

JUDGE CARMEN BEAUCHAMP CIPARICK: A GLIMPSE INTO
THE SENIOR ASSOCIATE JUDGE'S JUDICIAL PHILOSOPHY
THROUGH HER DISSENTS

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I. INTRODUCTION

A study of New York State Court of Appeals Senior Associate Judge Carmen Beauchamp Ciparick's dissents unveils a liberal jurist who supports "claims of civil rights, liberties, equal protection, government-provided assistance or protections, [and] rights of the criminally accused."¹ Although the extent and degree of her liberal favor has evolved during the course of her sixteen-year tenure on the bench,² Ciparick is still perhaps the most liberal judge voting on the Court today. Her voting pattern, opinions, dissents, and public statements indicate that she views the judiciary as a necessary protector of these rights; these sentiments are memorialized in her rulings on issues concerning constitutional infringement by the executive³ and the legislature,⁴ institutional mechanisms such as arbitration,⁵ police power,⁶ and criminal

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¹ VINCENT MARTIN BONVENTRE, *STREAMS OF TENDENCY ON THE NEW YORK COURT: IDEOLOGICAL AND JURISPRUDENTIAL PATTERNS IN THE JUDGES' VOTING AND OPINIONS* 3 n.6 (2003) [hereinafter *BONVENTRE, STREAMS OF TENDENCY*].

² *Id.*

³ *See, e.g.*, *Pataki v. N.Y. State Assembly*, 4 N.Y.3d 75, 104, 824 N.E.2d 898, 915–16, 791 N.Y.S.2d 458, 475 (2004) (Kaye, J., dissenting) (proposing that the New York State Governor may not rewrite or propose substantive law of the state as an item of appropriation because it would overstep the line between the governor's budget-making responsibility and the legislature's lawmaking responsibility).

⁴ *See, e.g.*, *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 489, 909 N.E.2d 70, 77, 881 N.Y.S.2d 377, 384 (2009) (Ciparick, J., dissenting) (proposing that New York State has an affirmative duty to help the needy, and that denial of state benefits to needy, indigent, disabled, and blind individuals (including refugees), on the basis of citizenship status, is a violation of equal protection and article XVII of the New York State Constitution).

⁵ *See, e.g.*, *N.Y. State Office of Children & Family Servs. v. Lanterman*, Nos. 31, 32, slip op. 02432, at *8 (N.Y. Mar. 25, 2010) (Ciparick, J., dissenting) (voting to compel arbitration under employees' collective bargaining agreement to afford employees disciplinary due process).

⁶ *See, e.g.*, *People v. Mundo*, 99 N.Y.2d 55, 59, 780 N.E.2d 522, 524–25, 750 N.Y.S.2d 837,

prosecution.⁷

The purpose of this article is to provide a window into the judicial philosophy and principles that drive Ciparick's jurisprudence on New York State's highest bench. This comment will begin with a contextual background pertinent to understanding Ciparick's judicial ideology, including a discussion on notable jurisprudence that distinguished Ciparick early in her judicial career. The discussion will then progress to an analysis of Ciparick's voting patterns, focusing specifically on Ciparick's dissents as a primary indicator of judicial philosophy and principles.

II. BIOGRAPHY

Ciparick is the daughter of two Puerto Rican immigrants.⁸ She was born in New York City on January 1, 1942, and grew up in Washington Heights.⁹ For her undergraduate degree, she attended Hunter College of the City University of New York.¹⁰ Ciparick subsequently worked as a teacher during the day while attending law school at St. John's University School of Law in the evenings.¹¹ She received her J.D. degree in 1967 and immediately began work at the Legal Aid Society in the Bronx.¹² Thereafter, Ciparick was employed in a number of positions in judicial administration, first serving as assistant counsel for the Judicial Conference of the State of New York and then as chief law assistant of the New York City Criminal Court,¹³ after which she served as counsel in the Office of the New York City Administrative Judge under Judge David Ross.¹⁴ In 1978, Ciparick was appointed by Mayor Edward Koch¹⁵ to serve as a judge of the New York City Criminal Court, where she held the

839–40 (2002) (Ciparick, J., dissenting) (holding that a traffic violation did not constitute an “actual and specific danger” to an officer’s safety that would justify a search).

⁷ See, e.g., *People v. Gajadhar*, 9 N.Y.3d 438, 449, 880 N.E.2d 863, 870, 850 N.Y.S.2d 377, 384 (2007) (Ciparick, J., dissenting) (defendant cannot waive right to trial by jury of twelve, even if the defendant requests a waiver to avoid mistrial).

⁸ Daniel Wise, *Described as Personable, Principled*, N.Y. L.J., Dec. 2, 1993, at 1.

⁹ Historical Society of the Courts of the State of New York, Court of Appeals: State of New York (2001), *available at* http://www.courts.state.ny.us/history/pdf/Library/Courts/COA_Pamphlet.pdf.

¹⁰ Wise, *supra* note 8, at 2.

¹¹ *Id.*

¹² Honorable Carmen Beauchamp Ciparick (“Judge Ciparick Biography”), State of New York Court of Appeals, <http://www.nycourts.gov/ctapps/cbc.htm>.

¹³ *Id.*

¹⁴ Wise, *supra* note 8, at 2.

¹⁵ *Id.*

position for four years.¹⁶ She was then elected to the state supreme court in 1982, where she stayed until her appointment by Governor Mario M. Cuomo to the New York State Court of Appeals in 1993 and subsequent confirmation by the state senate in 1994.¹⁷ Upon commencement of her tenure, Ciparick would hold two diverse distinctions: as the first Hispanic and the second woman to serve as a judge on the New York State Court of Appeals.¹⁸

III. NOTABLE JURISPRUDENCE BEFORE APPOINTMENT TO THE NEW YORK COURT OF APPEALS

By the time of her nomination to the Court of Appeals, Ciparick had earned a reputation for being “fearless,” “personable,”¹⁹ and “independent.”²⁰ Ciparick gained favorable public attention for her diplomacy while presiding over *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*.²¹ The case involved a dispute over whether the American sailing team had violated the rules of the prestigious America’s Cup when it used a catamaran in the competition;²² the dispute was heated and produced “patriotic outbursts across the country.”²³ Ciparick ultimately ruled against the American team while appeasing impassioned spectators in the courtroom.²⁴ Her diplomacy was described as “completely in character,”²⁵ and she was widely regarded as possessing a temperament commensurate with appellate-level jurisprudence.²⁶ Although her ruling would be

¹⁶ Honorable Carmen Beauchamp Ciparick, *supra* note 12.

¹⁷ *Id.*

¹⁸ John M. Bagyi, Comment, *Carmen Beauchamp Ciparick: The Court of Appeals’ Voice of Compassion*, 59 ALB. L. REV. 1913, 1914 (1996). There has been some debate as to whether Judge Benjamin Cardozo was, in fact, the first Hispanic to serve as a judge on the New York Court of Appeals. *See id.* at 1914 n.10 (citing Vincent M. Bonventre, *The High Court Remade: New Judges Leave Their Marks*, EMPIRE S. REP., Mar. 1994, at 59 (stating that the honor of being the first Hispanic on the Court of Appeals may belong to former Chief Judge Benjamin Cardozo); Jeffrey A. Segal, *Cardozo Was First*, NEWSDAY, Dec. 20, 1993, at 77 (stating that Benjamin Cardozo was the first Hispanic to serve on the Court of Appeals)).

¹⁹ Wise, *supra* note 8, at 1.

²⁰ BONVENTRE, STREAMS OF TENDENCY, *supra* note 1, at 78 n.41.

²¹ *See Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 150 A.D.2d 82, 89, 545 N.Y.S.2d 693, 697 (App. Div. 1st Dep’t 1990).

²² *Id.*

²³ Bagyi, *supra* note 18, at 1916 n.23.

²⁴ Even in light of the controversial and intricate matter, Ciparick openly exchanged pleasantries with the mayor of San Diego, who attended the trial and shared the American team’s interest. Wise, *supra* note 8, at 2.

²⁵ Wise, *supra* note 8, at 2.

²⁶ *Id.* (quoting Presiding Justice Francis T. Murphy of the Appellate Division, First Department).

overturned by the state's highest court,²⁷ Ciparick became known for her “[g]race under [p]ressure” while “going out on a limb on an issue in which she strongly believe[d].”²⁸

Before her appointment to the Court of Appeals, Ciparick authored a number of significant opinions in support of “the individual [as well as the view of] the constitution as a shield with which the judiciary can protect the state’s citizenry.”²⁹ Among the most notable of these was her opinion in *Hope v. Perales*, where Ciparick ruled that the denial of abortion costs in government-subsidized prenatal care was unconstitutional.³⁰ In her own words: “[t]he right of a pregnant woman to choose an abortion in circumstances where it is medically indicated is one component of the right of privacy rooted in the due process clause of the New York State Constitution.”³¹ Ciparick further reasoned that services enumerated within the list of covered prenatal care were based “on conduct,” and “not need,” which forced women already made vulnerable by their financial dependence on state-provided care into a “state preferred choice of childbirth.”³² This ruling, too, would be overturned by the Court of Appeals.³³

The *Hope* opinion alone sparked heated opposition during her lengthy confirmation hearing,³⁴ which even prompted the senate judiciary committee, in an unprecedented move, to break for “due reflection” after the hearing and before voting.³⁵ The committee openly questioned her views on abortion, her legal rationale in the *Hope* decision, and “her understanding of ‘legislative intent’ and

²⁷ *Mercury Bay Boating Club*, 76 N.Y.2d at 260, 557 N.E.2d at 89, 557 N.Y.S.2d at 853.

²⁸ Wise, *supra* note 8, at 1.

²⁹ Bagyi, *supra* note 18, at 1915.

³⁰ *Hope v. Perales (Hope I)*, 150 Misc. 2d 985, 571 N.Y.S.2d 972 (Sup. Ct. 1991), *rev'd* 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994).

³¹ *Id.* at 994, 571 N.Y.S.2d at 978.

³² *Id.* at 995, 571 N.Y.S.2d at 979; *see also id.* at 991–92, 571 N.Y.S.2d at 976–77 (“That [the Prenatal Care Assistance Program] provides funds for only one of the only two courses of treatment for pregnancy is not only inconsistent with New York’s long and liberal history of aiding residents it identifies as needy in some regard, it is contrary to the constitutional right to privacy guaranteed by the Due Process Clause of the New York State Constitution.”).

³³ *See Hope v. Perales (Hope II)*, 83 N.Y.2d 563, 571, 634 N.E.2d 183, 184, 611 N.Y.S.2d 811, 812 (1994).

³⁴ *Hope I*, 150 Misc. 2d at 986, 571 N.Y.S.2d at 973 (arguing that denial of abortion costs in government-subsidized prenatal care was unconstitutional), *rev'd* 83 N.Y.2d at 571, 634 N.E.2d at 184, 611 N.Y.S.2d at 812; James Dao, *Koppell Named Interim Attorney General*, N.Y. TIMES, Dec. 17, 1993, at B9 (“Justice Ciparick’s appointment to the high court had been strongly opposed by anti-abortion groups and some Republican senators because of her 1991 ruling that said that the right to an abortion is protected under the state constitution.”).

³⁵ Gary Spencer, *Ciparick Faces Sharp Questions from Senators*, N.Y. L.J., Dec. 16, 1993, at 1 (quoting Acting Chairman John J. Marchi of Staten Island).

‘separation of powers.’”³⁶ In response, Ciparick stated her refusal to “relitigate the case,” or to discuss her personal opinions about abortion, explicitly reserving any reexamination of her decision to the appellate courts.³⁷ When asked whether a judge could “question the motives of the Legislature if it has made its intent clear,”³⁸ Ciparick replied:

If it infringes on a constitutional right, then the court must step in to protect that right [regardless of whether the problem stems from] police action, executive action or action by the Legislature. That is the linchpin of our freedoms and of our Constitution—that we must continue protecting our citizens.³⁹

Although Ciparick ultimately succeeded in her nomination, Senate Aides indicated that “the 34-to-25 vote was the slimmest margin of approval for a Court of Appeals Judge in memory.”⁴⁰

IV. RE-NOMINATION TO THE NEW YORK COURT OF APPEALS AND THE BID FOR CHIEF JUDGESHIP

In 2007, Ciparick was successfully appointed to a second fourteen-year term by Governor Eliot Spitzer.⁴¹ The reappointment was notable because her second term will be cut short by a mandatory retirement age, which will force Ciparick to leave the Court in 2012.⁴² Judge Ciparick’s re-nomination came in the wake of a recent reappointment denial, which was rooted in the mandatory retirement age rule.⁴³ In 2006, Governor George Pataki denied Judge George Bundy Smith’s reappointment, noting that the judge’s reappointment would leave the seat vacant in just over one year,

³⁶ *Id.* (quoting Acting Chairman John J. Marchi of Staten Island).

³⁷ *Id.*

³⁸ *Id.* (quoting Senator Michael J. Tully, Jr.).

³⁹ *Id.*

⁴⁰ Dao, *supra* note 24, at B9 (“But despite antipathy to Justice Ciparick, many senators felt rejecting her nomination would alienate both Hispanic and female voters in next year’s statewide races.”).

⁴¹ Honorable Carmen Beauchamp Ciparick, *supra* note 12; *see also* New York State Executive Chamber, Governor Eliot Spitzer, Press Release, Governor Eliot Spitzer Nominates the Honorable Carmen Beauchamp Ciparick as Associate Judge of the Court of Appeals (Nov. 26, 2007), available at <http://www.state.ny.us/governor/press/1126071.html>.

⁴² Joel Stashenko, *Ciparick Is on List to Fill Her Seat on Top Court*, N.Y. L.J., Oct. 15, 2007, at 1.

⁴³ There is much debate on whether the requirement, which was adopted in 1869, should be abandoned. *See* Joel Stashenko, *Mandatory Retirement at Age 70 for State Judges: A “Waste of Accumulated Wisdom” or a “Good Thing”?*, Dec. 29, 2008, at 1 (surveying Court of Appeals judges affected by the requirement).

pending a mandatory retirement age requirement.⁴⁴ The denial was politically motivated. Republican Governor Pataki was “eager to leave a lasting legacy on the Court” before the upcoming end of his own term; he also feared the appointment powers of a presumed Democratic successor (Eliot Spitzer was identified at the time as the likely candidate).⁴⁵ Although many feared that this denial “would harm the merit selection process if a respected judge with outstanding credentials were denied reappointment because of political considerations,”⁴⁶ Governor Pataki declined Smith’s reappointment and appointed Judge Eugene F. Pigott, Jr., instead.

The appointment, nonetheless, left the panorama of the bench without one African American face in attendance.⁴⁷ Following her own re-appointment that would last only five years, and perhaps wary of Smith’s experience, Ciparick commended Governor Spitzer for supporting continued diversity on the bench and for his “willingness to reappoint judges, appointed during previous administrations.”⁴⁸ Ciparick further offered that “any well-qualified judge seeking reappointment to his or her judicial post [should] be granted such an appointment regardless of political party affiliation or judicial philosophy.”⁴⁹ Subsequently, in 2008, Ciparick applied for but was denied consideration for the Chief Judge position left vacant by Chief Judge Judith Kaye.⁵⁰

V. ANALYSIS: THE DISSENT APPROACH

A judge’s dissent is the most valuable tool with which to measure

⁴⁴ John Caher, *Seven Judges on “Very Strong” Court List*, N.Y. L.J., July 21, 2006, at 1.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ John Caher, *Lack of Diversity on Top Court and in Pipeline Is Criticized*, N.Y. L.J., Dec. 5, 2006, at 1. Governor Pataki would be criticized for leaving the bench without any African American representation; he would leave the appellate divisions with only two African American justices out of a total of fifty-seven. Notably, both African American justices were appointed by Governor Pataki’s democratic predecessor, Governor Mario M. Cuomo. A spokesman stated this response for Governor Pataki: “[T]he governor is very proud of his record of appointing outstanding jurists, who he believes will have the greatest long-term impact on the judiciary.” *Id.*

⁴⁸ Joel Stashenko, *Ciparick Praises Spitzer’s Diverse Picks for Bench*, N.Y. L.J., Jan. 9, 2008, at 1.

⁴⁹ *Id.*

⁵⁰ Joel Stashenko, *Paterson “Outraged” by All-Male Court Picks but Appears Bound*, N.Y. L.J., Dec. 4, 2008. Although two women applied for the nomination, the shortlist presented to Governor Paterson was devoid of any female nominees. Paterson remarked: “I am not happy about the message it sends to young women who are in college or who are thinking about applying to law school, young lawyers who are women who know the glass ceiling well, who wonder if they had the qualifications, would they have made the list?” *Id.*

his or her “strongest feelings, views, philosophies, tendencies, and ideological leanings.”⁵¹ By dissenting, a jurist has chosen to depart from the majority, and to state, on record, his or her refusal to join.⁵² In so many other instances, the opportunity to write a dissent may be abandoned for many reasons. For instance, the writing of a dissent may not fit within a judge’s workload, could create unwanted and unnecessary conflict within the court, might not herald the judge’s principles to a large enough degree, or the issue at hand might not be sufficiently critical to warrant the added heartache.⁵³

The dissent becomes possible when a judge’s inner principles are challenged to a level where formalities and compromises stand aside. When judges are “public [with] their divisions and their reasons,” they “also supply information about their attitudes and their values which is available in no other way.”⁵⁴ Where “[t]he directive force of a principle may be exerted along the line of logical progression . . . historical development . . . customs of the community . . . and lines of justice, morals and social welfare,”⁵⁵ the dissent becomes necessary when that line is challenged by the direction of a court’s decision-making. In a dissent, the judge’s voice stands alone and largely unaltered by the compromises typically made within the authoring of a majority opinion. For these reasons, dissents represent a brilliant opportunity to reflect on the profile of a judge’s principled decision-making.

⁵¹ Posting of Vincent Bonventre to New York Court Watcher, *New York Court of Appeals: More Dissents in Kaye Court (Part 2: Who? How Many? What?)*, <http://www.newyorkcourtwatcher.com/2008/07/new-york-court-of-appeals-more-dissents.html>. (“All these dissent numbers . . . represent instances where [] judges felt strongly enough about a case to go public with a disagreement over a decision of their very collegial court. . . . And these written dissents, the few disagreements gone public, reflect much more than their numbers might suggest. They provide insights into other disagreements that are never made public.”).

⁵² See 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, 1167 (1994) [hereinafter Bonventre, *Kaye*].

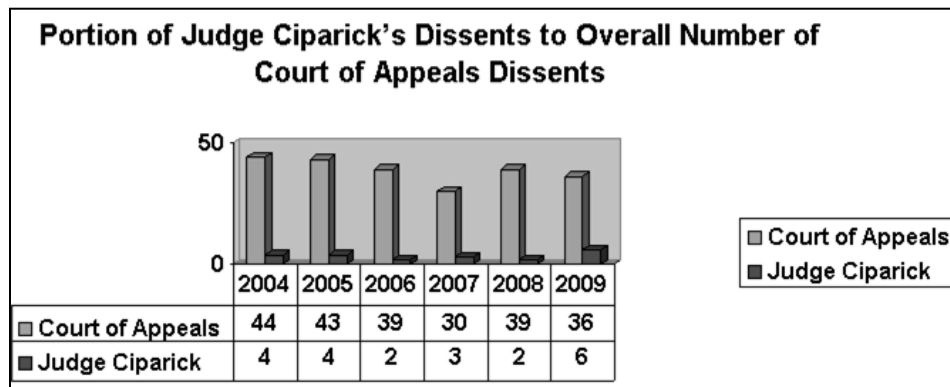
⁵³ Posting of Vincent Bonventre, *supra* note 51; see also Bonventre, *Kaye, supra* note 52, at 1167 (citing Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 5 (1966) (arguing that judicial opinions, or joining of majority opinions, reveal little about a judge’s jurisprudence)).

⁵⁴ Bonventre, *Kaye, supra* note 52, at 1168 (citing C. Herman Pritchett, *Divisions of Opinion Among Justices on the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890, 892 (1941) (analyzing voting patterns of Supreme Court justices)).

⁵⁵ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 30–31 (1921).

VI. STATISTICAL APPROACH TO DISSENTS

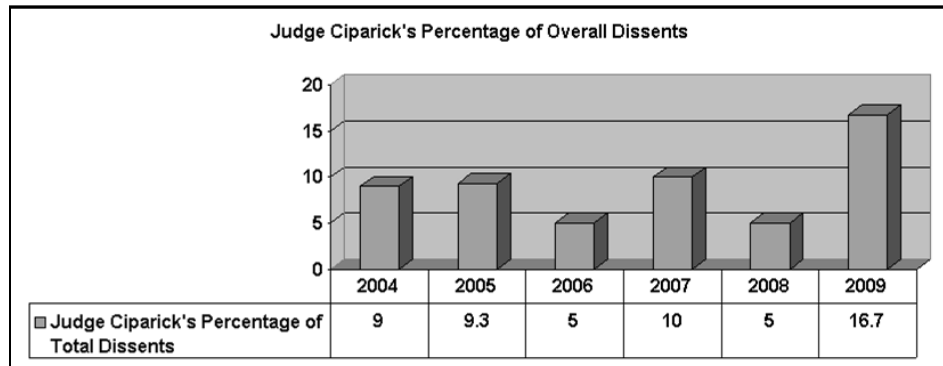
Every year, the New York Court of Appeals publishes an annual report reflecting, among other data, the number of appeals filed by the Court and the subsequent portion of those appeals filed with concurring or dissenting opinions. The report typically describes the number of appeals filed *without* dissent distinct from those filed *with* dissent.⁵⁶ At first blush, Ciparick appears to render dissents infrequently, averaging at three-and-one-half in the past six years:⁵⁷



Comparing Ciparick's overall percentage of participation in dissent-authoring yields the same result. If all judges on the Court of Appeals were to dissent in equal proportions, each judge would contribute to roughly fifteen percent of all dissents annually. Over the past six years, Ciparick has averaged approximately 9.2% of the overall dissents filed by the court—well below her fictitious “proportionate share.” This result highlights the gravity and importance by which each judge employs his or her decision to file a dissent. This result also establishes that Ciparick is not the most prolific dissenter on the court.

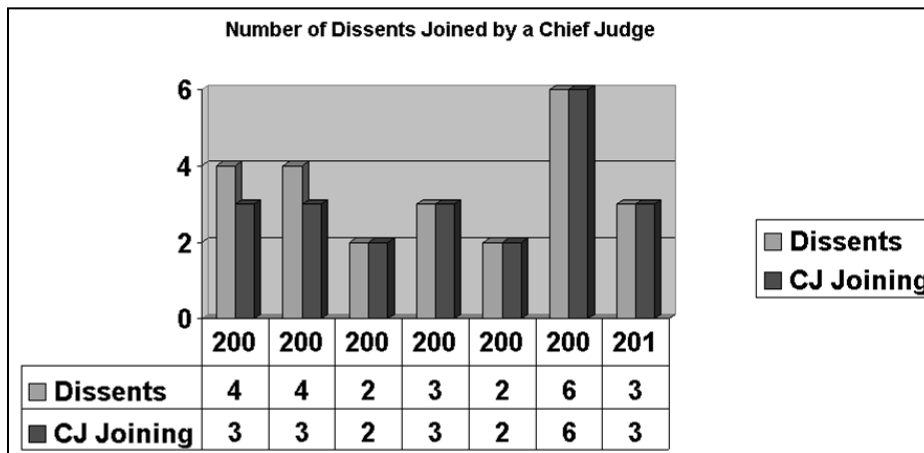
⁵⁶ See, e.g., COURT OF APPEALS OF THE STATE OF N.Y., ANNUAL REPORT OF THE CLERK OF THE COURT 5 (2008), available at <http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2008.PDF>.

⁵⁷ I have included statistics pertaining to either the past six years (including the past five full years for roundedness, plus results through 2009) or since Judge Ciparick began serving on the Court of Appeals in 1994 for a complete synopsis of her participation. Because data is incomplete for 2010, I have limited discussion of 2010 dissents to correlations with Chief Judge Lippman joining.



An overwhelming majority of dissents written by Ciparick were joined by Chief Judge Kaye. Consulting her dissent record within the past six years shows that this was a rather dependable trend with Kaye. Conversely, Ciparick would join Kaye in dissent eleven times during the course of their tenure together. The judges joined in dissent primarily on issues arising in criminal appeals, municipal employee rights, and municipal disputes on the disbursement of benefits among public and private entities. Although it may be shortsighted to make a determination on the matter yet, Ciparick's dissents appear to have the support of newly-appointed Chief Judge Lippman as well; and each of these dissents have sought to expand the rights of the individual.⁵⁸

⁵⁸ Lippman has joined Ciparick in all nine dissents she authored between 2009 and 2010: *People v. Tolentino*, No. 37, slip op. 02643, at *10 (N.Y. Mar. 30, 2010) (Ciparick, J., dissenting) (suggesting that DMV records discovered as a result of an allegedly unlawful stop should be suppressed); *N.Y. State Office of Children & Family Servs. v. Lanterman*, Nos. 31, 32, slip op. 02432, at *8 (N.Y. Mar. 25, 2010) (Ciparick, J., dissenting) (voting to compel arbitration under employees' collective bargaining agreement to afford employees disciplinary due process); *Heslin v. County of Greene*, No. 1, slip op. 01010, at * 6 (N.Y. Feb. 11, 2010) (Ciparick, J., dissenting) (arguing that the plaintiff, administrator of the estate of the infant decedent whose sole distributees are her infant sisters, should be entitled to the infancy toll pursuant to CPLR 208 in personal injury action); *Lee v. Astoria Generating Co.*, 13 N.Y.3d 382, 392, 920 N.E.2d 350, 355, 892 N.Y.S.2d 294, 300 (2009) (Ciparick, J., dissenting) (proposing that where a federal remedy is not provided for an injured maritime employee's tort claim, there is no "exclusive remedy" that preempts state law actions); *People v. Arafet*, 13 N.Y.3d 460, 468, 920 N.E.2d 919, 924, 892 N.Y.S.2d 812, 817 (2009) (Ciparick, J., dissenting) (arguing that highly prejudicial evidence as to the defendant's prior federal felony conviction, and a multitude of other collateral evidence concerning prior criminality, should not be permissible under *Molineux* rule); *Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 611, 911 N.E.2d 817, 822, 883 N.Y.S.2d 755, 760 (2009) (Ciparick, J., dissenting) (insisting that the plain language of an insurance regulation ensures additional benefits to injured party); *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 489, 909 N.E.2d 70, 77, 881 N.Y.S.2d 377, 384 (2009) (Ciparick, J., dissenting) (arguing that New York State has an affirmative duty to help the



Looking to the remaining seats on the bench, Judges Graffeo, Read, Smith, and Pigott have never joined a dissent authored by Ciparick. Judge Jones has concurred with three dissents authored by Ciparick during their shared tenure;⁵⁹ Ciparick has joined Jones three times in dissent, each time voting pro-defendant on criminal law issues.⁶⁰ These dissent patterns provide insight into Ciparick's jurisprudence. More specifically, the dissent patterns reveal the issues about which Ciparick feels most passionate as well as the side of the bench with whom Ciparick shares her ideology.

needy, and that denial of state benefits to needy, indigent, disabled, and blind individuals (including refugees), based on citizenship status, is a violation of equal protection and article XVII of the New York Constitution)); *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 280, 907 N.E.2d 292, 295, 879 N.Y.S.2d 379, 382 (2009) (Ciparick, J., dissenting) (arguing that the majority should have held that the delegation of recordkeeping duties to an agency other than that designated by statute may estop town from asserting lack of notice); *People v. Kalin*, 12 N.Y.3d 225, 232, 906 N.E.2d 381, 386, 878 N.Y.S.2d 653, 658 (2009) (Ciparick, J., dissenting) (proposing that the sufficiency of an accusatory instrument is a question of jurisdiction and may not be negotiated, even where the entire instrument may be waived for another).

⁵⁹ *Arafet*, 13 N.Y.3d at 468, 920 N.E.2d at 924, 892 N.Y.S.2d at 817; *Kalin*, 12 N.Y.3d at 232, 906 N.E.2d at 386, 878 N.Y.S.2d at 658; *Appleton Acquisition, LLC v. Nat'l Housing P'ship*, 10 N.Y.3d 250, 259, 886 N.E.2d 144, 151, 856 N.Y.S.2d 522, 539 (2008) (Ciparick, J., dissenting) (preserving common law action for breach of contract where the statute providing for alternative recovery does not specifically bar the action).

⁶⁰ *People v. Ochoa*, Nos. 22, 23, slip op. 01346, at *11 (N.Y. Feb. 16, 2010) (Jones, J., dissenting) (finding reversible error in favor of defendant); *People v. Sanchez*, 13 N.Y.3d 554, 568, 921 N.E.2d 570, 578, 893 N.Y.S.2d 803, 811 (2009) (Jones, J., dissenting) (arguing that the gang assault statutes require persons who "aided" and were "actually present" to have a degree of mental culpability); *People v. Naradzay*, 11 N.Y.3d 460, 468, 900 N.E.2d 924, 929, 872 N.Y.S.2d 373, 378 (2008) (Jones, J., dissenting) (arguing that while extensive planning established mens rea, defendant was never "dangerously near" completion of the crime to constitute actus reus for attempt).

A. *Criminal Appeals*

Since the beginning of her career on the Court of Appeals, Ciparick has been known for being “generally protective of defendant’s rights,” which was consistent with her “tendency to focus on the individual.”⁶¹ Ciparick “views procedural safeguards and evidentiary rules as powerful tools of the judiciary” that ensure due process.⁶² Although Judge Ciparick’s philosophy includes a willingness to “constrain the otherwise unchecked discretion of the police,” she contends that her goal is not to “‘tie the hands of law enforcement’;” furthermore, Judge Ciparick so eloquently said that although checks and balances necessarily result “in a less ‘efficient’ criminal justice system,” the process is a “necessary incident of living in a society graced with a constitution designed to protect its citizenry.”⁶³ The entire body of Ciparick’s voting history on the Court of Appeals evinces the notion that the state constitution is a protective tool with which the judiciary is charged to protect the people.

Ciparick appears to consistently vote pro-defendant when authoring or joining a dissent. Taking into consideration her entire tenure on the Court of Appeals, through the end of 2009, Ciparick has authored a total of fourteen dissents and has joined twenty-two others. Out of a total of thirty-six authored or joined dissents, Ciparick has voted against the defendant only twice.

Ciparick’s criminal dissents focus on preserving the defendant’s due process rights to a fair and impartial trial to the maximum extent possible.⁶⁴ *People v. Gajadhar* is an illustrative example, both for its result and its view into Ciparick’s use of statutory interpretation to broaden the rights of the criminal defendant. In *Gajadhar*, Ciparick forcefully argued that a defendant may not negotiate his right to a trial by a jury of twelve by accepting a jury of fewer people, based on plain language in the New York Constitution that Ciparick characterized as non-negotiable.⁶⁵ The

⁶¹ Bagyi, *supra* note 18, at 1920.

⁶² *Id.* at 1932; *see, e.g.*, *People v. Gajadhar*, 9 N.Y.3d 438, 449, 880 N.E.2d 863, 870, 850 N.Y.S.2d 377, 384 (2007) (Ciparick, J., dissenting).

⁶³ Bagyi, *supra* note 18, at 1932.

⁶⁴ For an early example, *see People v. Brancoccio*, 83 N.Y.2d 638, 643, 634 N.E.2d 954, 956, 612 N.Y.S.2d 353, 356 (1994) (Kaye, C.J., dissenting) (suggesting that the criminal court should have been divested of jurisdiction over felony indictment after misdemeanor indictment filed).

⁶⁵ *Gajadhar*, 9 N.Y.3d at 449, 880 N.E.2d at 870, 850 N.Y.S.2d at 384 (Ciparick, J., dissenting). Judge Ciparick’s use of language is critical:

There has been no constitutional or legislative amendment permitting a trial by fewer

defendant had requested a waiver of these rights when one of the jurors suddenly became ill and incapable of serving during the final days of trial.⁶⁶ Ciparick argued that because the right to a trial by a jury of twelve was imbedded in both statute and constitution, the requirement could not be waived by “a court, a prosecutor [or] a defendant.”⁶⁷ Ciparick interpreted the language of the New York Constitution as offering but two options to the defendant: a jury of twelve individuals or a waiver of a trial by jury altogether.⁶⁸ Ciparick argued that the number of jurors was therefore not negotiable, and rejected any exception or mode of leniency regarding the rule.⁶⁹

In *People v. Aarons*, Ciparick used a *noscitur a sociis* interpretation of the criminal procedure law to disqualify an indictment that followed after a grand jury failed to vote a true bill on an initial presentation.⁷⁰ In *Aarons*, the grand jury was unable to come to a conclusion after the initial presentation, and the prosecutor submitted new evidence sua sponte to secure an indictment.⁷¹ On appeal, the validity of the indictment rested on whether a dismissal by the grand jury constituted an action under applicable criminal procedure law, which required a quorum of twelve members, or whether dismissal resulted automatically when the grand jury failed to vote a true bill on the initial presentation.⁷² The relevant section of criminal procedure law provides that four actions could be taken by a grand jury provided that a quorum of twelve members is reached: (1) “[t]he finding of an indictment”; (2) “a direction to file a prosecutor’s information”; (3) “a decision to submit a grand jury report”; and (4) “every other affirmative official

than 12 jurors and no ‘judicial interpretation’—until today—that allows such a drastic departure from the text of article VI, section 18 of the New York Constitution—adopted in 1961. That section formally enshrined in the language of our Constitution the number of jurors required in a criminal case—‘that crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution.’

Id. at 451, 871–72, 385–86.

⁶⁶ *Id.* at 439, 880 N.E.2d at 863, 850 N.Y.S.2d at 377.

⁶⁷ *Id.* at 449, 880 N.E.2d at 870, 850 N.Y.S.2d at 384 (Ciparick, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *People v. Aarons*, 2 N.Y.3d 547, 553, 813 N.E.2d 613, 616, 780 N.Y.S.2d 533, 536 (2004) (Ciparick, J., dissenting). The *noscitur a sociis* textual canon of statutory interpretation states that an ambiguous word may be articulated by reference to other words associated with it. 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.26 (Norman Singer, ed., 6th ed. 2000).

⁷¹ *Aarons*, 2 N.Y.3d at 549, 813 N.E.2d at 613–14, 780 N.Y.S.2d at 534.

⁷² *Id.* at 553, 813 N.E.2d at 617, 780 N.Y.S.2d at 537 (Ciparick, J., dissenting).

action or decision [by a grand jury].”⁷³ Dismissal was not enumerated in this list and could therefore only fit within the fourth category. Ciparick argued that the first three categories listed permissive acts which resulted in further proceedings against the defendant.⁷⁴ Ciparick employed a liberalist approach, yielding “support for extending . . . rights, liberties, protections, or entitlements,” thus finding dismissals outside the scope of the applicable provision and concluding that the dismissal occurred upon deadlock.⁷⁵ Ciparick further argued that the prosecution’s resubmission of evidence to the grand jury, without judicial leave and absent a sua sponte request from the grand jury, was improper and exposed the defendant to double jeopardy.⁷⁶

Ciparick dissents often on the issue of identification. Most recently, in *People v. Arafet*, a *Molineux* signature was predicated on the complexity of a tractor trailer hoisting, coupled with evidence of the defendant’s prior crimes and circumstantial evidence linking the defendant to others who also had the ability to commit the crime.⁷⁷ Ciparick’s dissent implicated the weight of circumstantial evidence that was used to convict the defendant, citing a misuse of the *Molineux* rule.⁷⁸ In *People v. Grajales*, Ciparick reiterated that all identification procedures must be disclosed to the defendant, that all pre-trial identification must be fully disclosed in the notice served on defendant without exception, and that failure to do so should result in suppression.⁷⁹ In *People v. Jones*, Judge Ciparick argued for the suppression of a lineup identification obtained after an illegal arrest.⁸⁰

In dissent, Ciparick also writes on the principle that due process violations in trials involving heinous crimes must be ardently pursued. In cases involving heinous crimes, the defendant’s position is uniquely prejudiced, and constitutional violations appear more vulnerable to “harmless error” analysis. In a 2004 dissent on a case concerning a hate crime, Ciparick argued that photographs

⁷³ *Id.* at 553, 813 N.E.2d at 617, 780 N.Y.S.2d at 537 (quoting N.Y. CRIM. PROC. LAW § 190.25(1) (McKinney 2007)).

⁷⁴ *Id.* at 554, 813 N.E.2d at 617–18, 780 N.Y.S.2d at 537–38.

⁷⁵ See BONVENTRE, STREAMS OF TENDENCY, *supra* note 1, at 3 n.6.

⁷⁶ *Aarons*, 2 N.Y.3d at 557, 813 N.E.2d at 619–20, 780 N.Y.S.2d at 539–40.

⁷⁷ *People v. Arafet*, 13 N.Y.3d 460, 468, 920 N.E.2d 919, 924, 892 N.Y.S.2d 812, 817 (2009) (Ciparick, J., dissenting).

⁷⁸ *Id.* at 468, 920 N.E.2d at 924, 892 N.Y.S.2d at 817.

⁷⁹ *People v. Grajales*, 8 N.Y.3d 861, 865, 864 N.E.2d 596, 599, 832 N.Y.S.2d 466, 469 (2007) (Ciparick, J., dissenting).

⁸⁰ *People v. Jones*, 2 N.Y.3d 235, 248, 810 N.E.2d 415, 425, 778 N.Y.S.2d 133, 143 (2004) (Ciparick, J., dissenting).

depicting the defendant's supremacist tattoos could not be submitted as evidence to establish the defendant's motive.⁸¹ Ciparick found that the submission of the evidence was improper because it compelled the defendant to be a witness against himself.⁸² She asserted that the "[d]efendant's heinous crimes and despicable beliefs do not exempt him from the protections of the Constitution or the law."⁸³ In 2006, in a case concerning the trial of a child rapist, Ciparick advocated to protect the high standard of the right to counsel when she stated:

It is a sad day when the Court of Appeals deviates from its heretofore robust protection of the right to counsel as conceived under the State's Constitution solely because of the proof of guilt and the heinousness of the crimes alleged. Contrary to our jurisprudence, the majority has focused on indicia of "overwhelming" evidence of guilt in order to apply harmless error when a defendant was deprived of the right to counsel at a critical stage of the proceeding—a pretrial suppression hearing.⁸⁴

All of these dissents reveal a consistency to Ciparick's jurisprudence in due process issues. Ciparick's dissents repeatedly vote to extend protections to defendants in criminal trials.

B. Civil Appeals

Ever since *Hope v. Perales*,⁸⁵ Ciparick has been known as a judge who seeks to protect "the defenseless, the disenfranchised, and the underprivileged" through actively shielding these groups with constitutional protections.⁸⁶ Ciparick's liberal rulings are consistent throughout her tenure on the Court of Appeals, as well as her written dissents. Overwhelmingly indicated in Ciparick's dissents are municipal employee rights and the rights of undocumented workers.

Ciparick dissents to extend protections to municipal employees who risk falling outside of certain classes of protections. In *Garcia v. Bratton*, a probationary officer was placed on modified duty

⁸¹ *People v. Slavin*, 1 N.Y.3d 392, 400, 807 N.E.2d 259, 265, 775 N.Y.S.2d 210, 216 (2004) (Ciparick, J., dissenting).

⁸² *Id.* at 401–02, 807 N.E.2d at 265–66, 775 N.Y.S.2d at 216–17.

⁸³ *Id.* at 404–05, 807 N.E.2d at 268, 775 N.Y.S.2d at 219.

⁸⁴ *People v. Wardlaw*, 6 N.Y.3d 556, 560, 849 N.E.2d 258, 261, 816 N.Y.S.2d 399, 402 (N.Y. 2006) (Ciparick, J., dissenting).

⁸⁵ *See supra* Part III.

⁸⁶ Bagyi, *supra* note 18, at 1915.

during a period of time that extended beyond the original probationary period.⁸⁷ The officer was terminated without a hearing, and the department attested that the probationary period had been extended by modified duty and that the officer was therefore not entitled to a hearing.⁸⁸ Ciparick dissented, opining that the officer was due a hearing because correlating statutes were ambiguous on the treatment of modified duty and probationary periods, and should therefore be read in favor of the officer's position.⁸⁹ In *Lee v. Astoria Generating Company*, a land-based maritime worker was injured while working on a barge at an electric generating facility.⁹⁰ He brought a state law claim against the barge owner, who defeated the claim by arguing federal preemption under the federal government's exclusive maritime jurisdiction.⁹¹ The preemption would then provide no remedy to the employee, because his injury did not constitute a maritime tort.⁹² Ciparick adamantly insisted on permitting a state claim for tort where a federal statute preempted the issue generally but provided no remedy. Ciparick wrote, "[i]f there is no remedy provided [within a federal statute, then] there is no 'exclusive remedy' that preempts state law actions."⁹³ In *In re Obot*, a discharged prison employee appealed from an arbitration award that confirmed the grounds for his discharge.⁹⁴ He claimed retaliatory measures had been taken against him, and sought review of this issue on appeal even it had not been preserved during arbitration.⁹⁵ Ciparick argued:

Because of the strong public policy decrying retaliatory discharges expressed in Civil Service Law § 75-b(2), together with the public policy, as articulated by the Supreme Court, recognizing an exception to the finality of arbitral awards procured at the expense of the employee's right to fair representation, we conclude that the award should be vacated⁹⁶

In each of these dissents, Ciparick argued to expand the rights of

⁸⁷ *Garcia v. Bratton*, 90 N.Y.2d 991, 994, 688 N.E.2d 495, 497–98, 665 N.Y.S.2d 621, 624 (1997) (Ciparick, J., dissenting).

⁸⁸ *Id.* at 994–95, 688 N.E.2d at 498, 665 N.Y.S.2d at 624.

⁸⁹ *Id.* at 994–95, 688 N.E.2d at 498, 665 N.Y.S.2d at 624.

⁹⁰ *Lee v. Astoria Generating Co.*, 13 N.Y.3d 382, 389–90, 920 N.E.2d 350, 353–54, 892 N.Y.S.2d 294, 297–98 (2009).

⁹¹ *Id.* at 390, 920 N.E.2d at 354, 892 N.Y.S.2d at 298.

⁹² *Id.* at 394, 920 N.E.2d at 357, 892 N.Y.S.2d at 301 (Ciparick, J., dissenting).

⁹³ *Id.* at 394, 920 N.E.2d at 357, 892 N.Y.S.2d at 301.

⁹⁴ *In re Obot*, 89 N.Y.2d 883, 885, 675 N.E.2d 1197, 1198, 653 N.Y.S.2d 245, 245 (1996).

⁹⁵ *Id.* at 885, 675 N.E.2d at 1198, 653 N.Y.S.2d at 245.

⁹⁶ *Id.* at 887, 675 N.E.2d at 1199, 653 N.Y.S.2d at 245 (Ciparick, J., dissenting).

municipal workers by preserving remedies for them.

Notably, in the past two years, Ciparick has authored three dissents seeking to extend constitutional rights to undocumented immigrants. In *Cubas v. Martinez*, Ciparick argued that the DMV commissioner may not require a Department of Homeland Security document to prove inability to receive a social security number in issuing state identification, citing this documentation is an exclusive immigration matter.⁹⁷ In *Ramroop v. Flexo-craft Printing, Inc.*, an undocumented worker lost his hand in a machinery accident and was denied “additional compensation” by the New York State Workers’ Compensation Board.⁹⁸ Ciparick’s dissent reasoned that workers with impaired immigration status should be entitled to compensation benefits where such benefits are otherwise available to them.⁹⁹ And, in *Khrapunskiy v. Doar*, she found that the denial of social security benefits to needy, indigent, disabled, and blind individuals (including refugees), where disability delayed the acquisition of citizenship beyond the mandatory seven year window, was a constitutional violation.¹⁰⁰

Ciparick’s rulings in favor of extending protections to undocumented immigrants are an interesting and timely progression of Ciparick’s advocacy for broadened constitutional protections. First, this new trend of labeling this class as “undocumented immigrant,” instead of “illegal immigrant,” whether sparked by a renewed sense of protection or simply the mere opportunity by way of the docket, is extremely timely.¹⁰¹ In a December 2009 opinion, newly appointed Supreme Court Justice Sonia Sotomayor put to pen the term “undocumented immigrant” in lieu of “illegal immigrant”;¹⁰² a linguistic characterization serving as a precursor to extending rights to this class. Ciparick clearly has joined suit. Second, in her view, state constitutional rights—at least New York State constitutional rights—are more expansive

⁹⁷ *Cubas v. Martinez*, 8 N.Y.3d 611, 621, 625, 870 N.E.2d 133, 139, 141–42, 838 N.Y.S.2d 815, 821, 824 (2007) (Ciparick, J., dissenting).

⁹⁸ *Ramroop v. Flexo-craft Printing, Inc.*, 11 N.Y.3d 160, 164, 896 N.E.2d 69, 69–70, 866 N.Y.S.2d 586, 587 (2008).

⁹⁹ *Id.* at 168–69, 896 N.E.2d at 73, 866 N.Y.S.2d at 590 (Ciparick, J., dissenting).

¹⁰⁰ *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 489–90, 909 N.E.2d 70, 77–78, 881 N.Y.S.2d 377, 384–85 (2009) (Ciparick, J., dissenting) (finding the withholding of benefits to this class as a violation of equal protection as well as article XVII of the New York Constitution, under which the state has an affirmative duty to aid the needy).

¹⁰¹ Adam Liptak, *Sotomayor Draws Retort from a Fellow Justice*, N.Y. TIMES, Dec. 8, 2009, available at <http://www.nytimes.com/2009/12/09/us/09sotomayor.html>.

¹⁰² *Id.* This was the first time the newly preferred term has appeared in a Supreme Court document; “illegal immigrant” has appeared approximately a dozen times.

than those guaranteed by the federal government. Under this ideology, Ciparick envisions New York State jurisprudence at the forefront of the most progressive and liberal judiciaries, challenging legislative enactments and institutionalized remedies where results are against public policy or unconstitutional.

VII. CONCLUSION

Ciparick's dissents provide a lens into her ideology as the Senior Associate Judge of the New York State Court of Appeals. Her dissents consistently advocate for the protection and expansion of constitutional rights in favor of the individual in both criminal and civil cases. Dissents, especially published dissents, uniquely showcase a judge's attitudes and values in a voice largely unaltered by the compromises necessarily handed down in authored majority opinions. From an analysis of her dissents, it is clear that Judge Ciparick advocates for the extension of constitutional protections for "claims of civil rights, liberties, equal protection, government-provided assistance or protections, or rights of the criminally accused."¹⁰³ It is for this reason that Judge Ciparick is one of the most liberal jurists on the Court of Appeals today.

In 2008, the *Albany Law Review* held its annual *State Constitutional Commentary* symposium on the topic of "Judges on Judges." All seven judges of the Court of Appeals were panelists at the symposium. Each judge presented on his or her favorite retired Court of Appeals judge by telling personal stories and reflecting on a judge's "wisdom, influence, opinions, dissents, writing-style, jurisprudence . . . personality, character [or just] plain fun."¹⁰⁴ Ciparick selected Judge Vito Titone, and spoke at length about his life as a judge. She admired him for voting to extend the constitutional rights of the accused. Reflecting on what she saw as his most venerable characteristics as an accomplished jurist, Ciparick stated: "he always stood up for what was right and just, [and was] a consummate defender of individual rights, a defender of the poor and the powerless with an unflinching commitment to the preservation of the constitutional rights of the accused."¹⁰⁵

Ciparick's admiration of Titone also yields insight into her own

¹⁰³ BONVENTRE, STREAMS OF TENDENCY, *supra* note 1, at 3 n.6.

¹⁰⁴ Judge Carmen Beauchamp Ciparick, Symposium: Judges on Judges: the New York State Court of Appeals Judges' Own Favorites in Court History, *Judge Vito J. Titone*, 71 ALB. L. REV. 1061, 1061 (2008).

¹⁰⁵ *Id.* at 1064.

ideology. The qualities listed above account for those that are revealed by Ciparick's dissents. Much like Titone, Ciparick is also known as a judge who votes for individual rights, as she seeks to extend constitutional protections for the defenseless or vulnerable.