

## NEW YORK'S COURT OF APPEALS

### TOWARD THE LIPPMAN COURT: FLUX AND TRANSITION AT NEW YORK'S COURT OF APPEALS

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#### I. INTRODUCTION: THE SIGNIFICANCE OF CHIEFS

New York has a new chief judge. It seems to have a new Court of Appeals as well. That Court is confident, contentious, and controversial.

The retirement of Judith Kaye, and her replacement with Jonathan Lippman, might only be a change of one in the composition of the state's highest court. But that change in composition has been reflected in a significant change in the Court's dynamics and jurisprudence. It is a change that goes well beyond what might be expected when the appointee of one liberal democratic governor is simply replaced by the appointee of another.<sup>1</sup>

Courts often do reflect the personality, priorities, and ideological persuasion of the judge or justice who occupies the center seat. Indeed, courts are typically referred to by the name of their chief judge or justice at a given time. This is true when we speak of the United States Supreme Court at relevant times as, for example, the "Warren Court," the "Burger Court," or the "Rehnquist Court."<sup>2</sup>

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<sup>1</sup> Judith S. Kaye was nominated by Democratic Governor Mario Cuomo on February 22, 1993, and confirmed by the New York State Senate and sworn in as chief judge on March 23, 1993. THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 805, 812 (Albert M. Rosenblatt ed., 2007). Jonathan Lippman was nominated by Democratic Governor David Paterson on January 13, 2009, and confirmed and sworn in on February 11, 2009. Joel Stashenko, *Lippman Is Pick for Chief Judge*, N.Y. L.J., Jan. 14, 2009, at 1; Joel Stashenko, *Senate Confirms Lippman as Chief Judge*, N.Y. L.J., Feb. 13, 2009, at 1.

<sup>2</sup> See, e.g., HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S.

Such usage is no less appropriate when referring to the Court of Appeals as, for example, the “Cardozo Court”—that is one that can never be excluded when speaking of New York’s historically prominent tribunal—or more recently, the “Cooke Court,” the “Wachtler Court,” or the “Kaye Court.”

Moreover, these appellations are not merely conveniences. They are not simply easy shorthands for referring to a court at a specific period. They also recognize the reality that the individual who is chief judge or justice makes a difference, leaves an imprint, helps to define the era that is bounded by his or her tenure, and that a court’s dynamics and direction usually do change—with some chiefs, of course, more than others.

By way of illustration, the tenures of the last three chief justices of the Supreme Court have surely been distinct. With Earl Warren at the helm, the “Warren Court” actively expanded the protections of civil rights, civil liberties, and the rights of the accused.<sup>3</sup> Under Chief Justice Warren Burger, the “Burger Court” was a transitional institution, retrenching from rulings of the preceding era, while rendering some rights-protecting landmarks of its own.<sup>4</sup> With William Rehnquist in the center seat, the “Rehnquist Court”

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SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 197, 233, 275 (5th ed. 2008); ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO BURGER* 234, 283 (3d ed. 1979).

<sup>3</sup> ABRAHAM, *supra* note 2, at 202–03; MASON, *supra* note 2, at 251–03; *see generally* BERNARD SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* (1983). In the civil realm, *see for example*: *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting freedom of the press from all non-malicious defamation); *Sherbert v. Verner*, 374 U.S. 398 (1963) (invalidating incidental burden on free exercise of religion which did not satisfy compelling government interest/strict scrutiny test); *Brown v. Board of Education*, 349 U.S. 294 (1954) (prohibiting racial segregation in education). In the criminal realm, *see Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending right to counsel to all criminal prosecutions); *Mapp v. Ohio*, 367 U.S. 643 (1961) (imposing exclusionary rule on states for evidence obtained in violation of federal constitutional search and seizure protections).

<sup>4</sup> ABRAHAM, *supra* note 2, at 233–74; MASON, *supra* note 2, at 283–323; *see generally*, NEITHER CONSERVATIVE NOR LIBERAL: THE BURGER COURT ON CIVIL RIGHTS AND LIBERTIES (Francis Graham Lee ed., 1983); *United States v. Leon*, 468 U.S. 897 (1984) (limiting exclusionary rule for evidence obtained through unconstitutional searches or seizures to cases where police acted in bad faith); *Michigan v. Long*, 463 U.S. 1032 (1983) (extending permissible scope of *Terry* pat down for weapons to entire passenger compartment of automobile; expanding jurisdiction to state court rulings where federal question in doubt to review possible over-protection of rights of the accused); *Oregon v. Hass*, 420 U.S. 714 (1975) (allowing impeachment of a defendant with statements obtained in violation of right to counsel invoked upon *Miranda* warnings); *cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (recognizing a public and press right under the First Amendment to attend criminal trials); *Roe v. Wade*, 410 U.S. 113 (1973) (extending the right to privacy to a woman’s right to choose to terminate a pregnancy); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (excusing Amish community from state education mandates on grounds of free exercise of religion).

vigorously accelerated the undoing of the “Warren Court” decisions, drastically diluting or reversing disfavored liberal<sup>5</sup> precedents, while establishing its own conservative ones.<sup>6</sup>

Earl Warren was chief justice for fifteen years; Warren Burger for seventeen; William Rehnquist for nineteen. They each had plenty of time to make their marks upon the Court. The chief judges of New York typically have much less time. While appointments to the nation’s highest Court are for life,<sup>7</sup> New York law mandates the retirement of judges on its highest court at the age of seventy.<sup>8</sup> Nevertheless, the state’s chief judges have placed their individual imprints on the Court of Appeals during their respective tenures. Jonathan Lippman’s immediate predecessors are no exception.

Under Lawrence Cooke, chief judge for six years, the “Cooke

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<sup>5</sup> The terms “liberal” and “conservative” are used here in the same sense that they are commonly used in judicial studies by political scientists and legal commentators, such as the National Science Foundation’s United States Supreme Court database project. See, e.g., Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 (1989); Vincent Martin Bonventre, *New York’s Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1166 n.11 (1989) [hereinafter Bonventre, *Chief Judge Kaye*]. Hence, “liberal” refers to votes and decisions in support of civil rights and liberties, equal protection, or rights of the accused. “Conservative,” on the other hand, refers to voting and decisions supportive of the government or prosecution against claims of civil rights and liberties, equal protection, or rights of the accused.

<sup>6</sup> ABRAHAM, *supra* note 2, at 275–314; see generally STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA (2000). In the civil realm, see *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating a federal crime prohibiting gun possession near a school on the ground that the connection to interstate commerce was too remote); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (narrowing permissible federal affirmative action to remedy past discrimination); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (construing precedents as requiring only a reasonable and religious-neutral government interest to justify a prohibition on the free exercise of religion). In the criminal realm, see *California v. Hodari*, 499 U.S. 621 (1991) (holding that police pursuit of an individual need not be based on a warrant, probable cause, or even reasonable suspicion because it is not a “seizure” under federal constitutional search and seizure protections without physical contact or success); *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that police need no articulable reason to approach an individual, even within the close confines of a bus, and ask incriminating questions and consent to search); *California v. Greenwood*, 486 U.S. 35 (1988) (searching an individual’s garbage put out for pick-up need not be based on a warrant, probable cause, or even reasonable suspicion because it is not a “search” under federal constitutional search and seizure protections). For a discussion of the role reversal of the Supreme Court and the state high courts brought about by the conservative direction of the Supreme Court under Burger and, even more so, under Rehnquist, see Vincent Martin Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 ALB. L. REV. 841, 842–52 (2007) [hereinafter Bonventre, *Changing Roles*].

<sup>7</sup> U.S. CONST. art. III, § 3 (“[S]hall hold their Offices during good Behavior.”).

<sup>8</sup> N.Y. CONST. art. VI, § 25(b). See *Maresca v. Cuomo*, 64 N.Y.2d 242, 475 N.E.2d 95, 485 N.Y.S.2d 724 (1984) (upholding the mandatory retirement against age discrimination challenges).

Court” became institutionally what he was individually throughout his total of ten years on New York’s highest bench—a national leader in the state constitutional protection of rights and liberties that were being curtailed as a matter of federal constitutional law by an increasingly conservative Supreme Court.<sup>9</sup> With Sol Wachtler at the helm for eight years, the “Wachtler Court” viewed the state’s constitution as a supplemental source of rights to which it resorted following reversals by the Supreme Court and, in its later years, became deeply divided as the chief judge and his Court moved into a more conservative direction.<sup>10</sup>

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<sup>9</sup> Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES IN STATE CONSTITUTIONAL L. 48–51 (1989) [hereinafter Bonventre, *State Constitutionalism*]; THE JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 1, at 769, 772–74; *see, e.g.*, *Beach v. Shanley*, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984) (construing state shield law broadly to protect a reporter’s right to keep sources confidential even where a source’s disclosure was unlawful); *People v. Skinner*, 52 N.Y.2d 24, 417 N.E.2d 501, 436 N.Y.S.2d 207 (1980) (prohibiting, under state constitutional right to counsel, any interrogation after attorney instructs police not to question accused in his absence); *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978) (striking ex-parte sales under the state’s lien law as violative of state constitutional due process); *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (dismissing indictment on state constitutional grounds because of “reprehensible police action” in brutally inducing informant to draw defendant into a drug sale).

<sup>10</sup> Bonventre, *State Constitutionalism*, *supra* note 9, at 52–54 (describing Court’s resort to the state constitution following reversals by the Supreme Court). *Accord* Vincent Martin Bonventre, *New York and the Supremes: State Constitutional Law on the Rebound at the Court of Appeals*, ST. CONST. COMMENT. & NOTES, Summer 1994, at 24–29 (on file with author) [hereinafter Bonventre, *New York and the Supremes*]. *But see* Vincent Martin Bonventre, *State Constitutional Adjudication at the Court of Appeals, 1990 and 1991: Retrenchment Is the Rule*, 56 ALB. L. REV. 119, 121–42 (1991) [hereinafter Bonventre, *Retrenchment Is the Rule*] (noting that the Court was more conservative and divided). *Accord* Vincent Martin Bonventre, *The New York Court of Appeals: An Old Tradition Struggles with Current Issues*, 22 PERSP. ON POL. SCI. 149 (1993) (reviewing divisions on state constitutional adjudication) [hereinafter Bonventre, *An Old Tradition Struggles with Current Issues*]; Vincent Martin Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, 4 EMERGING ISSUES IN STATE CONST. L. 1, 2–15 (1991) [hereinafter Bonventre, *State Constitutional Recession*]; Vincent Martin Bonventre, *Court of Appeals: State Constitutional Law Review*, 14 PACE L. REV. 353, 445–48 (1991) [hereinafter Bonventre, *Court of Appeals*].

Among the decisions resorting to state constitutional law following reversal by the Supreme Court, *see, e.g.*, *People v. Harris*, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991) (rejecting Supreme Court’s finding that subsequent stationhouse confession was sufficiently attenuated from the prior illegal confession to be admissible); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986) (requiring more detailed information to support a warrant to seize adult videos than the Supreme Court held necessary); *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986) (adopting impact test for burdens on expressive activity—adult bookstore—rather than Supreme Court’s intent test, and requiring measures “no broader than necessary”). Among the bitterly divided decisions evincing the Wachtler Court’s conservative shift, *see, e.g.*, *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989) (rejecting, in a 4-3 decision, the “least restrictive means” test for indirect burdens on expressive activities despite, in the dissenters’ view, *Arcara*’s plain language);

With Judith Kaye as *primus inter pares* for sixteen years—a Court of Appeals record and an exception to the typically much shorter tenures—the “Kaye Court” initially returned to the more progressive direction of the Cooke and early-Wachtler Courts.<sup>11</sup> But following harsh public criticism initiated by Governor George Pataki for being too liberal and, then, staffed with several appointees of that governor, the Court became increasingly cautious and conservative.<sup>12</sup>

That is a thumbnail—i.e., over simplified—sketch of the Court over three decades and three chief judges. What follows is a closer review of the Court in the years immediately preceding Jonathan Lippman’s appointment in 2009. We will then take a look at a number of developments that have already distinguished the Lippman Court from its predecessor, and this will include a survey of some illustrative significant decisions.

## II. FLUX IN THE KAYE ERA

At the outset, the Kaye Court behaved as one might expect. By the time she was elevated from associate to chief judge in early 1993, Judith Kaye had already established herself, both on the Court and off, as an eminent judicial scholar and a national leader

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*Caruso v. Ward*, 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988) (permitting, in a 5–2 decision, random, suspicionless drug-testing of police officers despite recent precedent); *In re Patchogue-Medford Cong. of Teachers v. Board of Education*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (forbidding the same practice for public school teachers); *People v. Bing*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990) (overruling the right to counsel protections previously adopted in *People v. Bartolomeo*, 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981)).

<sup>11</sup> See generally Bonventre, *Chief Judge Kaye*, *supra* note 5; Marcia B. Smith, Comment, *Judith S. Kaye: Progressive Decisionmaking Rooted in the Common Law*, 59 ALB. L. REV. 1763 (1996).

<sup>12</sup> VINCENT MARTIN BONVENTRE, *STREAMS OF TENDENCY ON THE NEW YORK COURT: IDEOLOGICAL AND JURISPRUDENTIAL PATTERNS IN THE JUDGES’ VOTING AND OPINIONS* 3–4, 67–128 (2003) [hereinafter BONVENTRE, *STREAMS*]; Vincent Martin Bonventre & Kelly M. Galligan, *Court of Appeals Update, 2000 & 2001: Conservative Voting, Narrow Rulings*, 65 ALB. L. REV. 1085, 1105–08, 1117–19 (2002); Vincent Martin Bonventre & Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments*, 64 ALB. L. REV. 1355, 1385–87 (2001); see, e.g., *People v. Tortorici*, 92 N.Y.2d 757, 709 N.E.2d 87, 686 N.Y.S.2d 346 (1999) (upholding, in Kaye authored majority opinion, trial judge’s decision to permit prosecution of questionably competent defendant without a competency hearing); *In re Duckman*, 92 N.Y.2d 141, 699 N.E.2d 872, 677 N.Y.S.2d 248 (1998) (removing judge for misconduct following disciplinary proceedings politically instigated and publicly urged by Governor Pataki because of the judge’s “criminal coddling”); *Johnson v. Pataki*, 90 N.Y.2d 900, 685 N.E.2d 211, 662 N.Y.S.2d 430 (1997) (upholding, in a 4–3 decision written by Kaye, Governor Pataki’s removal of an anti-death penalty local district attorney with the pro-death penalty attorney general to prosecute a capital case).

in advocating independent state constitutional decision making.<sup>13</sup> Immediately, her Court began to distinguish itself from its recent past under her predecessor and among state supreme courts across the country. In brief, the Court became noticeably more rights-protective than it had been, and it did so by applying its own case law, despite the continuing opposite direction of contemporary Supreme Court jurisprudence.<sup>14</sup>

A couple of years into the Kaye Court, however, it changed. It did so dramatically. Both the circumstances and the consequences were striking. Beginning in late 1995, the recently elected Republican Governor George Pataki, commenced a campaign of publicly castigating the Court of Appeals. He condemned the Court for “irrational, mindless procedural safeguards for criminals,” for “putting the rights of the defendant . . . ahead of the rights of the people to walk the streets, go to school, and live at home in safety,” for “protecting the guilty and not the innocent,” etc.<sup>15</sup> The governor’s tirades against the Court were joined by other politicians and by the New York tabloids.<sup>16</sup> The criticisms, however inaccurate or even outlandish they might have been,<sup>17</sup> seemed to have an impact. The Court’s decisions, the judges’ voting, and other observable patterns changed.

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<sup>13</sup> Sarah Lyall, *Cuomo Nominates Judith Kaye for Top New York Judicial Post*, N.Y. TIMES, Feb. 23, 1993, at A1 (reporting that legal scholars were praising Kaye’s appointment); Kevin Sack, *Woman in the News; Cuomo’s Choice to Head the Court of Appeals: A Judge’s Judge*, N.Y. TIMES, Feb. 23, 1993, at B2 (noting Kaye’s national reputation as one of the leading state court judges in the country); Bonventre, *Chief Judge Kaye*, *supra* note 5, at 1169–99 (reviewing Kaye’s concurring and dissenting opinions favoring greater state constitutional protection of rights and liberties); Smith, *supra* note 11, at 1773–79 (reviewing Kaye’s push for independent state constitutional law at the Court). For her scholarly writings at the time included, see titles listed in BONVENTRE, STREAMS, *supra* note 12, at 77 n.39, and in Smith, *supra* note 11, at 1775 n.124.

<sup>14</sup> Bonventre, *Chief Judge Kaye*, *supra* note 5, at 1199–1205 (finding a liberal shift in the voting and decisional output at the Court following the resignation of Sol Wachtler and the elevation of Judith Kaye); Vincent Martin Bonventre & John D. Powell, *Changing Course at the High Court*, EMPIRE ST. REP., Mar. 1994, at 55 (noting the same). The same post-Wachtler/early-Kaye voting and decisional output was found by John M. Bagyi, Comment, *Carmen Beauchamp Ciparick: The Court of Appeals’ Voice of Compassion*, 59 ALB. L. REV. 1913, 1929–31 (1996).

<sup>15</sup> Vincent Martin Bonventre & Judi A. DeMarco, *Court Bashing and Reality: A Comparative Examination of Criminal Dispositions at the New York Court of Appeals and Neighboring High Courts*, AMERICAN B. ASS’N JUDGES’ J., Winter 1997, at 9, 9–10 [hereinafter Bonventre & DeMarco, *Court Bashing*].

<sup>16</sup> *Id.* at 10 (reviewing newspaper articles describing the Court of Appeals as “coddling dangerous criminals” and as a “[f]riend to the [f]elon”); see also BONVENTRE, STREAMS, *supra* note 12, at 71–72 (2003).

<sup>17</sup> Bonventre & DeMarco, *Court Bashing*, *supra* note 15, at 10–13, 50–51; Vincent Martin Bonventre & Judi A. DeMarco, *Court of Appeals Bashing: A Reality Check*, N.Y. STATE B.J., July–Aug. 1997, at 10, 11–15.

In criminal cases, the specific area of law signaled out for the harshest rebuke, the before-and-after differences were stark. Moreover, these differences were particularly revealing. Criminal law, with its ever-present tension between “law and order” and the rights of the accused, is especially sensitive to political changes and leanings.<sup>18</sup>

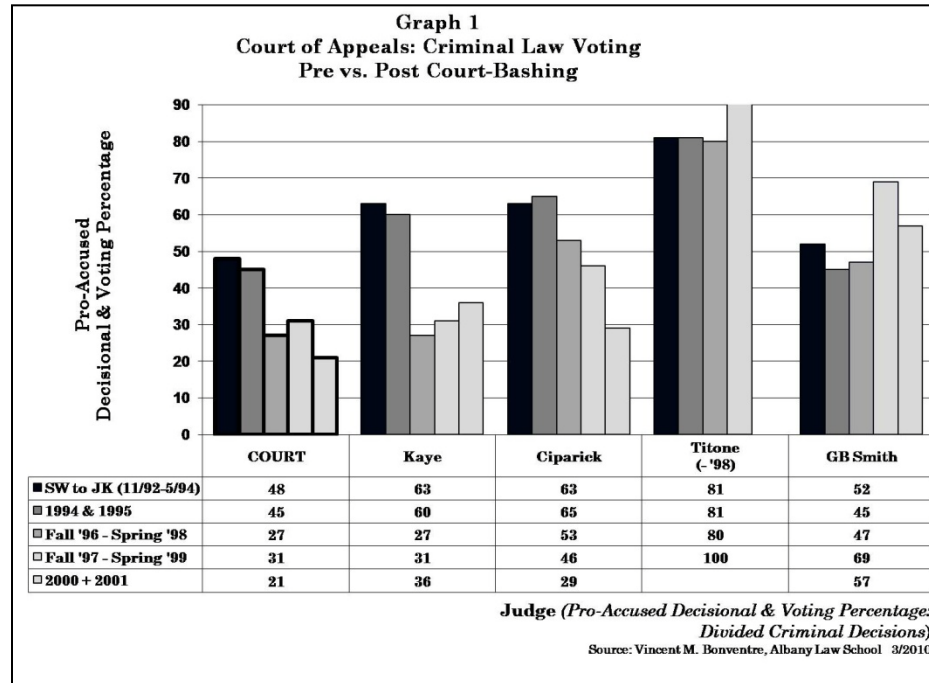
In deciding these criminal cases, the Court of Appeals became considerably more pro-prosecution. The proportion of its decisions finding merit in the claims of the accused dropped substantially. The drop was not a mere aberration. Instead, it persisted, establishing a sharp and continued contrast with the years prior to “the court-bashing.”<sup>19</sup>

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<sup>18</sup> For an examination of the inherent conflict of interests and perspectives in criminal law, see the seminal writings of Herbert Packer, e.g., *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (identifying and defining the competing “crime control” and “due process” approaches to criminal justice).

<sup>19</sup> See Graph 1. As depicted in that graph, the Court sided with the accused in nearly half of its divided criminal cases in the immediate post-Wachtler/early-Kaye period, and this continued for the next couple of years. Immediately following the 1995–1996 court-bashing, that pro-accused proportion dropped considerably and within a few years was less than half what it had been. The graph also shows the voting of the Court’s four most liberal-leaning judges at the time. See BONVENTRE, STREAMS, *supra* note 12, at 19 (Vito Titone); *id.* at 67 (Judith Kaye and Carmen Ciparick); *id.* at 129 (George Bundy Smith). Kaye’s pro-accused voting fell in half immediately. Ciparick’s did so within a few years. Neither Titone’s nor Smith’s voting was similarly affected. See also *supra* note 12 and accompanying text.

Data for Graph 1 was derived from prior studies (Bonventre, *Chief Judge Kaye*, *supra* note 5, at 1201–08; Bagyi, *supra* note 14, at 1929–32; Galligan, *supra* note 12, at 1087–88); the tables in BONVENTRE, STREAMS, *supra* note 12, at 249–76; and the graphs throughout this article. The focus on divided decisions in judicial studies has been explained countless times by generations of judicial scholars and legal commentators and need not be repeated here. See Galligan, *supra* note 12, at 1085–86; C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES*, 1937–47, at xiii (1948).



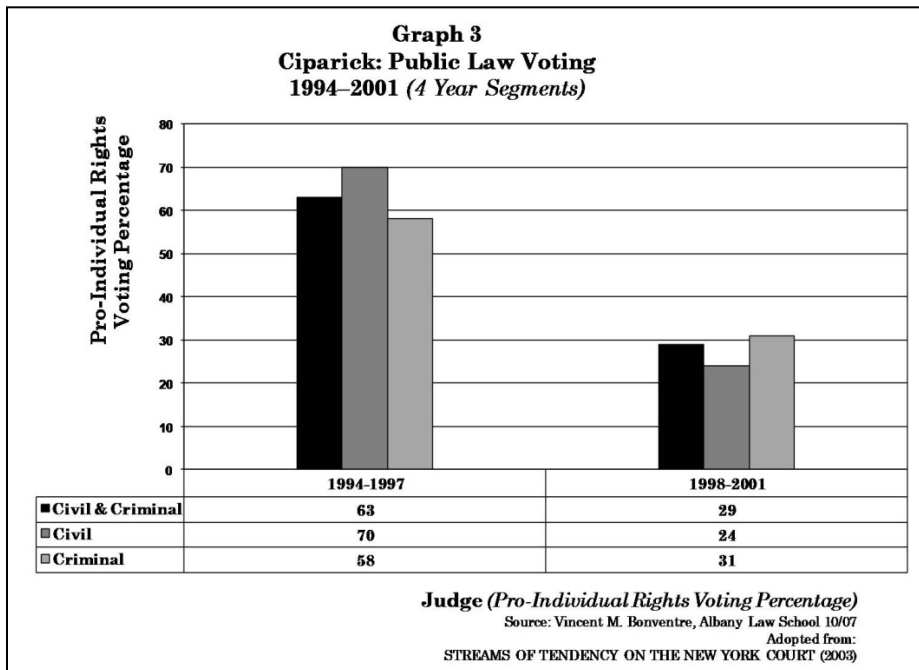
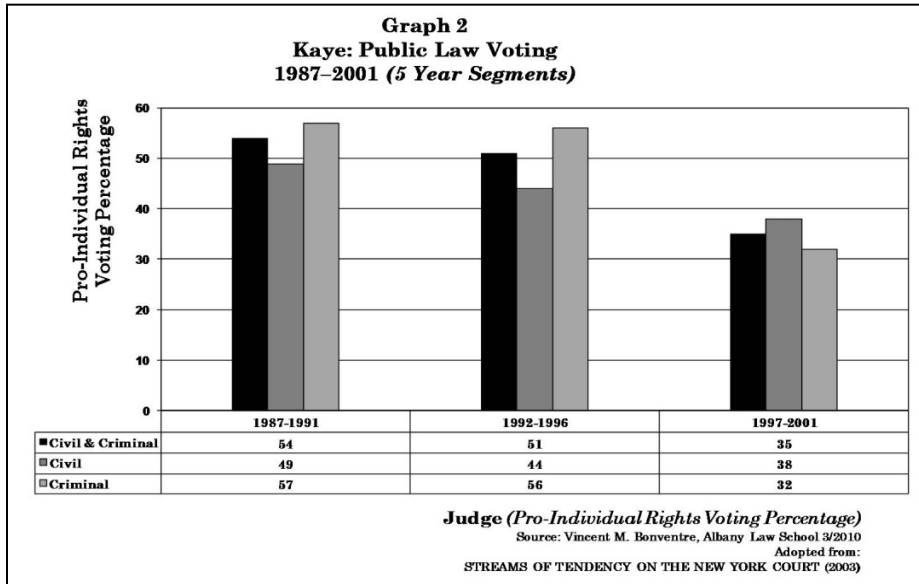
This rightward swing was observable in the voting patterns of two of the Court's more liberal members.<sup>20</sup> Chief Judge Kaye's voting in favor of the accused dropped in half immediately following the Pataki-instigated excoriation of the Court. Judge Carmen Ciparick's dropped a couple of years later.<sup>21</sup> As with the change in the Court's decisions, the change in Kaye's and Ciparick's voting was not aberrational. The pro-prosecution swing in the voting of each of those two judges was part of a pattern that evinced a clear and substantial contrast between the years before and the years after the court-bashing.<sup>22</sup>

<sup>20</sup> BONVENTRE, STREAMS, *supra* note 12, at 79–82 (reviewing Kaye's liberal opinions and voting prior to the court-bashing); *id.* at 82–85 (noting the same for Ciparick); *see also* Bagyi, *supra* note 14, at 1929 (finding "liberal" tendencies apparent in [Ciparick's] separate opinions").

<sup>21</sup> *See* Graph 1 and discussion *supra* note 19.

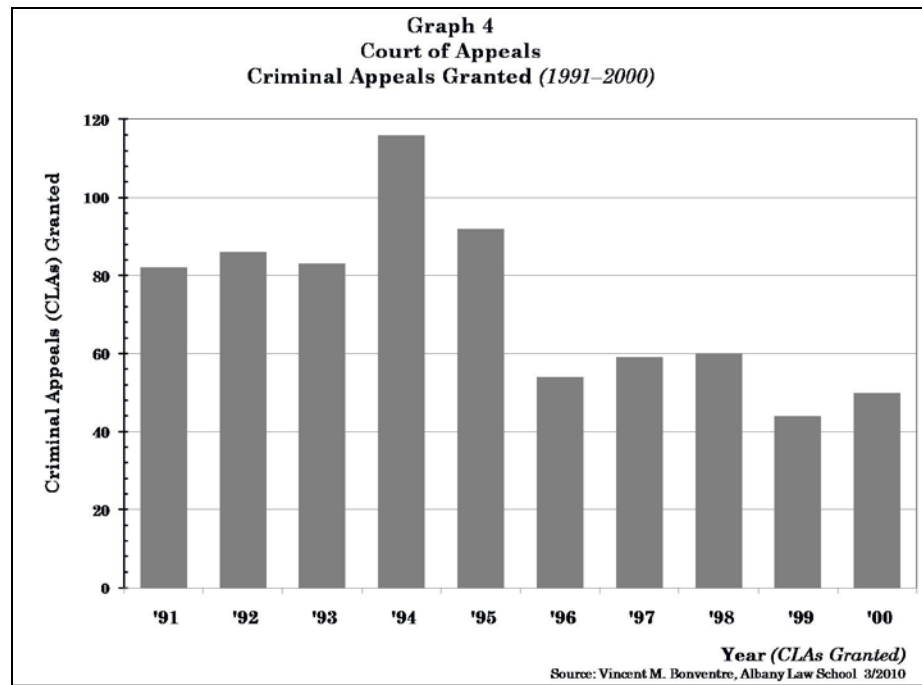
<sup>22</sup> *See* Graphs 2 and 3. Graph 2, based upon data from a study of the Court of Appeals from 1987 through 2001, depicts Kaye's voting across those fifteen years divided into five-year periods. The latter five-year period, which was subsequent to the court-bashing, shows an unmistakable drop in Kaye's liberal—i.e., pro-individual rights—voting. Her voting in criminal cases was decidedly less pro-accused than it had been in the two previous—i.e., pre court-bashing—periods.

Graph 3, based on data from the same study, depicts Ciparick's voting over the total eight years she had then been on the Court, divided into two four-year periods. The latter period



shows an equally substantial drop in her liberal voting. Notably, that period followed both the court-bashing and the retirement of Judge Vito Titone, the Court’s foremost liberal and Ciparick’s dear friend. See Carmen Beauchamp Ciparick, *Judge Vito J. Titone*, 71 ALB. L. REV. 1061 (2008) (discussing her selection of Titone as her favorite Judge in Court history).

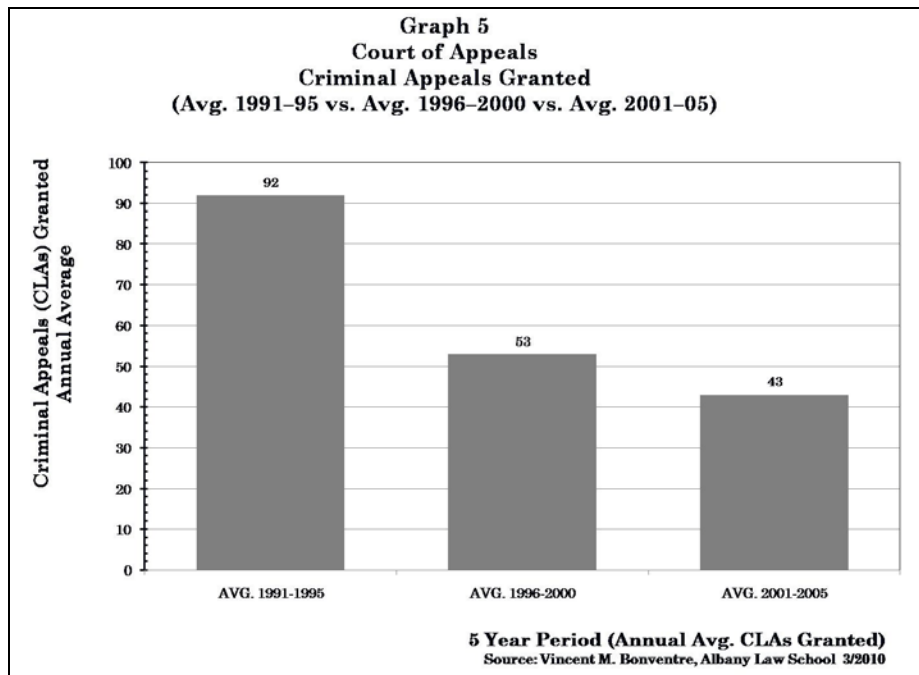
There were other changes that corroborate what the timing of the decisional and voting shifts certainly suggest—i.e., that the shifts were not mere happenstance. At the same time that those shifts were taking place, the Court began to grant appeals in fewer criminal cases. The very kind of cases that were the subject of the critical uproar against the Court were now being accepted for review in significantly reduced numbers.<sup>23</sup> In fact, the number of criminal grants by the Court was cut nearly in half immediately. Moreover, that sharp decrease was not an aberration, any more than was the pro-prosecution shift in the Court's decisional and voting patterns. Rather, it persisted and, within a few years, the number of criminal grants was reduced to less than half of what it was prior to the court-bashing.<sup>24</sup>



<sup>23</sup> See Graph 4. That graph depicts the number of criminal grants—i.e., criminal leave applications (“CLAs”) granted—for each of the five years immediately preceding the court-bashing and for each of the five years thereafter. The figure for 1997 is adjusted to reflect the fact that fifty-four CLAs granted that year were actually from a single consolidated appeal at the appellate division, which was then treated and decided as a single consolidated appeal at the Court of Appeals. See *People v. Allen*, 92 N.Y.2d 378, 703 N.E.2d 1229 (1998).

The figures on criminal grants throughout this article do not rely on those published in the official Court of Appeals Annual Reports, but are independently determined from searches on Westlaw, Lexis-Nexis, and the Court's weekly list of new case filings.

<sup>24</sup> See Graph 5. That graph depicts the annual average number of criminal grants for the five-year period immediately preceding the court-bashing and for the two five-year periods thereafter.

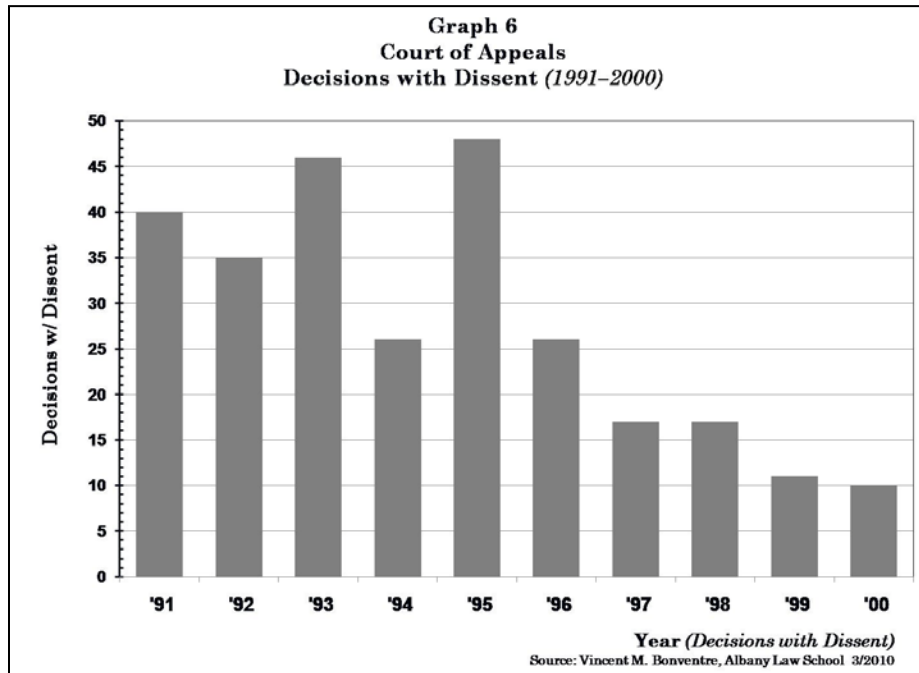


There was also the matter of dissents. More specifically, there was the matter of the sharply reduced frequency with which dissenting opinions were being written. There is strength in numbers—on a court as elsewhere. There is strength in unity—in consensus and, even more so, in unanimity. A divided opinion confirms that there is more than one way to decide a case. It leaves the judges in the majority more exposed than in a unanimous decision to criticism that they got it wrong. The proof, as well as the criticism itself, is right there in the dissent.

Not surprisingly then, judges who have endured harsh public criticism might favor unanimous opinions. A Court that has endured the kind of public denunciation that the Court of Appeals did at the hands of Pataki et. al might well seek some cover and consolation in unanimity whenever possible. Whether or not these were the reasons, the number of divided decisions at the Court did drop precipitously following the court-bashing.

As with the number of criminal grants, the number of decisions with dissent declined sharply at the same time that the Court's decisional and voting patterns turned more pro-prosecution. In the years prior to the court-bashing, the number of cases with dissent averaged around forty annually. Afterwards, the number was

typically less than half of that.<sup>25</sup>



A rightward shift in decisions and in voting. A dramatic drop in criminal grants. An even greater drop in decisions with dissent. All occurring in the immediate aftermath of the Pataki-initiated public denunciation of the Court. A mere coincidence? To be sure, nearly anything is possible. What is not a mere possibility but fact, however, is that these changes did take place and that they took place when they did.

What we know in addition to these facts is that Chief Judge Kaye preferred unanimity. The sharp reduction in dissents was apparently to her liking. This would be no surprise to those who worked with her at the Court.<sup>26</sup> Indeed, in discussing the matter

<sup>25</sup> See Graph 6. That graph depicts the number of divided decisions—i.e., decisions with dissent—for each of the five years immediately preceding the court-bashing and for each of the five years thereafter.

As with the figures for criminal grants, the figures for divided decisions do not rely on those published in the official Court of Appeals Annual Reports. They are independently determined from searches on Westlaw and Lexis-Nexis and a review of the individual decisions.

<sup>26</sup> Indeed, it is no secret to judges and clerks at the Court during Kaye's tenure, or to anyone else who has read her opinions or heard her speak publicly about the Court's work, that she preferred consensus and often labored to bring it about. This is consistent with my

recently with the *New York Times*, Kaye said that she “landed on the side of unanimity, where possible, without compromising principles.” Where there were disagreements among her colleagues, she said that she would try to “fold something into the majority opinion” to lure other votes.<sup>27</sup>

It appears that she was successful for several years. It appears that she was able to “fold” enough into the majority opinions that the number of divided decisions remained quite low for some time after the court-bashing. By 2004, however, dissents were again on the rise. By that time, four of Kaye’s colleagues—a majority on the seven member Court—were appointees of Governor Pataki.<sup>28</sup> The number of divided decisions more than doubled.

From an annual average of less than fourteen prior to 2004, the number of divided decisions rose to an average of more than thirty-three in the years thereafter.<sup>29</sup> Those non-unanimous decisions were usually the result of one or more Pataki appointees not joining the “fold.” In fact, some of those appointees were writing dissenting opinions at a rate several times that of any other judge on the Court.<sup>30</sup> They evidently did not share or conform to Chief Judge Kaye’s strong preference for unanimity and consensus.

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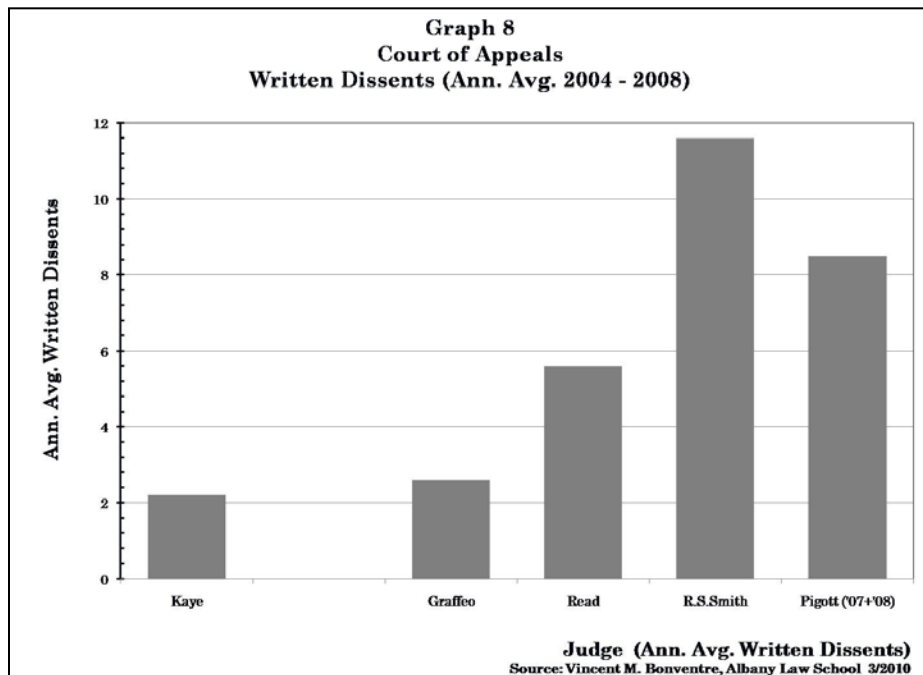
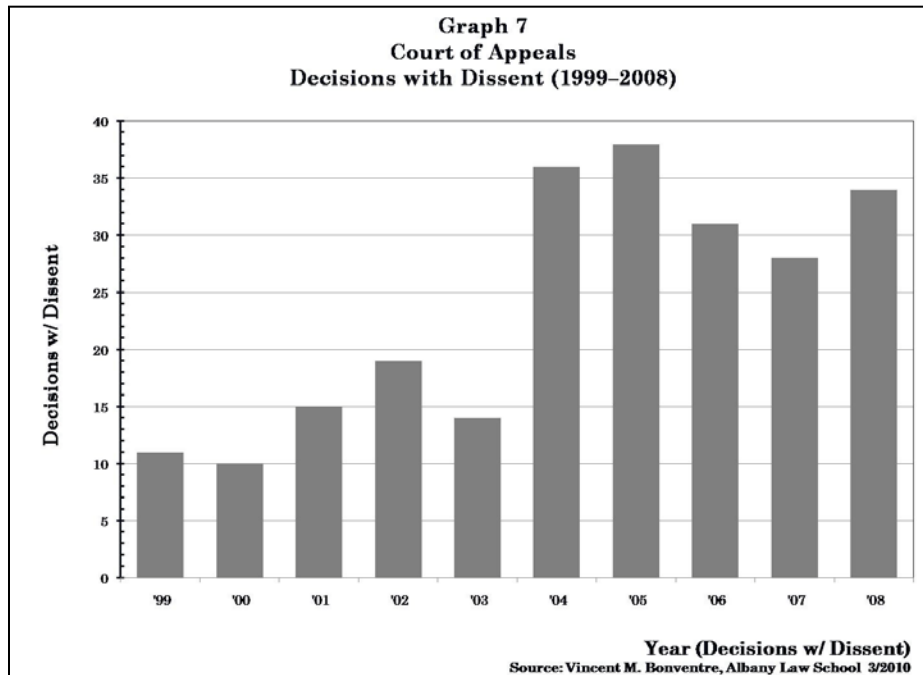
general observations as a law clerk at the Court for six years and with the general observations of other law clerks and judges expressed in general conversations about the Court.

<sup>27</sup> William Glaberson, *Top Judge Sets Liberal Course for New York*, N.Y. TIMES, Feb. 18, 2010, at A1.

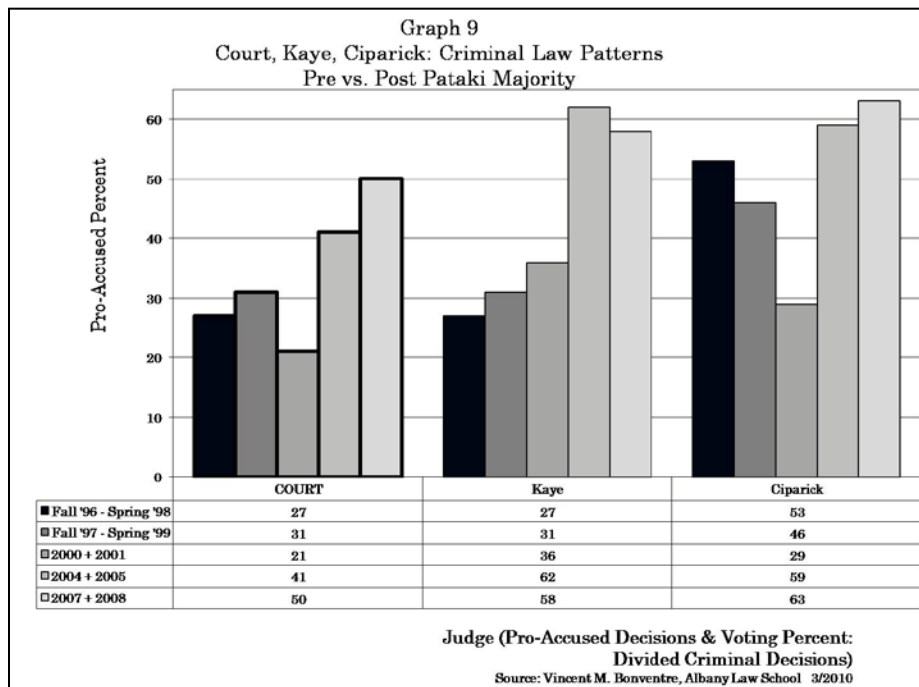
<sup>28</sup> Albert Rosenblatt was appointed by Pataki in 1998; Victoria Graffeo in 2000; Susan Read in 2003; and Robert Smith in 2003. Smith actually replaced Pataki’s first appointee, Richard Wesley, who was appointed in 1996, but left the Court in 2003 to accept an appointment to the U.S. Court of Appeals for the Second Circuit. Pataki’s final appointee was Eugene Pigott in 2006. See State of New York, Court of Appeals, <http://www.nycourts.gov/ctapps/> (last visited Apr. 12, 2010); see also THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY, *supra* note 9, at vi, 931, 955, 977, 984, 991.

<sup>29</sup> See Graph 7. That graph depicts the number of divided decisions for each of the five years prior to 2004 and for each of the five years thereafter.

<sup>30</sup> See Graph 8. That graph depicts the annual average number of dissenting opinions authored by Kaye and by each of the four Pataki appointees for the five year period beginning in 2004 and ending in 2008, Kaye’s final year on the Court. Other than Graffeo, each of the Pataki appointees authored at least a few more dissenting opinions per year than Kaye, with Smith and Pigott writing more than four times as many.



Though Kaye was not succeeding in keeping the number of dissents low, she ironically did seem to be having some success at the same time in shifting the Court's decisional record back to a somewhat more liberal direction. In fact, in the last few years of her tenure on the Court, Kaye's own voting record again resembled the more liberal one it had been prior to the court-bashing period. The same was true for the voting record of Kaye's closest ideological ally on the Court, Judge Ciparick. Their pro-accused voting records doubled from what they had been a few years earlier, and this was reflected in the Court's decisional record which seemed to be experiencing a similar—if more modest—movement.<sup>31</sup>



<sup>31</sup> See Graph 9. That graph depicts the voting records of Kaye and Ciparick over the course of several years following the court-bashing, as found in prior studies, and their voting records in more recent periods including the last two years of Kaye's tenure. See *supra* Graph 1, note 19 and accompanying text. The graph depicts the same for the decisional record of the Court as a whole. The pro-accused records of Kaye, Ciparick, and the Court all doubled in recent years from their lowest levels in the post court-bashing years.

So while the Pataki appointees were making their presence felt in the last few years of the Kaye era, she might have been having the last word on the direction her Court was taking.<sup>32</sup> The Court seemed to be in flux once again.

This was the Court from which Chief Judge Kaye retired. At the least, it is a sketch of some of the salient features that convey a general sense of the Court that Jonathan Lippman inherited upon his appointment as chief judge in February 2009. It is the Court which thereafter, in very short order, began to take shape as an institution with someone new—and different—at the helm.

### III. TRANSITION TO THE LIPPMAN COURT

There is already a great deal to discuss about the Lippman Court. At the time of this writing, barely a year has passed since Jonathan Lippman took the center seat at New York's highest tribunal. Still there has been no shortage of notable developments for the Court as an institution and for its case law.

Another article in this collection on the Court of Appeals examines the record of the new chief judge in laudable detail.<sup>33</sup> Here, only a few developments will be considered. But these few may well provide more than an inkling of what may come in the next several years. At the least, they paint an early—and telling—picture of the Lippman Court.

Criminal grants, dissents, and “groundbreaking”<sup>34</sup> decisions. More specifically, the number of criminal cases granted review by the Court; the number of decisions against which at least one judge wrote a dissenting opinion; and decisions rendered by the Court that were particularly significant as a matter of legal policy or politics. Even a brief look at these three features of the Lippman Court's first year reveals a good deal, both about this Court itself and about how it already differs from its predecessor.

As for criminal grants, the number increased. It increased considerably. Following a report in the *New York Law Journal* that

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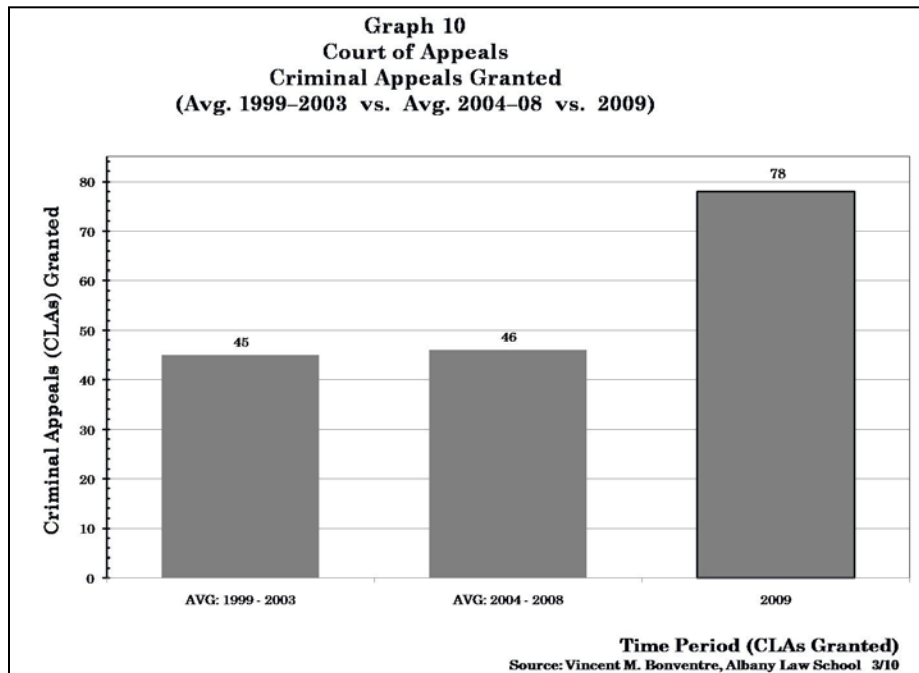
<sup>32</sup> Inasmuch as her right hand man, Jonathan Lippman, was replacing her as chief judge—he had been her longtime chief administrative judge—there was a good chance that Kaye's last word would be a lasting one. See New York State Court of Appeals, Chief Judge Jonathan Lippman, <http://www.nycourts.gov/ctapps/chjl.htm> (last visited Apr. 14, 2010).

<sup>33</sup> See Matthew J. Laroche, Comment, *Chief Judge Jonathan Lippman: A New Era*, 73 ALB. L. REV. 925 (2010).

<sup>34</sup> This is how Lippman referred to the Court's recent decision on judicial pay raises, *Maron v. Silver*, Slip Op. 01528, 2010 WL 605279 (Feb. 23, 2010). See Press Release, Public Statement of Chief Judge Jonathan Lippman (Feb. 23, 2010), available at <http://www.courts.state.ny.us/press/press-statement-salary-dec-feb-2010.pdf>.

the Court had been accepting a low number of criminal appeals in recent years,<sup>35</sup> there was an abrupt change. Chief Judge Lippman was quoted as saying that he would look into the matter. He evidently did that, and more. The figures rose dramatically.

In fact, the figures for criminal grants rose as dramatically as they had previously fallen in the years following the court-bashing. Those fallen figures had remained low over the years with an annual average in the mid-forties. In 2009, that figure rose to nearly eighty.<sup>36</sup>



That increase is even more impressive than it would at first seem. The *New York Law Journal* published its article on criminal grants in late April of 2009.<sup>37</sup> It was at that time that the chief judge said he would take a look. Whatever action Lippman might have taken,

<sup>35</sup> Joel Stashenko, *Chief Judge to Review Why Court Accepts Few Criminal Appeals*, N.Y. L.J., Apr. 22, 2009, at 1.

<sup>36</sup> See Graph 10. That graph depicts the annual average number of criminal grants for the two five-year periods immediately preceding 2009 in contrast with the number of grants in that year. The annual number of grants averaged in the mid-forties for both of those five-year periods which began shortly after the court-bashing. The number jumped abruptly to nearly eighty in 2009, Lippman's first year on the Court. See also *supra* Graph 5, note 24 and accompanying text.

<sup>37</sup> See *supra* note 35 and accompanying text.

whatever discussion or exhortation he might have engaged in, he presumably did so after that law journal article. Presumably also, then, the jump in the number of criminal grants in 2009 reflects an increased rate for only the remaining months of the year. In short, the sharp rise to nearly eighty likely understates the changed rate at which criminal cases were being accepted.

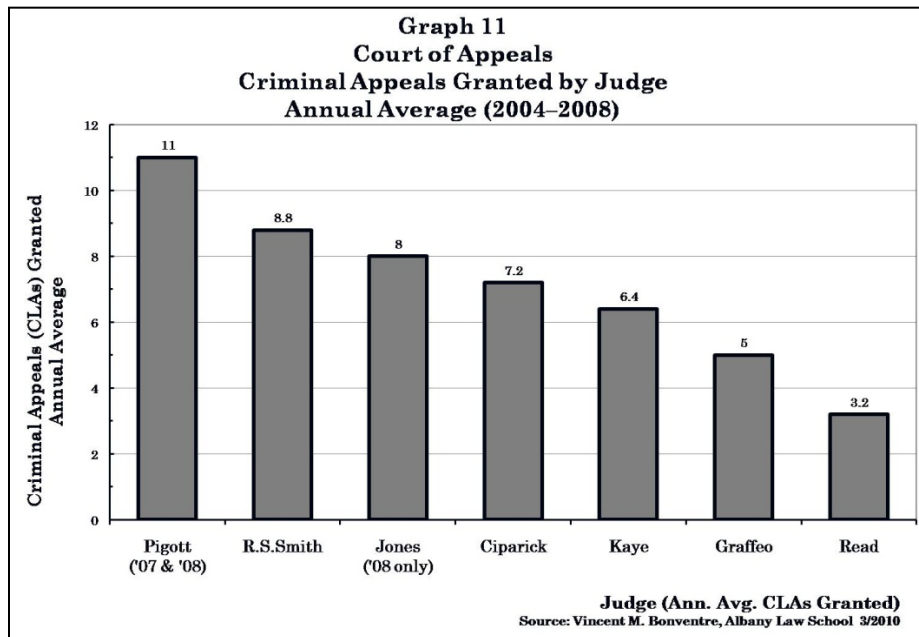
In any event, the story of criminal grants is also a story about the individual judges. At the Court of Appeals, each application seeking appeal in a criminal case is decided by a single Judge. These criminal leave applications (“CLAs”) are distributed among the seven judges, and each judge is the sole decider of the CLAs he or she has received.<sup>38</sup> As would be expected in the absence of any fixed numerical requirement or a set of precise standards, the judges vary in their receptiveness to applications and, thus, in the number of criminal appeals they each grant. In fact, the variation among the Court’s judges has been considerable.

Over the last several years prior to Lippman’s appointment, for example, Judge Susan Read averaged a Court-low of three criminal grants per year. Chief Judge Kaye and Judge Victoria Graffeo had the next lowest annual averages with six and five, respectively. Those figures contrasted with Judge Eugene Pigott’s Court-high average of eleven.<sup>39</sup>

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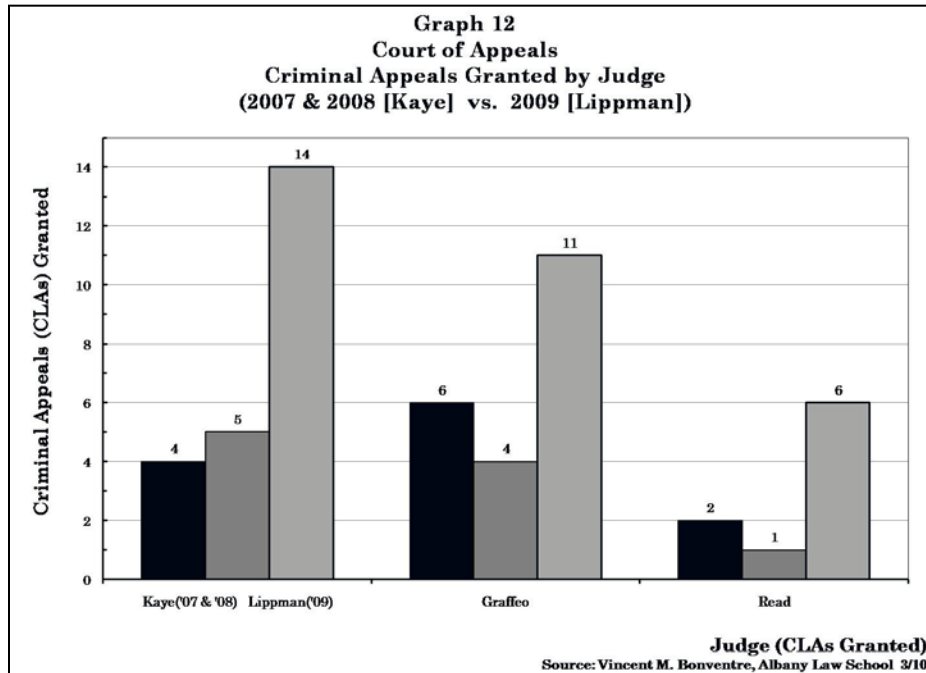
<sup>38</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20(c) (2010) (“The chief judge directs the assignment of each application to a judge of the [C]ourt through the clerk of the [C]ourt.”). There have been proposals to change the procedure for reviewing CLAs in order to insure a more uniform basis for decisions and a more equal rate of grants—i.e., to reduce the unfairness of having one’s CLA assigned to a judge with a particularly low grant rate. The proposals range from having two judges review each CLA to having the entire Court do so. See Alan J. Pierce, *If the System Is Not Working Let’s Fix It: Why Seven Judges Are Better Than One for Deciding Criminal Leave Applications at the Court of Appeals*, 73 ALB. L. REV. 765 (2010).

<sup>39</sup> See Graph 11. That graph depicts the entire range of average annual grants, for the five year period from 2004 through 2008, for the seven judges who were sitting on the Court in 2008, the year immediately prior to Lippman’s appointment as chief judge. Judge Pigott’s and Judge Jones’s figures represent the shorter period of time that each of them had been on the Court by the end of 2008.



The figures changed in 2009. Just as the criminal grants rose sharply for the Court as a whole, so too did they rise for the judges with the lowest previous figures. More specifically, Read's and Graffeo's criminal grants multiplied, and Lippman's grants were several times higher than those of the chief judge he replaced. The change becomes particularly vivid when 2009 is contrasted with the two preceding years. Read, whose high for 2007 and 2008 was two criminal grants, granted three times that number in 2009. Graffeo, who had averaged five grants in the two previous years, doubled that in Lippman's first year. As for Lippman himself, he granted fourteen criminal appeals in 2009, thereby tripling his predecessor's numbers for each of her last two years on the Court.<sup>40</sup>

<sup>40</sup> See Graph 12. The graph depicts the clearly significant increase in the number of CLAs granted in Lippman's first year on the Court by Judges Read and Graffeo, as well as by Chief Judge Lippman in comparison to his predecessor.



It might be argued that with Republican Governor Pataki out of the picture, it is less politically perilous for Lippman and his Court to take more criminal appeals. To be sure, there is some merit in that. But Pataki had been gone from office for the last two years of Kaye's tenure, he had been weakened politically even before that, and the court-bashing he initiated was long in the past by then.<sup>41</sup>

On the other hand, criminal cases can always be politically charged. They almost always present the opportunity for political opportunists, tabloids, and other critics to contrast the virtue of "law and order" and being "tough on crime" with the vice of a court that "coddles criminals" or cares more about them than about victims or safe neighborhoods. No doubt, this is not lost on Lippman any more than it was on Kaye. But whatever the reason that criminal grants remained low in the Kaye era, Lippman and his Court have chosen to increase the number substantially, and thereby to take the risk of an increased number of politically unpopular rulings.<sup>42</sup>

<sup>41</sup> See Michael Cooper & Patrick D. Healy, *Pataki Decides to Forgo a 4th Term, Confidants Say*, N.Y. TIMES, July 27, 2005, available at <http://www.nytimes.com/2005/07/27/nyregion/metrocampaigns/27pataki.final.html>.

<sup>42</sup> Notable also is the related matter of Chief Judge Lippman's establishment of a

That risk, moreover, is enhanced when the Court's decisions are divided. It is enhanced, that is, whenever there is a dissenting opinion arguing that the Court's decision is wrong. A dissenting opinion always presents an alternative legal argument that would have allowed the Court to reach a different result. In criminal cases, when the majority has ruled in favor of the accused, such dissenting opinions show the way to a more law-and-order result and, consequently, are often much more politically popular.

Dissenting opinions certainly can make life for the majority a bit less comfortable. Whether in criminal or civil cases, they can cause tension, even rifts among the judges, straining the collegiality essential to the functioning of an appellate court. One might, then, well expect that a chief judge or justice would prefer to keep such divisions to a minimum. That agreement would be preferable to dissent. That reaching consensus in the conference room would be preferable to public criticism of the Court's ruling. And such criticism, of course, is precisely the nature of a dissenting opinion.<sup>43</sup>

Chief Judge Kaye did not hide her preference for avoiding dissents. Chief Judge Lippman has not concealed his different view—his dissenting opinion, so to speak—on that matter. As he told the *New York Times*, “I am a result-oriented person, and the result I am looking for is not necessarily unanimity.”<sup>44</sup> In an elaboration that made the contrast with Kaye even sharper, Lippman added: “Sometimes you have a choice. You can compromise and get a unified Court, or sometimes it's better to have a divided court because you have decisions that are not fuzzy. You have bolder decisions.”<sup>45</sup>

Whether there is a causal relationship between Chief Judge Lippman's openness to dissents and an increase both in them and in “bolder” decisions is hardly certain. What is clear, however, is that,

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permanent Justice Task Force to investigate the causes of wrongful convictions and other miscarriages of justice in New York's criminal justice system, and to look for solutions. See Joel Stashenko, *Lippman Forms Task Force to Study Ways to Avoid Wrongful Convictions*, N.Y. L.J., May 1, 2009, at 1. In fact, Lippman moderated the Wrongful Convictions Symposium hosted by the *Albany Law Review's State Constitutional Commentary* on March 4, 2010. Turning a critical eye toward the courts, judges, prosecutors, defense counsel, law enforcement personnel, and other players and aspects of the state's criminal justice system for injustices in which they might have participated is hardly an enterprise designed to insure popularity among those actors. Indeed, some who are involved in innocence work have said in conversations with the author that there had been efforts to no avail in past years to have something established along the lines of the task force that Lippman created shortly after his appointment as chief judge.

<sup>43</sup> See Bonventre & Galligan, *supra* note 12, at 1085–86.

<sup>44</sup> Glaberson, *supra* note 27.

<sup>45</sup> *Id.*

concurrent with there being a new chief judge who has a different, more welcoming attitude toward dissents, there has, in fact been an increase in the number of dissents. There has also, in fact, been a near-constant stream of bold, even “groundbreaking,” divided decisions.

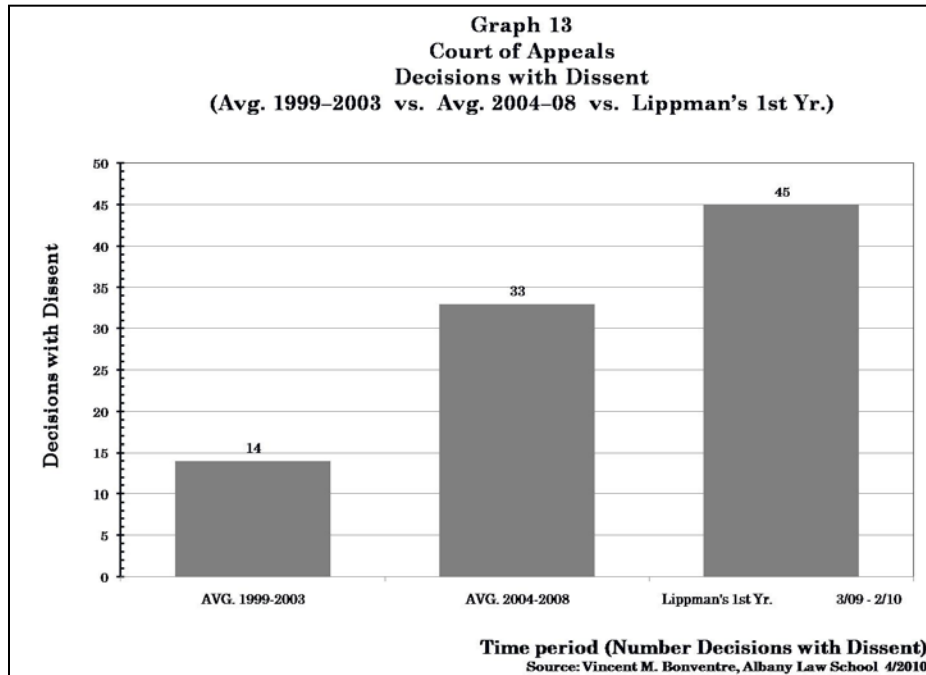
The number of decisions with dissent—which had increased in the last few years of the Kaye era after a period of very low numbers<sup>46</sup>—increased significantly yet again. The number, which had more than doubled from an annual average of fourteen, rose again in Chief Judge Lippman’s first full year to more than triple that previously low average.<sup>47</sup> So the recent history of dissents at the Court has been a matter of decrease, increase, and increase again. First was the rather drastic decrease in dissents in the years immediately following the court-bashing; that was, then, reversed by the substantial increase incident to Pataki-appointees becoming a majority on the Court; and, most recently, the number of dissents has jumped even higher with Lippman as Chief Judge.

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<sup>46</sup> See *supra* notes 25–30 and accompanying text.

<sup>47</sup> See Graph 13. That graph depicts the annual average number of decisions with dissents at the Court of Appeals for the two consecutive five-year periods preceding Chief Judge Lippman’s appointment, as well as the number of divided decisions during his first full year on the Court. Hence, the five-year periods are 1999 through 2003 (i.e., not long after the Pataki-initiated court-bashing period during which the number of dissents remained very low) and 2004 through 2008 (i.e., after Pataki-appointees were a majority on the Court, notably for these purposes including Read, Smith, and eventually Pigott, during which the number of dissents increased sharply). Lippman’s first full year on the Court (“Lippman’s 1st Yr.” in the graph) includes decisions rendered from March 2009 through February 2010, inasmuch as he was appointed in mid-February 2009 and heard arguments that month in appeals that would not be decided until the following month.

The data for dissents and divided decisions through Lippman’s first full year—i.e., from March 2009 through February 2010—were available at the time of this writing and are reflected in the graphs. The data available for CLAs is not so complete or current. Hence, data used for the discussion and graphs on CLAs covers the calendar year 2009—the first post-Kaye calendar year, in the second month of which Chief Judge Lippman was appointed.

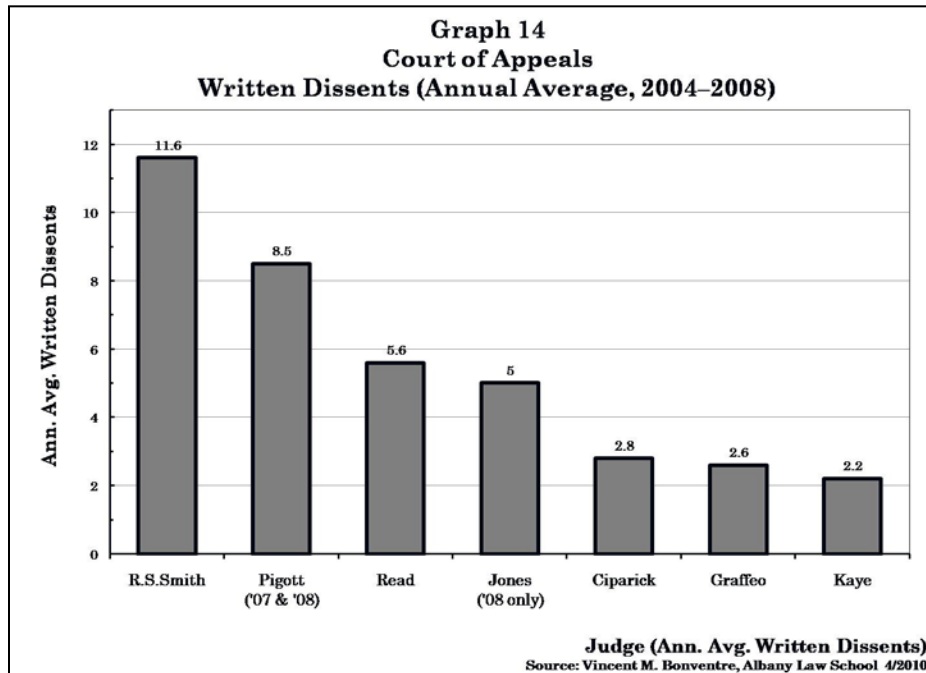


As with granting CLAs,<sup>48</sup> there is no fixed number of written dissents required of each judge. So too, as with CLAs, the judges would be expected to vary in the number of dissenting opinions they each author. And indeed, as with CLAs, the judges have varied, and widely so, in the frequency with which they have written dissents.

In the final years of the Kaye Court, Judges Robert Smith and Pigott were the most prolific authors of dissenting opinions. Smith averaged close to twelve over the last five years of the Kaye era. Pigott averaged nearly nine for the two years he was on the Court. At the other end of the spectrum was Chief Judge Kaye herself. Her five-year annual average was barely two dissenting opinions. Judges Graffeo and Ciparick were next with averages of less than three a year.<sup>49</sup>

<sup>48</sup> See *supra* notes 38–39 and accompanying text.

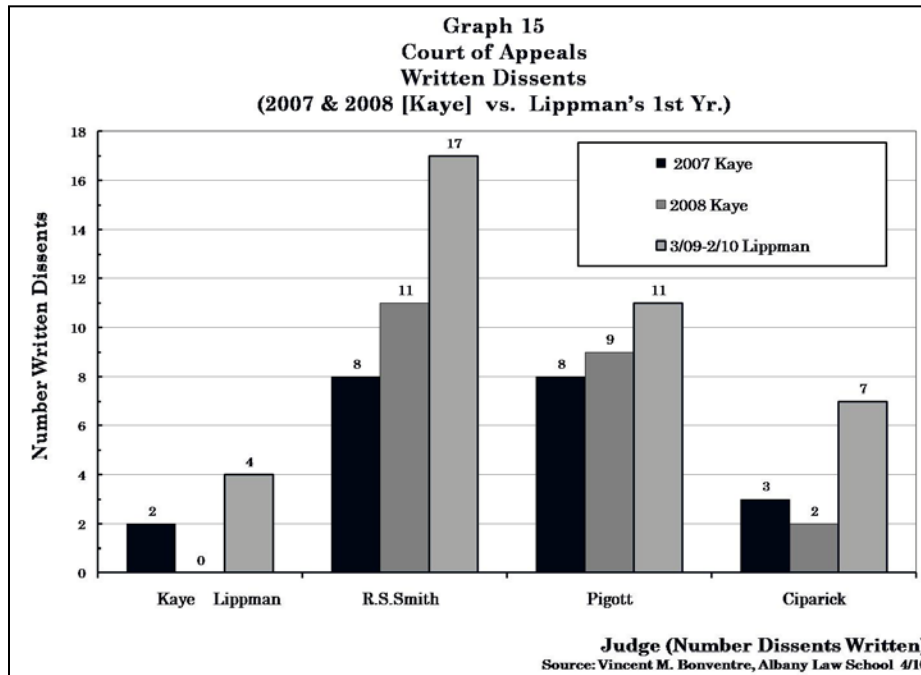
<sup>49</sup> See Graph 14 (depicting the wide spectrum of dissenting frequency amongst the judges sitting on the Court during the last year of Chief Judge Kaye's tenure). For each judge, the figure given is the annual average for the last five years of the Kaye era, or the annual average for the fewer years the judge had been on the Court during those five years. Notably, three of the Pataki appointees—Read, Pigott, and Read—averaged from two, to more than five times as many dissenting opinions as Chief Judge Kaye.



In the first full year of the Lippman Court, the jump in decisions with dissent was attributable to sizeable increases in the number of dissenting opinions by a few of the judges. Judge Smith, who had already been authoring dissents at a higher rate than any of his colleagues, wrote substantially more than even he had written in previous years. His seventeen dissents were half-again as many as he had written the year before. They were also half-again as many as the number authored by Judge Pigott, the Court's next most prolific dissenter.

Judge Pigott himself did write a few more dissents than he had in his first two years on the Court. But it was Judge Ciparick who, other than Judge Smith, had the most significant increase. Her seven dissenting opinions more than doubled the number she had written in each of the two immediately preceding years, as well as her annual average for the five-year period. As for Chief Judge Lippman, the four dissents that he authored were four more than his predecessor had written the year before, and in fact, doubled the former chief judge's five-year average.<sup>50</sup>

<sup>50</sup> See Graph 15 (depicting the number of dissenting opinions authored during Chief Judge Lippman's first full year on the Court and the two years immediately preceding). The four judges are the ones who wrote the most dissents (Smith and Pigott) or who had the greatest increase from the year before (Smith and Ciparick), as well as the new chief judge whose



Notably, the increase in decisions with dissent in Chief Judge Lippman's first full year on the Court was not attributable to Pataki appointees alone; although Judges Smith and Pigott—both appointees of the former Republican Governor—authored more dissents than any of the other judges, collectively accounting for a significant proportion of the Court's increase from the year before. But Chief Judge Lippman, appointed by Democratic Governor Paterson, and Judge Ciparick, appointed by Democratic Governor Cuomo, accounted for at least as much of that increase. Together, Chief Judge Lippman and Judge Ciparick added a total of nine dissents. That compares to the eight dissenting opinions added by Judges Smith and Pigott.

While the causes and implications of that bipartisan increase in dissents are not yet entirely clear, a few observations can be made. The first is that this increase during Chief Judge Lippman's first year on the Court was, in fact, not one-sided. That is, it was not

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record is contrasted with that of his predecessor. As for the three remaining judges not included in the graph, the number of dissenting opinions they each authored for 2007, 2008, and Lippman's first full year (Mar. 2009–Feb. 2010) are as follows: Graffeo, three, three, and one; Read, five, four, and four; Jones (whose first full year on the Court was 2008), five (2008) and seven (Lippman's first full year).

uni-partisan. The jump in decisions with dissent does not reveal a growing rebellion by Republican appointees against increasingly liberal decisions—at least not as opposed to the same by Democratic appointees against increasingly conservative ones. The bipartisan nature of the jump might well suggest, instead, that both of those possibilities are true or that neither one of them is. Continued examination of divided decisions in the coming years of the Lippman Court may provide some clarification.

What could not be clearer, on the other hand, is that Judges Smith and Pigott have remained the most prolific dissenters. They were the leading writers of dissenting opinions in the latter years of the Kaye Court, with a chief judge who disfavored dissents. They retained that status under the new chief judge, who welcomes these open expressions of disagreement. But what is at least as significant is the considerable increase in Judge Ciparick's dissenting output.

Under Kaye, with whom she was allied the closest, Ciparick was among the least frequent dissenters. Under Lippman, who has not sought to discourage divided decisions, and with whom she now has the closest alliance,<sup>51</sup> she far exceeded the number of dissents she had typically written in previous years. In fact, if her colleagues had all authored as many additional dissenting opinions as she had—an increase in five in Lippman's first year from the last year of the Kaye Court—the Court's total number of decisions with dissents would have more than doubled the previous five-year average.<sup>52</sup>

Moreover, Ciparick's apparent receptiveness to Lippman's welcoming attitude toward dissenting opinions was met with a receptiveness of his own in return. He joined virtually all of her written dissents. Of the seven dissenting opinions authored by Ciparick in Lippman's first year, he joined her in all but one.<sup>53</sup>

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<sup>51</sup> On the Lippman-Ciparick alignment, see generally Laroche, *supra* note 33; Jillian Kasow, Comment, *Judge Carmen Beauchamp Ciparick: A Glimpse into the Senior Associate Judge's Judicial Philosophy Through Her Dissents*, 73 ALB. L. REV. 953 (2010).

<sup>52</sup> See *supra* notes 48–51 and accompanying text.

<sup>53</sup> Lippman joined Ciparick's dissenting opinions in *Heslin v. County of Greene*, 14 N.Y.3d 67 (2010), *Lee v. Astoria Generating Co.*, 13 N.Y.3d 382, 920 N.E.2d 350, 892 N.Y.S.2d 294 (2009), *People v. Arafet*, 13 N.Y.3d 460, 920 N.E.2d 919, 892 N.Y.S.2d 812 (2009), *Allstate Insurance Co. v. Rivera*, 12 N.Y.3d 602, 911 N.E.2d 817, 883 N.Y.S.2d 755 (2009), *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 909 N.E.2d 70, 881 N.Y.S.2d 377 (2009), *People v. Kalin*, 12 N.Y.3d 225, 906 N.E.2d 381, 878 N.Y.S.2d 653 (2009). The only dissent of Ciparick's which Lippman did not join was in *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 907 N.E.2d 292, 879 N.Y.S.2d 379 (2009). He also joined her separate concurring opinion in *Godfrey v. Spano*, 13 N.Y.3d 358, 920 N.E.2d 328, 892 N.Y.S.2d 272 (2009).

Curiously, however, there was less reciprocity on the part of Ciparick toward Lippman's dissents. Of the four that the new chief judge authored in his first year, there was only one that Ciparick joined. In fact, Lippman had more success drawing Pataki appointees to his side. In each of his three dissenting opinions not joined by Ciparick, he was joined by an appointee of the Republican Governor.<sup>54</sup>

This is not to minimize the Lippman-Ciparick alignment. It is the strongest on the Court.<sup>55</sup> But this aspect of Lippman's dissents is indicative of a more general feature of the Lippman Court. Indeed, together with the new chief judge's greater tolerance for divided decisions, it may be a primary reason for Lippman's considerable success in what he says he prefers: "bolder" decisions. Lippman—or at least the positions he has supported—has attracted one or more of the Pataki appointees to constitute winning majorities on some of the most significant, contentious, and controversial issues that the Court has confronted. A brief mention of a few decisions illustrates the point.

Perhaps the first major test for the Lippman Court was the GPS case. In *People v. Weaver*, the Court ruled that the warrantless monitoring of someone's whereabouts by means of a GPS (global positioning system) device surreptitiously attached to that person's vehicle is an invalid search.<sup>56</sup> The Court declined to follow the Supreme Court's modern practice of declaring various searches not to be "searches" under the Fourth Amendment and, thereby, rendering irrelevant the government's lack of any legal justification for its conduct.<sup>57</sup>

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<sup>54</sup> *Afri v. Basch*, 13 N.Y.3d 592, 921 N.E.2d 1034, 894 N.Y.S.2d 370 (2009), is the one case in which Chief Judge Lippman's dissent was joined by Judge Ciparick. In *People v. Samandarov*, 13 N.Y.3d 433, 920 N.E.2d 930, 892 N.Y.S.2d 823 (2009), Lippman's dissenting opinion was joined by Pataki-appointee Judge Pigott; in *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 913 N.E.2d 394, 885 N.Y.S.2d 8 (2009), by Pataki-appointee Judge Graffeo; in *Bazakos v. Lewis*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009), by Pigott. As for Lippman's joining dissenting opinions written by Pataki appointees, he did so the same number of times he was joined by one of them, but that constituted a much lower rate. He joined two of Judge Smith's seventeen dissents: in *People v. Konstantinides*, 14 N.Y.3d 1, 923 N.E.2d 567, 896 N.Y.S.2d 284 (2009) and *In re Peaslee*, 13 N.Y.3d 75, 913 N.E.2d 387, 885 N.Y.S.2d 1 (2009). He joined one of Judge Pigott's eleven: in *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009).

<sup>55</sup> See *supra* notes 52–54 and accompanying text.

<sup>56</sup> 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009).

<sup>57</sup> See, e.g., *Florida v. Riley*, 488 U.S. 455 (1989) (involving surveillance of a backyard from a hovering helicopter); *California v. Greenwood*, 486 U.S. 35 (1988) (regarding search of garbage put out for collection); *Oliver v. United States*, 466 U.S. 170 (1984) (involving a search—even a trespassory one—of so-called "open fields" which include any private property beyond the curtilage of the dwelling); *United States v. Place*, 462 U.S. 696 (1983) (concerning

Chief Judge Lippman authored the opinion for the Court. Though he discussed and distinguished related Supreme Court case law, he based the decision on the Court of Appeals's own search and seizure precedents and issued a ruling unmatched in its significance as a matter of independent state constitutional law in nearly twenty years.<sup>58</sup> The vote was four to three.<sup>59</sup> Chief Judge Lippman and the two other Democratic appointees, Judges Ciparick and Jones,<sup>60</sup> were on one side. Three Pataki appointees, Judges Graffeo, Read and Smith,<sup>61</sup> were on the other. Judge Pigott, the remaining Pataki appointee,<sup>62</sup> broke the tie by giving the new chief judge the fourth vote needed for the majority.<sup>63</sup>

A few months later, Chief Judge Lippman again scored a four to three majority in the lieutenant governor case. In *Skelos v. Paterson*,<sup>64</sup> the chief judge authored the opinion upholding Governor

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a canine sniff); *United States v. Knotts*, 460 U.S. 276 (1983) (involving electronic tracking of a vehicle's travels with a surreptitiously attached beeper); *United States v. White*, 401 U.S. 745 (1971) (involving electronic interception of a private conversation). Along similar lines, see *New York v. Burger*, 482 U.S. 691 (1987) (concerning inspection of a "highly regulated" business for violations is not a "search").

<sup>58</sup> The last such decision was *People v. Scott*, 79 N.Y.2d 474, 478 593 N.E.2d 1328, 1330 583 N.Y.S.2d 920, 922 (1992) (rejecting the Supreme Court's "open fields" doctrine which allows the warrantless, trespassory search of any private property beyond the curtilage of the dwelling). The case was actually decided jointly with *People v. Keta*, 79 N.Y.2d 474, 491, 593 N.E.2d 1328, 1339, 583 N.Y.S.2d 920, 931 (1992) (rejecting the Supreme Court's "highly regulated business" doctrine which allows warrantless, probable cause-less searches for criminal violations such as mere "administrative inspections").

<sup>59</sup> The vote in *Scott* and *Keta* was the same. See *supra* note 58.

<sup>60</sup> Ciparick was appointed by Democratic Governor Mario Cuomo; Jones was appointed by Democratic Governor Eliot Spitzer. See Kasow, *supra* note 51; Erika L. Winkler, Comment, *Theodore T. Jones, the Defendant's Champion: Reviewing a Sample of Judge Jones's Criminal Jurisprudence*, 73 ALB. L. REV. 1109 (2010).

<sup>61</sup> See Jeremy Cooney, Comment, *Judge Victoria A. Graffeo: Committed, Conservative, Collegial*, 73 ALB. L. REV. 971 (2010); Sanjeev Devabhakthuni, Comment, *How to Win the Read Vote: A Profile of the Statutory Interpretation Method of Associate Judge Susan P. Read from a Practical Viewpoint*, 73 ALB. L. REV. 993 (2010); Peter A. Mancuso, Comment, *The Independent Jurist: An Analysis of Judge Robert S. Smith's Dissenting Opinions*, 73 ALB. L. REV. 1019 (2010).

<sup>62</sup> See Benjamin L. Loeffke, Comment, *The Pert Perpenders: Associate Judge Eugene F. Pigott, Jr.'s Journey from Buffalo to Rochester and Albany*, 73 ALB. L. REV. 1081 (2010).

<sup>63</sup> Another matter of significance, in the author's view, is that three strong, substantive opinions were written in *Weaver*. In addition to Lippman's majority, there were separate dissents by Smith and Read which offered perfectly reasonable, alternative, persuasive (not as persuasive in my view) views on how to resolve the GPS issue, as well as on the difficulties and ramifications of the majority's position. Contrast those serious, sober dissents, for example, with the near-hysteria of the dissenting opinion written against the Court's decisions in *Scott* and *Keta*. See 79 N.Y.2d at 506, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting). That dissent, not surprisingly, generated some commentary. See, e.g., Timothy B. Lennon, Comment, *Joseph W. Bellacosa: Cardozo's Knight-Errant?*, 59 ALB. L. REV. 1827, 1847-50 (1996).

<sup>64</sup> 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009).

Paterson's appointment of Richard Ravitch as lieutenant governor. Paterson's action, taken to fill a vacancy created when his predecessor's resignation elevated him to the position of governor, was challenged as unauthorized by state statute or constitution. The majority rejected the challenges to gubernatorial authority. In doing so, it also rejected the decisions of both lower courts and the weight of opinion publicly pressed by legal scholars, former high-ranking officials, and even the sitting attorney general of the state.<sup>65</sup>

As in the GPS case, the three Democratic appointees lined up on one side, and three of the four Republican appointees on the other. This time, it was Pataki appointee Judge Read who gave Chief Judge Lippman the winning fourth vote.

Judge Read had also provided the Democratic appointees with a fourth vote in the case concerning Rochester's juvenile curfew. In *Anonymous ex rel. Anonymous v. City of Rochester*,<sup>66</sup> speaking through the opinion of Judge Jones, the majority found the city's ordinance violative of both the New York State and Federal Constitutions. The asserted purpose of preventing crimes by juveniles and protecting them from victimization was not doubted to be legitimate and important. But according to the five to two majority—Judge Graffeo, the fifth vote, authored a concurring opinion—there was simply too tenuous a connection between those purposes and the curfew's substantial interference with the rights of parents to make decisions about their minor children, as well as with the concededly attenuated rights of minors themselves.<sup>67</sup>

Judges Read and Graffeo were also part of five to two majorities with the Democratic appointees in two cases dealing with the post-

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<sup>65</sup> The lower court decisions are found at 65 A.D.3d 339, 885 N.Y.S.2d 92 (2d Dep't 2009) and 25 Misc. 3d 347, 884 N.Y.S.2d 812 (Sup. Ct. 2009). For the publicly expressed opposition, see, e.g., Peter Galie, Opinion, *Naming of Lieutenant Governor Defies Constitution*, BUFFALO NEWS, July 15, 2009, available at <http://www.buffalonews.com/2009/07/15/733825/peter-galie-naming-of-lieutenant.html>; Sol Wachtler, Op-Ed, *The Law is Just That, Governor*, TIMES UNION (Albany, N.Y.), July 16, 2009, at A13, available at <http://www.timesunion.com/AspStories/story.asp?storyID=820334>; N.Y. ATTY GEN., STATEMENT OF ATTORNEY GENERAL ANDREW CUOMO REGARDING LIEUTENANT GOVERNOR APPOINTMENT PROPOSAL (July 6, 2009), available at [http://www.ag.ny.gov/media\\_center/2009/july/july6a\\_09.html](http://www.ag.ny.gov/media_center/2009/july/july6a_09.html); Brief for Gerald Benjamin, Peter J. Galie, Michael J. Hutter and Stan Lundine as Amici Curiae Supporting Plaintiff-Respondent, *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009) (No. 13426/09). But see Richard Briffault, *Skelos v. Paterson: The Surprisingly Strong Case for the Governor's Surprising Power to Appoint a Lieutenant Governor*, 73 ALB. L. REV. 675 (2010).

<sup>66</sup> 13 N.Y.3d 35, 915 N.E.2d 593, 886 N.Y.S.2d 648 (2009).

<sup>67</sup> *Id.* at 48–51, 915 N.E.2d at 599–601, 886 N.Y.S.2d at 654–656.

release supervision of the criminally convicted. In *People v. Boyd*,<sup>68</sup> with Judge Ciparick writing for the majority, the Court ruled that defendants who plead guilty are entitled to a reversal of their convictions if they were not informed by the trial judge about the supervision that would continue after their release from incarceration. Moreover, this is so, the Court held, even if there was no objection to the trial judge's allocution, and even though the post-release supervision is a statutorily mandated addition to prison sentences.

Then in *People v. Williams*,<sup>69</sup> one of the Pataki appointees, Judge Graffeo, wrote for the same five to two majority. In this case, the Court ruled that it was a violation of double jeopardy protection to impose post-release supervision at a resentencing held after the original prison sentences were served. Again, the Court ruled that this is so notwithstanding that post-release supervision is statutorily mandated and, thus, that an original sentence without it was contrary to that law.<sup>70</sup>

Judge Smith, who was absent from the majorities in the previously discussed decisions, was on the same side as Chief Judge Lippman and the other Democratic appointees in the environmental standing case. In *Save the Pine Bush, Inc. v. Common Council of the City of Albany*,<sup>71</sup> Judge Smith authored the opinion for a five to two majority. He and fellow Pataki appointee Judge Graffeo were joined with Chief Judge Lippman and Judges Ciparick and Jones.

The Court ultimately rejected the challenge to a zoning change that allowed development near a wildlife preserve. Of more lasting significance than the specific disposition of the case, however, was the ruling on the threshold issue of standing. On this question, the Court agreed with the environmental group. It adopted an expanded view of standing to sue for environmental injury. Organizations and individuals who visit, enjoy, or otherwise use a

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<sup>68</sup> 12 N.Y.3d 390, 908 N.E.2d 898, 880 N.Y.S.2d 908 (2009).

<sup>69</sup> Slip op. 01527, 2010 WL 605257 (Feb. 23, 2010).

<sup>70</sup> *Id.* at \*11. The Court based its decision on federal constitutional case law. The brief explanation offered was that it was unnecessary to address state constitutional law because federal double jeopardy precedents resolved the issue—apparently quite clearly in the majority's view. *Id.* at \*13 n.5.

One might well argue that the Court should first address issues as a matter of state constitutional law and, thereby, avoid turning their decisions into federal cases whenever that would be unnecessary. See generally, Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). But that is another matter beyond the focus of this article.

<sup>71</sup> 13 N.Y.3d 297, 918 N.E.2d 917, 890 N.Y.S.2d 405 (2009).

natural resource more than the general public, held the Court, have a sufficiently real and special interest to challenge environmental threats to that resource.

Judges Graffeo, Smith, and Pigott were together with the Democratic appointees in the stun belt case. There, in *People v. Buchanan*,<sup>72</sup> the Court “adopt[ed] the rule,” “as a matter of New York law,” that the routine use of stun belts to restrain murder defendants at their trials is “unacceptable.”<sup>73</sup> With Pataki appointee Judge Read as the sole hold out from the Court’s per curiam opinion, the six-member majority reversed the murder conviction of the stun-belted defendant, ordered a new trial, and directed the trial court to first determine whether that restraint was actually necessary for courtroom security before using it.<sup>74</sup>

In *Maron v. Silver*,<sup>75</sup> the Court entered the highly political debate about the adequacy of salaries for New York State’s judges. As recounted in the opinion by Judge Pigott, judicial compensation has been held hostage to politics in the legislative process.<sup>76</sup> This has been so notwithstanding the agreement among all the parties to the litigation—the legislature, the governor, and New York judges—that the state’s judges “have earned and deserve a salary increase.”<sup>77</sup>

Rather than avoiding the judicial salary question as a purely political one that should be left to the other two branches, the Court tackled the legal issues presented and then directed those branches to act. According to the Court, the state’s repeated failure to consider judicial compensation on its own merits, rather than tied to unrelated political and policy matters, threatens the independence of the judiciary in violation of the separation of powers.<sup>78</sup>

The Court did not, per se, order judicial pay raises. But it did order the serious and separate consideration of judicial salaries—which, the Court was quick to add, “all have agreed” need

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<sup>72</sup> 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337 (2009).

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* Judge Read was with the Democratic appointees—as she had been in the lieutenant governor and the Rochester curfew cases; see supra notes 65–67 and accompanying text—and, in fact, wrote the opinion for a majority consisting only of her and them in *Misicki v. Caradonna*, 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (2009). There, the bare four to three majority held that a worker injured as a result of an uncorrected condition affecting the safety of the electrically powered equipment he was using had a cause of action under the state’s labor laws. *Id.* at 521.

<sup>75</sup> Slip Op. 01528, 2010 WL 605279 (Feb. 23, 2010).

<sup>76</sup> *See id.* at 3.

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

<sup>78</sup> *Id.* at 2.

“adjustment.”<sup>79</sup> Similarly, the Court insisted that it was avoiding interference with the legislature’s budget-making authority. But it then did emphasize its own authority to decide whether the legislature had met the constitutional obligation the Court had just outlined.<sup>80</sup> And just to erase any doubts about its resolve, the Court’s last line was that it “expect[ed] appropriate and expeditious” compliance with that obligation.<sup>81</sup>

Lippman had recused himself from the appeal because he was a plaintiff in his capacity as chief judge.<sup>82</sup> Though he did not participate in the Court’s consideration of the case, his personal views were well known. He had publicly criticized both the governor and the legislature for their inability to act on judicial pay raises.<sup>83</sup> The decision of the Court *sans* him, was certainly to his liking. Indeed, he made that clear the day the Court released its ruling.

The decision rendered by his colleagues was, in his words, “a groundbreaking legal precedent” that “vindicates our longstanding position.”<sup>84</sup> Adding his own emphasis to the Court’s asserted expectation of “appropriate action,” the chief judge continued: “If the other branches do not proceed in accordance with the court’s decision, I will not hesitate to act in a manner consistent with the constitutional duties and obligations imposed upon me as the head of an independent branch of government.”<sup>85</sup>

In the same-sex marriage case, the chief judge did not get the result he wanted. But the result the Court reached was surely in the direction he preferred. In *Godfrey v. Spano*,<sup>86</sup> the Court was confronted with questions arising when same-sex couples, legally married in another jurisdiction, move to New York. Specifically, the Court had to decide the legality of two directives—an executive order from Westchester County and a policy memorandum from the New York State Department of Civil Service—to treat such couples the same as legally married opposite-sex couples for the purpose of

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<sup>79</sup> *Id.* at 18.

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

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

<sup>82</sup> Press Release, Public Statement of Chief Judge Jonathan Lippman (Feb. 23, 2010), available at <http://www.courts.state.ny.us/press/press-statement-salary-dec-feb-2010.pdf>.

<sup>83</sup> See, e.g., Joel Stashenko, *Lippman Rallies State Bar Backing for Threatened Judiciary Budget*, N.Y. L.J., Feb. 1, 2010, at 1.

<sup>84</sup> Press Release, Public Statement of Chief Judge Jonathan Lippman (Feb. 23, 2010), available at <http://www.courts.state.ny.us/press/press-statement-salary-dec-feb-2010.pdf>.

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

<sup>86</sup> 13 N.Y.3d 358 (2009).

public employee benefits.

The Court split four to three on whether to give full recognition to out-of-state same-sex marriages. The three Democratic appointees voted to adopt that position. Because they could recruit no Pataki appointee to join them, however, they were left to concur in a separate opinion authored by Judge Ciparick.<sup>87</sup> The three would have upheld the directives on the ground that out-of-state same-sex marriages were as valid in New York as opposite-sex marriages for all purposes.

Despite the Court's division, the challenges to the directives garnered no support from the four Pataki appointees either. In the majority opinion written by Judge Pigott, the challenges were rejected on narrow grounds—i.e., the county had already been conferring benefits on same-sex partners, and the department has broad, statutory discretion to determine dependent benefits.<sup>88</sup> Notably, there was not even a hint that same-sex marriages violate New York public policy. Not a hint that treating them equally, as the directives sought to do, contravened some important tenet of the state's law.

Indeed, rather than any express or implied opposition toward same-sex marriages, Pigott's majority opinion seemed veritably dismissive of the challenges. This was a far cry from the palatable hostility to same-sex marriages in the Court's 2006 decision in *Hernandez v. Robles*,<sup>89</sup> its last foray into the issue. In that case, the three judge plurality—supported in its result by the much more sympathetic separate concurring opinion of Judge Graffeo<sup>90</sup>—upheld the restriction of marriage to opposite-sex couples. It did so by hypothesizing legislative reasons for disfavoring same-sex relationships.

According to the plurality, the state's legislature could “find that such relationships are all too often casual or temporary.”<sup>91</sup> The legislature could also believe that a child is better off “having before his or her eyes, every day, living models of what both a man and a woman are like.”<sup>92</sup> The plurality endorsed this view as a matter of “[i]ntuition and experience,”<sup>93</sup> notwithstanding social science

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<sup>87</sup> *Id.* at 377 (Ciparick, J., concurring).

<sup>88</sup> *Id.* at 375.

<sup>89</sup> 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

<sup>90</sup> *See id.* at 366–79 (Graffeo, J., concurring).

<sup>91</sup> *Id.* at 359, 855 N.E.2d at 7, 821 N.Y.S.2d at 776.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

studies presented to the Court which had concluded otherwise.<sup>94</sup> But that was more than adequate—as was each of the hypothetical legislative rationales—for dismissing the claims that disallowing same-sex marriages was discriminatory and irrational.

Again, there was no such disparaging of same-sex relationships, hypothetically or otherwise, in *Godfrey*. To be sure, the Court did not go as far as the concurring judges would have preferred, or as Chief Judge Kaye had urged in her dissent in *Hernandez*.<sup>95</sup> But the Court, both the majority and concurring judges, did advance the equal treatment of same-sex couples beyond what had previously been recognized in Court of Appeals case law. The Lippman Court did not adopt Lippman's position. But the decision in *Godfrey* was nevertheless a step in the direction that he and his predecessor could applaud.<sup>96</sup>

#### IV. CONCLUSION

It is risky business to predict a judge's vote in any particular case based upon that judge's overall record, even an extended one. It is infinitely more foolish to try to predict what a Court will do, and

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<sup>94</sup> *Id.* at 360, 855 N.E.2d at 7–8, 821 N.Y.S.2d at 776–77.

<sup>95</sup> *See id.* at 380, 855 N.E.2d at 22, 821 N.Y.S.2d at 791 (Kaye, C.J., dissenting) (urging the Court to recognize a constitutional right of same-sex couples to marry).

<sup>96</sup> None of the foregoing is to suggest that the Court of Appeals has universally adopted, in part or in whole, the preferred positions of Chief Judge Lippman. To the contrary, Chief Judge Lippman has failed to win a majority of the Court in some important and closely divided cases. *See, e.g.,* *Hirschfeld v. Teller*, N.Y. Slip Op. 02639, 2010 WL 1194174 (2010) (restricting the right of access of the New York State Mental Hygiene Legal Services to mentally disabled residents of certain nursing homes in 4 to 3 decision, over Chief Judge Lippman's dissenting opinion.); *People v. Ochoa*, N.Y. Slip Op. 01346, 2010 WL 519818 (2010) (finding that the prosecutor did not improperly bolster a witness and that the trial judge did not err in failing to inform defense counsel about an ambiguous juror note in a 4 to 3 decision, over the dissenting opinion of Judge Jones joined by Chief Judge Lippman); *Heslin v. County of Greene*, 14 N.Y.3d 67 (2010) (holding, in a 4 to 3 decision, over the dissenting opinion of Judge Ciparick joined by Chief Judge Lippman, that the statute of limitations toll for infants in wrongful death actions does not apply to personal injury claims); *People v. Sanchez*, 13 N.Y.3d 554 (2009) (holding, in a 4-3 decision, over the dissenting opinion of Jones joined by Lippman, that the crime of gang assault does not require the mental culpability for accomplice liability); *Affri v. Basch*, 13 N.Y.3d 592, 921 N.E.2d 1034 (2009) (holding, in a 4 to 3 decision, over Chief Judge Lippman's dissenting opinion, that the injured worker had failed to show that the owners of the property had sufficient control over the work necessary to establish liability); *People v. Arafat*, 13 NY3d 460 (2009) (finding, in a 4-3 decision, over the dissenting opinion of Judge Ciparick joined by Chief Judge Lippman, that the improper admission of criminal propensity evidence was harmless error); *Bazakos v. Lewis*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009) (holding, in a 4 to 3 decision, over Chief Judge Lippman's dissenting opinion, that a personal injury action against adverse party's medical examiner was governed, and thus barred, by the shorter statute of limitations for professional malpractice).

where it will go, based upon its record for a single year under a new chief judge.

In its first year, the Lippman Court has shown a confidence in its willingness to accept more criminal cases for review and in its welcoming attitude toward public disagreements—i.e., dissents. Those dissents, and the relatively frequent divided decisions they have engendered, have evinced a contentiousness that was not always present in the Kaye Court, or was often glossed over in the pursuit of unanimous or near-unanimous decisions. The result has been a body of “bolder,”<sup>97</sup> “groundbreaking,”<sup>98</sup> controversial decisions that have already come to characterize this Court as distinct from the more cautious period under Chief Judge Lippman’s predecessor.<sup>99</sup>

Just as one would expect, a new chief judge or justice often invigorates a court. That occurred when Judith Kaye was elevated.<sup>100</sup> The same seems to have happened with Jonathan Lippman’s appointment as well. That being said, anything but the most tentative of predictions about the Lippman Court at this point would be imprudent at best, and entirely frivolous at worst. The Wachtler Court began with the chief judge encouraging resort to the state constitution to thwart the Supreme Court’s disapproval of the Court of Appeals’s liberal decisions.<sup>101</sup> But Wachtler and his Court later turned rightward, with his colleagues divided over the very legitimacy of independent state constitutional adjudication.<sup>102</sup> The Kaye Court began with a renewed enthusiasm for state constitutional adjudication and, more generally, for more rights-protective decisions.<sup>103</sup> But the Court became much more conservative and cautious following Governor Pataki’s public court-bashing and his appointment of a majority of the Court’s judges.<sup>104</sup>

Similarly, whatever the Lippman Court is today may well change

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<sup>97</sup> See *supra* note 45 and accompanying text.

<sup>98</sup> See *supra* note 34 and accompanying text.

<sup>99</sup> For a more complete discussion on the changed character of the Court under Chief Judge Lippman, see generally, Glaberson, *supra* note 27. For a discussion on the more cautious Kaye Court, see *supra* notes 19–27 and accompanying text.

<sup>100</sup> See *supra* notes 13–14 and accompanying text.

<sup>101</sup> See Bonventre, *State Constitutionalism*, *supra* note 9 at 52–54 (discussing the tendency of the Court of Appeals in resorting to state constitution following reversal and remand).

<sup>102</sup> See Bonventre, *New York and the Supremes*, *supra* note 10 at 24–29; Bonventre, *Retrenchment Is the Rule*, *supra* note 10 at 121–42; Bonventre, *State Constitutional Recession*, *supra* note 10 at 2–15; Bonventre, *Court of Appeals*, *supra* note 10 at 445–48; Bonventre, *An Old Tradition Struggles with Current Issues*, *supra* note 10.

<sup>103</sup> See *supra* notes 13–14 and accompanying text.

<sup>104</sup> See *supra* notes 15–25 and accompanying text.

in years to come. A change in the state's politics, the composition of the Court, or the philosophical leanings of one or more of the judges—all have the potential of altering the character and course of the current Lippman Court. Nonetheless, the Court has been as fascinating as it is important to follow in the new chief judge's first year. It will likely be just as fascinating, and certainly just as important, throughout his tenure.