-to-face promotion of a particular brand name drug by sales representatives—known as ‘detailers’—who are employed by the pharmaceutical company that manufactures and distributes that drug and make in-person visits to physicians for the purpose of such promotion.” *Id.* at 282 n.2.

<sup>76</sup> *Id.* at 268 (majority opinion).

<sup>77</sup> *Id.*

that the statute was an impermissible restriction imposed on appellant's commercial speech because it "prohibit[ed] pharmaceutical manufacturers from using PI data regarding prescriptions written and dispensed in Vermont in their marketing efforts."<sup>78</sup>

Judge Livingston respectfully dissented, arguing that the majority's analysis was flawed. In her dissent, Judge Livingston parsed the PI data collection and sale process into a "sequence of events," namely, (1) initial gathering of PI data by the pharmacy, (2) the sale of PI data to data miners, and (3) the re-sale of PI data from data miners to pharmaceutical companies.<sup>79</sup> According to Judge Livingston, the First Amendment analysis should begin at the beginning of the "sequence of events," and the most important question for the court to address was "whether the restriction on *pharmacies* implicates the First Amendment interests of the data miners and pharmaceutical companies [in this case]."<sup>80</sup> In addressing that issue, Judge Livingston focused on the fact that Vermont pharmacies collect prescription information pursuant to a state mandate.<sup>81</sup> Thus, Judge Livingston concluded that, since Vermont mandated the collection of PI data by pharmacies, Vermont had "an interest in controlling its further dissemination."<sup>82</sup> In concluding her argument, Judge Livingston stated, "with respect to appellants, Vermont's law operates principally to prevent them from obtaining otherwise private PI data, and as such, does no more than restrict their unfettered *access* to information. This the First Amendment permits."<sup>83</sup>

Moreover, Judge Livingston indicated that, even if the restriction imposed by the Vermont statute was a restriction on commercial speech, she would determine that it was a permissible restriction.<sup>84</sup> She argued that Vermont has a substantial interest in protecting the public health and privacy of prescribers.<sup>85</sup> Additionally, she argued that the statute directly furthers those interests, specifically the interest of containing cost and public health, which is established by the overwhelming evidence of funds spent to "detail" brand name drugs and of increased market share by the use of PI

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<sup>78</sup> *Id.* at 274 (citing VT. STAT. ANN. tit. 18 § 4631 (2011)).

<sup>79</sup> *IMS Health Inc.*, 630 F.3d at 283 (Livingston, J., dissenting).

<sup>80</sup> *Id.* at 284.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (citing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

<sup>84</sup> *IMS Health Inc.*, 630 F.3d at 290.

<sup>85</sup> *Id.*

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data.<sup>86</sup> Finally, Judge Livingston contended that the statute is not more broad than necessary to achieve Vermont's substantial interests, which is a critical factor in determining the constitutionality of commercial speech regulation.<sup>87</sup> She stated that since the restriction imposed is "both minimal and indirect," it is proportionate to the interest that Vermont seeks to further and thus passes Constitutional muster.<sup>88</sup> Judge Livingston argued:

At most, [the statute] indirectly limits the message detailers convey by preventing them from "tailoring" their message based on a particular doctor's past prescribing habits. The law does not otherwise affect the message they deliver, nor does it directly restrict detailing in any way. . . .

Given that minimal and indirect burden on speech, [the statute] is inherently distinct from the sorts of "categorical" and direct bans on commercial speech the Supreme Court has previously struck down.<sup>89</sup>

In so arguing, Judge Livingston rationalized that there was "a 'reasonable fit' between the burdens imposed and the interests furthered,"<sup>90</sup> warranting a finding in favor of the State.

## V. CONCLUSIONS

A review of the data contained in this study reveals a series of helpful insights about Judge Livingston and Judge Raggi. Overall, both judges have a tendency to dissent very sparingly. Judge Livingston dissents a bit more frequently with respect to civil matters, while Judge Raggi dissents more frequently with respect to criminal matters. In either instance, however, both Judge Livingston and Raggi exude an air of conservatism in their dissents.

With respect to criminal cases, the numbers reveal that both judges tend to lean pro-prosecution. Further, *Whitten* and *Preacely* suggest that both judges display great deference to trial court convictions and are unlikely to overturn a conviction or sentence on appeal unless there was a major error on the part of the trial court. The final inference that can be drawn from the criminal cases examined is that both judges respect court precedent, and are hesitant to stray from existing decisions. With respect to civil cases,

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<sup>86</sup> *Id.* at 293.

<sup>87</sup> *See id.* at 295.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

the data and First Amendment case law on Judge Livingston reveal that she is unlikely to strike down a state statute on constitutional grounds, unless clearly warranted. Thus, one might safely assume that she defers to the state when confronted with a challenged statute.

Having devoted the entirety of this study to examining what the dissents of Judge Livingston and Raggi reveal, it is equally important to note that there may be many insights that the data does *not* reveal. For one, the data used from this study is derived from a relatively small sample size. It was intended to capture only the most recent dispositions of the Judges and so, any change in data may alter the final results. Finally, this study is not intended to produce a concrete profile of the judges. Rather, it is intended to be an objective analysis of both judges, drawing reasonable conclusions from the data gathered. Overall, this study is meant to provide some insight to the federal court practitioner should he or she find his or her case before the Second Circuit.