

NEW YORK STATE: STEERING A COURSE BETWEEN THE SCYLLA OF JUDICIAL ACTIVISM AND THE CHARYBDIS OF WAYWARD LEGISLATING – BUT FOR HOW LONG?

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The New York Court of Appeals (“Court”), New York’s highest state court, has an activist reputation, dating back at least to the 1960s and 1970s, when it issued a number of expansive rulings, particularly with respect to the rights of criminal defendants.²

That reputation is no longer deserved. As currently constituted, a majority of the seven judges are committed to judicial restraint and, barring any unforeseen departures, this four-judge core--all appointed by former Republican Governor George E. Pataki--will likely remain on the bench for another seven years.³

In reading the tea leaves to discern the Court’s likely future direction, however, a glance backward is necessary. Among decisions handed down in 2006 by the Court, two stand out as bellwethers: the 4-2 decision in *Hernandez v. Robles*,⁴ denying an equal protection challenge by homosexual couples to the state’s marriage laws, and the 6-0 *Catholic Charities of*

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² See John Caher, *The Pataki Legacy: Appointments to Top Court Bring More Conservative Approach*, N.Y.L.J., Jan. 2, 2007 at 1, 2.

³ *Id.* at 1 (“Although Governor Eliot Spitzer will have the opportunity to appoint three of the seven judges, including the chief judge, during his first term, he will not appoint a fourth judge until the tail end of a second term”).

⁴ 7 N.Y.3d 338 (N.Y. 2006) (one judge recused himself for reasons discussed *infra*).

the Diocese of Albany v. Serio, denying a challenge by ostensibly religious employers forced to include contraceptives in their prescription drug plans.⁵

Both decisions were authored by Associate Judge Robert S. Smith, a Pataki appointee who, prior to his ascension to the Court, was active in The Federalist Society. Both holdings are narrow, soundly-reasoned, and deferential to the legislature. Both decisions signal the eclipsing of Chief Judge Judith Kaye--a holdover appointee of former Democratic Governor Mario Cuomo, who authored an impassioned dissent in *Hernandez*, arguing for the imposition of “same sex marriage” by judicial fiat, who will leave the bench in 2008--by the strict constructionist Smith.

As such, however, the *Hernandez* and *Serio* decisions also serve as cold reminders to pro-lifers who hope for the eventual overturning of *Roe v. Wade*.⁶ Where a principled court adheres to (state or federal) constitutional limits placed on the judiciary, protection of the unborn will depend on the willingness of legislatures to protect the right to life. Where that state is increasingly blue-tinged like New York, whose ambitious new governor bears a demonstrated hostility toward the protection of the unborn,⁷ a principled judiciary may be scant

⁵ 7 N.Y.3d 510 (N.Y. 2006), *cert. denied*, __ U.S. __, 76 U.S.L.W. 3156 (2007). The extremely parsimonious religious employer exemption in the Contraceptive Mandate legislation excludes from its definition organizations like Catholic Charities of the Diocese of Albany and the Carmelite Sisters for the Aged and Infirm because their charitable efforts were not limited solely to co-religionists – a definition so cramped to exclude any religious charitable organization whose services are offered freely to all. *See* N.Y. INS. LAW § 3221(1)(16)(A)(1) (McKinney 2002) (defining religious employer *inter alia* as one who “serves primarily people who share the organization’s religious tenets”).

⁶ 410 U.S. 113 (1973).

⁷ Governor Eliot Spitzer’s aspirational themes, as recounted in his inaugural address, include preserving a “woman’s right to choose” and the public funding of embryo-destructive research. This anti-life commitment is consistent with his record as Attorney General. *See* discussion *infra*.

consolation when the legislature enacts laws like the contraceptive mandate at issue in *Serio*⁸ or refuses to allow a vote on bills to protect unborn victims of violence or ban partial birth abortion.⁹

Moreover, the question of how long New York's judiciary will retain its commitment to judicial restraint remains open, given that a premature vacancy could alter the bench's balance. Newly-elected Governor Eliot Spitzer, while the sitting attorney general, telegraphed what type of judges he intends to appoint: Blasting United States Supreme Court ("USSC") Justice Antonin Scalia and "originalism" as "undermining the freedoms we rely upon as a society," he professed belief in an "evolving Constitution" flexible enough to meet modern needs and mores.¹⁰ He will have had the opportunity to make three appointments to the bench by the end of his first term in 2011,¹¹ leaving his mark on the Court and potentially pushing the Court in an activist direction actively hostile to the culture of life.

I. LIFE ISSUES

As in many other areas of the law (such as commercial and criminal), New York State law jurisprudence on life issues is well-developed. As amplified below, the Court grappled with the abortion question prior to the USSC deciding *Roe*, and the Court has considered a wide array of issues impacting on life. If, looking prospectively, one might foresee a body of

⁸ The Women's Health & Wellness Act of 2002, N.Y. INS. LAW § 3221 (McKinney 2002).

⁹ See discussion *infra*.

¹⁰ John Caher, *Spitzer Blasts 'Originalist' Scalia at Law Day Event*, N.Y.L.J., May 2, 2006 at 1.

¹¹ On January 15, 2007, Spitzer announced his first appointment to the Court of Appeals, Judge Theodore T. Jones, who was subsequently confirmed by the New York State Senate. See discussion *infra*.

decisions that do not favor the cause of life, this will less likely be attributable to activism by the Court as currently constituted, but rather, to the passage of legislation hostile to life by the legislature.

Abortion

New York's legislature liberalized the state's abortion laws in 1970, prior to *Roe*, to allow abortion-on-demand until the 24th week of pregnancy, repealing an 1830 law that had proscribed abortion after "quickening," except where the life of the mother was in danger.¹² While two years later the legislature actually passed a repeal of the liberalized law, Governor Nelson A. Rockefeller vetoed the repeal.¹³ Thus, abortion arrived by acts of the legislative and the executive branches--and *not* by judicial fiat--in the Empire State.

The judiciary has, nevertheless, spoken several times on the issue of abortion, most famously in *Byrn v. New York City Health & Hospitals Corp.*,¹⁴ an historic *pre-Roe* case where Fordham Law School professor Robert Byrn challenged New York's then-newly-minted abortion law on state and federal due process grounds, while serving as guardian *ad litem* for all the unborn in the state threatened by the abortionist's curette.¹⁵

¹² NATIONAL RIGHT TO LIFE, ABORTION HISTORY TIMELINE, <http://www.nrlc.org/abortion/facts/abortiontimeline.html#1971>.

¹³ *Id.* That the New York legislature repealed the law it had narrowly passed just two years before belies the narrative adopted by certain proponents that the various States were already inexorably marching towards liberalization of the abortion laws. See JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (Carolina Academic Press 2006).

¹⁴ 31 N.Y.2d 194 (N.Y. 1972).

¹⁵ A Special Term Court had appointed Professor Byrn guardian *ad litem* and struck down the abortion law as unconstitutional, save those permitted by the prior law to save the life of the mother. The Appellate Division, in a divided opinion, reversed the Special Term. See BERNARD S. MEYER ET AL., *THE HISTORY OF THE NEW YORK COURT OF APPEALS: 1932-2003*, at 642 (Columbia University Press 2006).

The Court upheld the law in a 5-2 decision, ruling it is the prerogative of the legislature to determine who should be accorded legal personality.¹⁶ The positivistic underpinning of the Court's opinion was attacked in a strong dissent by Judge Robert M. Burke, who sought to uphold the primacy of natural rights that preexist the constitution, while savaging the philosophical presumption that human beings are "merely creatures of the State."¹⁷

In the 1994 decision in *Hope v. Perales*,¹⁸ New York's pre-natal care program (PCAP) was challenged by abortion rights activists, because it did not fund abortion.¹⁹ Both the trial court, in an opinion authored by then-trial court Justice Carmen Beauchamp Ciparick--appointed to the Court by Governor Mario Cuomo while appeal was pending²⁰--and the appellate division²¹ found PCAP unconstitutional, determining the failure to provide abortion services was a violation of the state constitution's guarantee of due process.²² In a unanimous decision authored by Chief Judge Judith Kaye, the Court reversed, holding first that there was no evidence of a denial of due process rights; no women were coerced, pressured, steered, or induced by the funding scheme to carry pregnancies to term. The Court went on to find that the challenged public health law provision bears a "rational" relationship to the state's interest in

¹⁶ 31 N.Y.2d at 201.

¹⁷ 31 N.Y.2d at 205 (Burke, J., *dissenting*). Thus, the *Byrn* Court was being "deferential" to the legislature, as the Court would be in later opinions discussed herein, though such deference was fatal to the unborn. Judge Burke noted that deference to the legislature on this issue "conflicts with natural justice and is in essence, irrational." *Id.* 83 N.Y.2d 563 (N.Y. 1994). George Pataki was elected governor in 1995.

¹⁹ N.Y. PUB. HEALTH LAW §§ 2520-2529 (providing needy women with various pregnancy related services but not "medically necessary" abortions).

²⁰ 150 Misc.2d 985 (Sup. Ct. N.Y. County 1991), *rev'd* 83 N.Y.2d 563 (N.Y. 1994).

²¹ 189 A.D.2d 287 (N.Y. App. Div.-1st 1993), *rev'd* 83 N.Y.2d 563 (N.Y. 1994).

²² N.Y. CONST. art. I, § 6 (due process clause).

providing needed prenatal care, satisfying the state due process clause's "rational relationship" test.²³

The Court further noted that it is "not the role of the courts to pass upon the wisdom of the Legislature's policy choice, even though there may be differences of views about the decision to exclude a medically necessary service from an otherwise comprehensive prenatal care program." While this restraint is to be applauded, it is tempered by *dicta* genuflecting at the altar of substantive due process: "[T]he fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at best as extensive as the Federal Constitutional right."²⁴

It is important not to impute the views expressed in *Hope v. Perales* thirteen years ago upon the Court as presently constituted, however, as only two of the judges involved in the decision, Chief Judge Kaye and Associate Judge Ciparick, remain on the bench today. Regardless of the current views of individual judges, the pro-abortion constituency remains strong not only in the legislature, particularly in the Democratic-controlled assembly, but also in the governor's mansion, whose recently-elected occupant has made continued access to abortion-on-demand one of his themes.

Addressing the people of New York in his inaugural speech on January 3, 2007, newly-elected Governor Spitzer spoke of his vision of New York as "a state that protects a woman's right to control her own reproductive health," vowing to work to "ensure" that open

²³ 83 N.Y.2d at 575-78.

²⁴ *Id.* at 575.

access to abortion remains the law of the state in the event that the USSC were to overturn *Roe v. Wade*.²⁵

There is no reason not to take him at his word, for in his previous position as attorney general, Governor Spitzer created a special “reproductive rights unit” to advance abortion rights at the behest of pro-abortion allies affiliated with groups like the National Abortion Rights Action League (“NARAL”).²⁶ It was this unit that spearheaded his campaign to subpoena approximately 20 crisis pregnancy centers throughout New York in 2002, in a crackdown that garnered national attention.²⁷ Ultimately, Spitzer was forced to withdraw the subpoenas after all but one of the pregnancy centers had moved to quash on the ground that the

²⁵ See Press Release, Governor’s Press Releases, Governor Spitzer Delivers First State of the State Address (Jan. 3, 2007), available at <http://www.ny.gov/governor/press/0103073.html>. Governor Spitzer also upped the ante on a proposed bond for stem cell research which he had originally floated while a candidate, from \$1 billion to \$2 billion. Compare Bruce Lambert, *Spitzer Unveils \$1 Billion Stem Cell Proposal*, N.Y. TIMES, Apr. 13, 2006, with Molly Kroon, *Spitzer Calls for Billions in Stem Cell Funding*, NY1 NEWS, Jan. 3, 2007, available at <http://www.ny1.com/ny1/content/index.jsp?stid=3&aid=65614>.

²⁶ At a speech he gave to NARAL supporters on January 22, 1999 to mark the anniversary of *Roe v. Wade*, Spitzer declared:

Every goal you have for equal opportunity in society depends on this fundamental concept: you must control your body. You must control your destiny. . . . *This is NARAL’s commitment, and this is my commitment.* . . . We will also address matters *such as false advertising for services.* . . . I am establishing a special reproductive rights unit within the Bureau of Civil Rights. . . . I promise you someone who will work closely with [NARAL] to make this office a model for the rest of the nation. I also will commit . . . *the full resources of my office* to help insure the success of the unit. . . . I must act forcefully, and I intend to do so. With the creation of this unit, I want to send a clear message that the attorney general is committed to protecting and defending reproductive rights, and that we will respond with the full force of the law to any attempt to undermine those rights.

Eliot Spitzer, Attorney Gen. of N.Y., Remarks at the NARAL Luncheon (Jan. 22, 1999), available at http://www.oag.state.ny.us/press/1999/jan/jan22a_attachment_99.html (emphasis added). Ominously, the Attorney General had concluded his remarks to NARAL by vowing “I am also determined to do all I can to restore a *suitable framework for public debate in New York.*” *Id.* (emphasis added).

²⁷ See Maggie Gallagher, *The Right to Choose Life*, TOWNHALL.COM, Feb. 12, 2002, http://www.townhall.com/columnists/MaggieGallagher/2002/02/12/the_right_to_choose_life, and Michelle Malkin,

subpoenas violated freedom of speech rights under the First Amendment to the U.S. Constitution.²⁸

The governor's inaugural vow to protect access to abortion in the event of any overturn of *Roe*²⁹ underscores a problem in New York: Where a legislature is unfriendly to life, judicial restraint is often merely a theoretical consolation, rather than one with beneficial practical consequences. Though the state senate remains republican-controlled (barely) and checks the more hostile impulses of the democratic-dominated state assembly, the state senate is often complicit in the passage of harmful legislation, with senate republicans theorizing that bending to the will of an electorate perceived as increasingly liberal would allow them to retain their majority.³⁰

The history of the contraceptive mandate legislation at issue in *Serio* is illustrative. (As the contraceptives at issue include those that function as abortifacients--“any

The Abortion Empire Strikes Back, TOWNHALL.COM, Jan. 11, 2002,

http://www.townhall.com/columnists/MichelleMalkin/2002/01/11/the_abortion_empire_strikes_back.

²⁸ See, e.g., *Pregnancy Resource Center, Inc. v. Spitzer*, Index No. 103182/02 (N.Y. Sup. Ct. N.Y. County). Copies of the papers submitted in support of Pregnancy Resource Center, Inc., one of the subpoenaed entities, are available upon request from the authors. There is currently a bill proposed in the State Assembly seeking to dictate the substance and timing of pregnancy center counselors' speech. A.B. 6591, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Glick). If such a bill were ever passed, it would likely be susceptible to a First Amendment challenge.

²⁹ Indeed, on April 25, 2007 – exactly one week after the U.S. Supreme Court upheld the Partial Birth Abortion ban in *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007), Governor Spitzer introduced his “Reproductive Health and Privacy Protection Act,” also known as “Governor's Program Bill No. 16.” See Press Release, Governor's Press Releases, Proposed Legislation Establishes a Fundamental Right to Privacy for Women (Apr. 25, 2007), available at <http://www.ny.gov/governor/press/0425072.html>. The bill would establish a “fundamental right of privacy” that would encompass the right to “bear a child or to terminate a pregnancy.” See *Governor Submits Extreme Abortion Proposal*, NEW YORK STATE PRO-LIFE REPORTER (New York State Catholic Conf.), May 24, 2007, at 1, available at http://www.nyscatholicconference.org/uploads/news_330may%2007.pdf. This bill appears to have stalled in the State Senate. S.B. 5829, 2007 Leg., 230th Sess. (N.Y. 2007).

³⁰ “They are afraid that a lot of guys, especially city and suburban guys, are going to get clocked. Look at how far left they came this year,’ passing bills on hate crimes, environmental protection, and gun control, in an effort to

contraceptive on the list of FDA contraceptives”--*Serio* can and should be viewed not solely as a religious liberty or conscience case, though it is those as well.) The republican senate had kept the legislation from coming to the floor for a vote, in part due to debates over how wide the religious employer exemption should be. Senate Majority Leader Joseph Bruno, however, reversed tack in an effort to shore up republican election prospects in a special election for the seat vacated by a retiring liberal Manhattan state senator, Roy Goodman, against a more liberal democrat who had made a campaign issue of senate republicans blocking “progressive” legislation like the contraceptive mandate.³¹ Ultimately, the version at issue in *Serio* passed, concern for the conscience rights of religious institutions and workers cast aside for crass political reasons.

To date, the legislature has failed to enact legislation banning even partial-birth abortion (“PBA”). Past legislative sessions saw a bill to ban PBA pass the republican-controlled state senate but languish in committee in the democratic-dominated state assembly, which is tightly controlled by the powerful speaker of the assembly, Sheldon Silver.³²

Other bills seeking to promote pro-life objectives, such as one requiring 48 hours-notice to one custodial parent prior to abortions performed on unemancipated children under age 18 (or, in the alternative, a waiver of parental notification signed by a family court judge), have

stave off a possible voter backlash this fall.” J.A. Lobbia, *Silk Stocking Strategy*, THE VILLAGE VOICE, Sept. 5, 2000, at 25. (quoting an unidentified state legislator, referring to State Senate Republicans).

³¹ See Tom Robbins, *East Side Attack*, THE VILLAGE VOICE, Nov. 5, 2002, at 28.

³² Once a legislative session ends without a bill being enacted, it must be reintroduced anew in both houses. A roundup of past and proposed legislation can be viewed at the New York State Conference of Catholic Bishops’ website, http://www.nyscatholic.org/pages/our_agenda/show_issues.asp?issue=Family%20Life/Respect%20Life.

been similarly stymied.³³ Likewise, though New York has numerous statutes requiring informed consent outside of the abortion context,³⁴ a proposal to increase the amount of information abortionists provide women prior to undergoing the procedure cannot gain traction.³⁵ Though Senator John A. DeFrancisco lobbied successfully for \$5 million, and Governor Pataki added another \$5 million to the 2006-2007 budget for the construction of a facility for a public cord blood bank in Syracuse, a bill to require public education on the benefits of cord blood research approved unanimously in the senate did not make it through the assembly. Several bills related to cord blood have been reintroduced for the 2007-2008 session.³⁶

On the other hand, the senate has been able to thwart anti-life measures passed by the assembly. Legislation that would allow the morning-after pill to be dispensed to females of any age without a doctor's prescription passed the assembly but was not voted on by the senate; this legislation also may be renewed in the new session.³⁷ Also, a bill to provide millions of dollars for "comprehensive" sex education, *i.e.*, including the promotion of contraceptives, which can also function as abortifacients, did not pass the senate.³⁸

³³ A parental notification bill has been reintroduced in the Assembly for the 2007-2008 legislative session. A.B. 2560, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Reilich).

³⁴ *See, e.g.*, N.Y. PUB. HEALTH LAW § 2404 (McKinney 2002) (requiring informed consent for the different methods of treating breast cancer), and § 2495 (McKinney 2002) (same with respect to hysterectomy procedures).

³⁵ A.B. 5720, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Rabbitt).

³⁶ *See* S.B 1265/A.B. 2915, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by DeFrancisco/Lentol, respectively) (promoting cord blood information and outreach), A.B. 155, 2007 Leg., 230th Sess. (N.Y.2007) (Sponsored by Lafayette) (requiring doctors to tell pregnant women of their option to donate cord blood), and A.B 1365, 2007 Leg., 230th Sess. (N.Y. 2007) (Eddington) (requiring the Department of Health to study cord blood collection).

³⁷ A bill that would provide for the distribution of emergency contraception at the State University of New York and City University of New York has already been introduced in the Assembly. A.B. 885, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Englebright).

Protection of the Unborn from Criminal Violence

New York does not have a law protecting the unborn from criminal violence. Under the present New York penal law, one has to be “born and alive” in order to be the victim of an assault or homicide. Even viable unborn children do not qualify as persons under the law.³⁹ A bill that would criminalize the assault or homicide of an unborn child during the commission of a crime against the mother is expected to garner broader bipartisan support than most pro-life legislation, however.⁴⁰ Assemblyman Michael Benjamin, a democratic sponsor of the bill from The Bronx, has reached out to law enforcement groups and domestic violence organizations for support, though without the support of the speaker, the bill will not advance beyond committee.

Though the Court has not had an opportunity to opine as to a law that sought to protect unborn victims of criminal violence, it has expanded tort law to include causes of action available to a mother victimized by medical malpractice that results in stillbirth. In the 2005 case *Broadnax v. Gonzalez and Fahey v. Canino*,⁴¹ the Court held that a mother may recover for emotional harm resulting from malpractice that kills her child *in utero*, even if she suffers no physical injury, thereby remedying an area of tort law that had denied a remedy to an obviously

³⁸ S.B. 6801, 2005 Leg., 229th Sess., (N.Y. 2006). Reintroduced for 2007-2008 as S.B. 1342/A.B. 2856, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Gottfried/Winner, respectively).

³⁹ See N.Y. PENAL LAW § 125.05 (McKinney 2004). The Court of Appeals, in *Endresz v. Friedberg*, has also ruled that no cause of action lay under the Wrongful Death Act where the personal representative of a stillborn infant brought an action against someone who had caused the stillbirth while the child was *en ventre sa mere*. 24 N.Y.2d 478 (N.Y. 1969).

⁴⁰ S.B. 3117/A. 5777, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Maltese/Benjamin, respectively). Another bill would expand the scope of Hate Crimes legislation to include assaults upon pregnant women. A.B. 3055, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Townsend).

⁴¹ 2 N.Y.3d 148, 155 (N.Y. 2004).

aggrieved class of plaintiffs. The Court's holding should not be overstated, however. Recovery is limited to harm done to a mother, not to the fetus: "Even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress."⁴²

The following year, in *Sheppard-Mobley v. King*,⁴³ the Court declined to extend its holding in *Broadnax/Fahey* to allow a mother to recover damages for emotional harm due to medical malpractice that causes *in utero* damage to a fetus, where the child is subsequently born alive. The Court reasoned that, as the child born alive could recover for his injuries, there was no need for the additional remedy.⁴⁴

One case that does not strictly fall within the unborn victims of violence category, yet nevertheless conceptually juxtaposes the well-being of children both inside and outside the womb versus the autonomy rights of the mother, is *Fosmire v. Nicoleau*,⁴⁵ a 1990 case that is not

⁴² *Id.*

⁴³ 4 N.Y.3d 627 (N.Y. 2006). *Cf.* *Leighton v. City of New York*, No. 2005-09514, slip op. 01525 (N.Y. App. Div. Feb. 20, 2007) (citing same).

⁴⁴ 4 N.Y.3d at 637. In *Sheppard-Mobley*, an expectant mother complained to her gynecologist, Dr. Leslie King, that she was suffering abdominal discomfort. Informing her that she was pregnant and had large fibroids in her uterus, and would thus not likely be able to carry her baby to term, the doctor counseled abortion. Seeking a second opinion, Dr. Ira J. Spector informed her that if the fibroids did not abort the pregnancy, "the baby would be terrible." Because surgical abortion would be difficult given her condition, Dr. Spector recommended applying methotrexate to break down the fetal tissue. Following her recommendation, Dr. King applied the methotrexate in two doses, subsequently informing Ms. Sheppard-Mobley that she could detect no fetal heartbeat. There was no fetal discharge, however, and, continuing to feel uterine pain, the mother subsequently discovered that the abortion procedure had failed and she was in her 28th week of pregnancy. Speculating that the child would suffer birth defects due to the botched chemical abortion, Drs. King and Spector counseled that Ms. Sheppard-Mobley travel out-of-state for a late term surgical abortion; she, however, declined, opting to bring her child to term. The child was born with serious congenital impairments. 4. N.Y.3d at 634-35.

⁴⁵ 75 N.Y.2d 218 (N.Y. 1990).

reflective of the thinking of any of the current judges other than then-Associate Judge Kaye, who concurred in the opinion.

In *Fosmire*, a pregnant nurse refused blood transfusion prior to and in the course of delivering her baby via caesarian section, on the ground that receiving transfused blood would violate her religious beliefs as a Jehovah's Witness. The hospital argued in favor of providing the patient the blood transfusions, as it believed the state had an interest in preserving the life of the patient for the benefit of the baby.⁴⁶

Decidedly *not* basing its decision on religious freedom grounds, the Court, in an opinion written by Chief Judge Sol Wachtler, ruled the patient had a "personal common-law and statutory right to decline the transfusions."⁴⁷ The Court found the state's interest in protecting individuals from themselves is less substantial when there is little or no risk of direct injury to the public, "consistent with the primary function of the State to preserve and promote liberty and the personal autonomy of the individual."⁴⁸ Finding neither case law nor legislative warrant for requiring a parent to submit to medical treatment to preserve the parent's life for the benefit of a minor child, the Court went on to explain that the state's "concern with maintaining family unity and parental ties is not an interest which it enforces at the expense of all personal rights or conflicting interests."⁴⁹ Rather, "the policy of New York, as reflected in the existing law, is to

⁴⁶ *Id.* at 229.

⁴⁷ *Id.* at 226.

⁴⁸ *Id.* (citing *Rivers v. Katz*, 67 N.Y.2d 485 (N.Y. 1986)).

⁴⁹ 75 N.Y.2d at 230.

permit all competent adults to make their own personal health care decisions without interference from the State.”⁵⁰

While the child in *Fosmire* was delivered successfully, the decision’s personal autonomy reasoning and the state’s ongoing failure to accord minimal protection to the rights of children *en ventre sa mere*⁵¹ make it likely that, until the moment of delivery, a mother’s ability to refuse treatment necessary to save not only her life but that of her unborn child would be upheld by the Court.

Assisted Suicide

With respect to maintaining laws that respect life, New York prohibits the practice of physician-assisted suicide.⁵² Two provisions of the New York penal law were challenged in what became a landmark ruling by the USSC, *Quill v. Vacco*,⁵³ with the New York law defended by Mr. Spitzer’s predecessor as attorney general, Dennis Vacco.⁵⁴ Dr. Timothy

⁵⁰ *Id.* It should be noted that, per prior Court of Appeals precedent, had the child been born, the parents could not have declined to provide the child with lifesaving medical treatment, such blood transfusions, even where religious beliefs motivated the refusal. See *Matter of Sampson*, 29 N.Y.2d 900 (N.Y. 1972).

⁵¹ See *supra* statutes and cases discussed in this section.

⁵² N.Y. PENAL LAW § 125.15(3) (McKinney 2004) (“A person is guilty of manslaughter in the second degree when: . . . 3. He intentionally causes or aids another person to commit suicide.”), and N.Y. PENAL LAW 120.30 (McKinney 2004) (“A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide.”).

⁵³ 521 U.S. 793 (1997) (holding that the United States Constitution does not guarantee a “right to suicide” or assisted suicide, deferring to state legislatures).

⁵⁴ New York is one of the few states that allows minor parties to cross endorse nominees of major parties and the votes across all lines for the same candidate to be amalgamated when tabulated. See Michael Grunwald, *Minor Parties Play Major Role in N.Y.*, WASHINGTON POST, Aug. 10, 1999 at A3. When he first ran for Attorney General in 1994, Mr. Vacco had accepted the nomination of New York’s small (and now effectively defunct) Right-to-Life Party. In 1998, however, he pointedly declined the party’s nomination on the advice of his handlers. The resulting election was extremely close, with less than 1% of the vote separating the candidates. The Vacco camp refused to concede the election, and the sides spent six weeks recounting ballots – an effort in which Mr. Tozzi participated in as a volunteer attorney for the Vacco campaign – and litigating. When the election was finally conceded, a little more than 25,000 votes separated the candidates. Mr. Spitzer’s 1998 margin of victory was less than the roughly 60,000 votes won by the Right-to-Life candidate, Robert Dapelo, on a line Mr. Vacco was offered but rejected. See

Quill and two other doctors alleged they were unable to exercise their best professional judgment in cases where “mentally competent terminally ill patients would request assistance in the voluntary self-termination of life.”⁵⁵

As the statutes were challenged in federal court, the Court did not have the opportunity to opine as to constitutionality. The Second Circuit, however, extensively reviewed New York Court of Appeals precedent in striking the law as violative of the U.S. Constitution’s equal protection clause – a ruling the USSC reversed:

- To determine whether there existed a rational basis for the statutes under New York law, the Second Circuit began with Judge Benjamin Cardozo’s statement in 1914 in a case upholding the right to refuse medical treatment: “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”⁵⁶
- In 1981, the Court held in *In re Eichner* that a terminally-ill 83-year-old patient who had consistently expressed his view that life should not be prolonged if there was no hope of recovery had the right, via his guardian, to have his respirator withdrawn.⁵⁷
- In the companion case to *Eichner*, *Matter of Storar v. Dillon*, the Court held that a profoundly retarded terminally-ill patient was not mentally capable of making a reasoned decision as to hastening his own death, and in that case, the Court refused to find the patient capable of deciding to end blood transfusions.⁵⁸
- In 1986, the Court returned to the issue of mental incompetence in the context of discussing the right to refuse antipsychotic drugs in *Rivers v. Katz*.⁵⁹ In this case, the Court stated that the right of

N.Y. State Board of Elections, Attorney General Election Returns (Nov. 3, 1998), available at <http://www.elections.state.ny.us/NYSBOE/elections/1998/ATGENWEB.pdf>; see also Grunwald, *supra*, at A3.

⁵⁵ *Quill v. Vacco*, 80 F.3d 716, 720 (2d Cir. 1996), *rev’d* 521 U.S. 793 (1997).

⁵⁶ *Schloendorff v. Soc’y of New York Hosp.*, 211 N.Y.125, 129 (N.Y. 1914).

⁵⁷ 52 N.Y. 2d 363 (N.Y.), *cert. denied*, 454 U.S. 858 (1981).

⁵⁸ *Storar* has been superceded by statute. As explained in *In re M.B.*, the Health Care Decisions Act for Mentally Retarded persons granted guardians appointed prior to the effective date of the Act full healthcare decision making authority for mentally retarded persons, including any decision to consent or refuse to consent to health care. 6 N.Y.3d 437 (N.Y. 2006) (Graffeo, J.).

⁵⁹ 67 N.Y.2d 485 (N.Y. 1986).

involuntarily committed mental patients to refuse medical treatment was a “fundamental common-law right” and was “coextensive with the patient’s liberty interest protected by the due process clause of our State Constitution.”⁶⁰

- In 1987, the New York legislature enacted Article 29-B of the New York public health law, entitled “Orders Not to Resuscitate,”⁶¹ and in 1990, the legislature enacted Article 29-C, entitled “Health Care Agents and Proxies,”⁶² providing that a patient has the right to hasten death by empowering an agent to require a physician to withdraw life-support systems.

Based upon this survey of New York law, the Second Circuit, in an opinion written by Judge Roger Miner, found that New York law did not treat all persons in the final stages of terminal illness alike, and this inequality of treatment was not rationally related to some legitimate state interest. Accordingly, the Second Circuit found that the New York statutes criminalizing assisted suicide violated the equal protection clause, as they were not rationally related to any legitimate state interest.⁶³

On appeal to the USSC, Chief Justice William Rehnquist reversed the Second Circuit, noting that the distinction made in the law in New York between assisting suicide and withdrawing life-sustaining treatment “is both important and logical: it is certainly rational.”⁶⁴ Justice Rehnquist found that the Second Circuit “erred in reading New York law as creating a ‘right to hasten death;’ instead the [New York] authorities cited by the [Second Circuit] Court

⁶⁰ *Id.* at 493. *Rivers v. Katz* is relied on in *Fosmire*, discussed *supra*.

⁶¹ N.Y. PUB. HEALTH LAW § 2960 (McKinney 1993).

⁶² § 2980.

⁶³ 80 F.3d at 729.

⁶⁴ 521 U.S. at 800-01.

recognize a right to refuse treatment and nowhere equate the exercise of this right with suicide.”⁶⁵

One Court case that the Second Circuit *Quill* court did not mention, though it is often discussed in connection with the above-referenced *Eichner* and *Katz* cases, is *Fosmire v. Nicoleau*,⁶⁶ discussed *supra*. In *Fosmire*, Judge Richard D. Simons, in his concurrence, expressed concern that the ability to refuse life-sustaining treatment (*e.g.*, a Jehovah’s Witnesses’ rejection of a blood transfusion) might lead some to infer a right to suicide. He thus wrote separately to make clear that the individual’s autonomy right is “not that broad and is limited by the State’s general interest in preserving life, protecting innocent third parties, preventing suicide and promoting medical ethics.”⁶⁷ Chief Judge Wachtler, responding to Judge Simons in his opinion, took pains to stress that “we in no way condone suicide and intend no interference in that regard,” noting that the injury sustained in the course of caesarian delivery “was not self-inflicted nor did the patient want to die.”⁶⁸

Healthcare Rights of Conscience

The aforementioned *Serio* case may also be looked on as a conscience case implicating the ability of religious institutions to operate in a manner consistent with the tenets of their faith tradition.⁶⁹

⁶⁵ *Id.* at 804 n.7.

⁶⁶ 75 N.Y.2d 218 (N.Y. 1990).

⁶⁷ *Id.* at 232 (Simons, J., concurring).

⁶⁸ *Id.* at 227 n.2.

⁶⁹ This was the topic of a recent “Faithful Citizenship” dialogue between Professor Susan J. Stabile and Piero A. Tozzi, Esq., at Fordham University School of Law’s Institute on Religion, Law & Lawyer’s Work, entitled “When Conscience Clashes with State Law & Policy: Catholic Institutions.” Both Professor Stabile’s and Mr. Tozzi’s

Unlike “constitutional” rights made up from whole cloth, such as the abortion license grounded in the right to privacy,⁷⁰ the religious organizations challenging the *Serio* contraceptive mandate could point to a broad clause in the New York state constitution guarantying the free exercise of religion:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.⁷¹

Recognizing the state constitutional free exercise argument to be plaintiffs’ “strongest” and holding the state free exercise protections broader than the federal, the Court nevertheless declined to apply strict scrutiny, opting for a lower “substantial deference” standard that required religious adherents claiming an exemption from a statute to show the legislation creates an “unreasonable interference” with religious freedom.⁷² In so doing, the Court credited the sincerity of the plaintiffs’ religious-based belief that contraception was immoral but noted that the conscience-crisis claim was overstated: As the legislation affected only employers who provided prescription drug coverage, a conscientious objector could sidestep the issue by simply not providing prescription drugs to its employees.⁷³ (The federal Employee Retirement Income Security Act, or ERISA, preempts state law from directly requiring that employers provide

remarks are to be published in an upcoming issue of the *Journal of Catholic Legal Studies*, published by St. John’s University School of Law.

⁷⁰ See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973) (“[The U.S. Constitution] simply says nothing, clear or fuzzy, about abortion.”).

⁷¹ N.Y. CONST. art. I, § 3.

⁷² 7 N.Y.3d 510, 525 (N.Y. 2006) In *dicta*, the Court indicated that certain potential legislation, such as one which would threaten the seal of the confessional (considered recently by the New Hampshire legislature), would be unreasonable and violate religious adherent’s free exercise rights.

certain benefits, though states can regulate indirectly the content of any benefit plans operating through state insurance law mandates.⁷⁴) The Court rejected the argument that the religious-affiliated employers are morally obligated to provide just wages and benefits to their workers, including prescription drugs, since “surely it is not impossible, though it may be expensive or difficult, to compensate employees adequately without including prescription drugs in their group health care policies.”⁷⁵ This reasoning, however, marginalizes the religious believer, preventing full participation in the activities of the public square.⁷⁶

Thus, *Serio* bodes ill for conscience rights. Given the relative strength of the free exercise claims of the ostensibly religious institutions, as acknowledged by the Court,⁷⁷ it implicitly creates an even higher hurdle for the individual employer who may be a devout religious practitioner (or, say, an ethical humanist not affiliated with any religious tradition) who would be forced to subsidize contraceptives despite the offense to his religious beliefs or conscience.

⁷³ 7 N.Y.3d at 527.

⁷⁴ See Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 38 HARVARD J. OF L. & PUB. POL. 741, 747 n.27 (Summer 2005). Thus a local law passed by the New York City Council that required any entity doing business with the City provide domestic partner benefits was struck down as preempted by ERISA. *Council of the City of New York v. Bloomberg*, 16 A.D.3d 212 (N.Y. App. Div. 2005) (“Since Local Law 27 ‘mandate[s] employee benefit structures or their administration,’ even if only conditionally, *i.e.*, only if the vendor chooses to contract with the City, it is connected with a core concern of ERISA . . . and is thus preempted.”) (citations omitted.).

⁷⁵ 7 N.Y.3d at 527.

⁷⁶ See Gerald J. Russello, *New York, Chipping Away at Religious Liberty*, NAT’L CATHOLIC REG., Nov. 5-11, 2006, at 9 (“The [Contraceptive Mandate] legislation signals a radical world-view shift from a Judeo-Christian based ethic to an illiberal secular one where conscientious adherence to the old principles of morality cannot even be accommodated.”).

⁷⁷ 7 N.Y.3d 510, 527 (N.Y. 2006) (stating that the state constitutional free exercise claim was the “strongest” argument and acknowledging that the law placed a burden on the religious institutions’ ability to practice their faith).

The issue of protection of conscience, disregarded in the contraceptive mandate upheld in *Serio*, was also the focus of a bill that stalled in the 2005-2006 session that would protect health and human services professionals from retaliation for refusing to participate in treatments or actions inconsistent with their conscience, including abortion, removal of life-sustaining treatment, and dispensing of the so-called morning-after pill.⁷⁸

This would supplement an existing, narrower provision in the civil rights law, added in the early 1970s, when New York liberalized its abortion law, protecting from retaliation those who refuse on conscience grounds to participate in an abortion.⁷⁹ Like the federal “Church Amendment” (named after Idaho’s liberal Senator Frank Church, not ecclesial entities) passed after the *Roe* decision,⁸⁰ New York’s civil rights law provision is solicitous of conscience rights, allowing in section 79-i that “When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor.”⁸¹

This provision unfortunately does not afford a private right of action. Thus two nurses who were terminated for “unprofessional conduct” for allegedly refusing to perform a laminaria (dilating a cervix in connection with, in this case, the evacuation of a stillborn baby)

⁷⁸ As of February 1, 2007, women 18 years of age and older are able to purchase Plan B abortifacients, also known as the morning-after-pill or emergency contraception, without a doctor’s prescription. This policy change was initiated by Republican former Governor Pataki and implemented by Democratic Governor Spitzer, and thus was neither legislated nor imposed from the bench. Elizabeth Benjamin, *State Eases Access to ‘Plan B’ Pill: Over-the-Counter Purchase of Contraception Medication Had Not Been Covered by Medicaid*, ALBANY TIMES UNION, Jan. 25, 2007.

⁷⁹ N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992).

⁸⁰ See CAROL HOGAN, CAL. CATHOLIC CONF., CONSCIENCE CLAUSES AND THE CHALLENGE OF COOPERATION IN A PLURALISTIC SOCIETY (Feb. 2003), <http://www.cacatholic.org/rfconscience.html>

⁸¹ N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992).

were not able to state a claim for retaliatory discharge in violation of civil rights law 79-i.⁸² The nurses were, however, able to state a cause of action under section 296(1)(a) of the executive law,⁸³ which prohibits discriminatory termination of individuals based on religious beliefs.⁸⁴

On the negative side of the ledger, assaults on the rights of conscience are percolating in the state assembly: Two bills have been introduced by Assemblywoman Deborah Glick mandating abortion training for medical residents and abortion coverage in insurance plans.⁸⁵ In addition, two bills seek to restrict the conscience rights of pharmacists,⁸⁶ and another seeks to force hospitals to perform “all services,” *i.e.*, including abortion.⁸⁷ So long as the state senate remains in republican hands, these bills are unlikely to pass.⁸⁸

⁸² *Larson v. Albany Med. Ctr.*, 252 A.D.2d 936 (N.Y. App. Div. 1998). The Appellate Division court noted that “The Court of Appeal has strongly stated . . . that there is no cause of action in tort for abusive or wrongful discharge . . . and that such recognition must await legislative action. This strong public policy, coupled with the failure to give expression either in Civil Rights Law § 79-i or in the legislative commentary attendant on its passage to the inclusion of a private cause of action, fully supports the [trial court’s] dismissal.” *Id.* at 938 (citations omitted).

⁸³ N.Y. EXEC. LAW § 296(1)(a) (McKinney 2005 & Supp. 2007) (“It shall be an unlawful discriminatory practice: (a) For an employer...because of the age race, *creed*, color, national origin.... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual.”) (emphasis added).

⁸⁴ 252 A.D.2d at 939.

⁸⁵ A.B. 2266, 2007 Leg., 230th Sess. (N.Y. 2007) and A.B. 1935, 2007 Leg., 230th Sess. (N.Y. 2007).

⁸⁶ S.B. 2317, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Duane) and S.B. 2344, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Schneiderman).

⁸⁷ S.B. 3464, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Oppenheimer).

⁸⁸ There is also concern that the Governor’s proposed “Reproductive Health and Privacy Protection Act,” *see supra* note 29, could be interpreted to require state licensed or funded hospitals to perform abortions, insofar as the bill states that “the state shall not discriminate” against the exercise of abortion rights in the “provision of benefits, facilities, services or information.” *See Governor Submits Extreme Abortion Proposal*, NEW YORK STATE PRO-LIFE REPORTER (New York State Catholic Conf.), May 24, 2007, at 2, *available at* http://www.nyscatholicconference.org/uploads/news_330may%2007.pdf.

Cloning & Destructive Embryo Research

The Court has spoken on the subject of embryo destructive research only in an indirect manner, in the 1998 case *Kass v. Kass*.⁸⁹ In *Kass*, a married couple had signed a consent agreement with a hospital's *in vitro* fertilization program that provided that any unused "pre-zygotes" would be given to the hospital for research purposes. In a post-divorce action to resolve issues of custody concerning five frozen "pre-embryos" or "pre-zygotes," the wife sought sole custody of her fertilized ova, so that she could implant them.

The trial judge granted the wife custody, but the appellate division reversed.⁹⁰ Chief Judge Kaye, writing for the majority of the Court, affirmed the appellate division, holding that a woman does not have a right to privacy or bodily integrity before the implantation occurs, so she has no superior authority to decide the fate of the "pre-zygotes," which per Chief Judge Kaye, was controlled by the couple's written agreement.

Noting that "pre-zygotes" are not "persons" for constitutional purposes, the chief judge declared: "We have no cause to decide whether the pre-zygotes are entitled to special respect."⁹¹ Therefore, the fertilized ova would be donated to the *in vitro* fertilization program for "approved research purposes."

Turning to the legislative arena, there has been success in blocking bills that would have furthered an anti-life agenda during the past legislative session, including efforts to fund cloning and embryonic stem-cell research initiatives. With respect to cloning, republican

⁸⁹ 91 N.Y.2d 554 (N.Y. 1998).

⁹⁰ *Id.* at 561.

⁹¹ *Id.* at 565.

State Senator DeFrancisco has introduced two pro-life bills that would prohibit the creation of human chimeras and germ line genetic engineering.⁹² On the anti-life side, State Senator Liz Krueger, the Democrat who ultimately took over liberal Republican Roy Goodman's seat, which passage of the contraceptive mandate was hoped to protect, has introduced a bill to fund embryonic stem-cell research and cloning.⁹³

Seeking to circumvent the legislature by following the lead of California Governor Arnold Schwarzenegger, however, Governor Spitzer wishes to hold a plebiscite similar to California's initiative on the issuance of a stem cell bond.

Death Penalty

Finally, the legislature is considering reenacting a death penalty statute after the Court struck down a law that had been on the books since 1995.

In a narrow ruling that nevertheless raised concerns over judicial activism,⁹⁴ the Court, in *People v. La Valle*, found "deadlock" language constitutionally problematic, without precluding adoption of a reworded statute.⁹⁵ The offending provision required a judge to explain to a jury that, if the jurors found a defendant guilty of first-degree murder but were unable to decide upon death or life without parole unanimously, the defendant would be subject to parole and possible eventual release.

In an opinion authored by now-retired Judge George Bundy Smith, with Chief Judge Kaye concurring, the Court held the "deadlock" provision to be unconstitutionally

⁹² S.B. 55, 2007 Leg., 230th Sess. (N.Y. 2007); S.B. 57, 2007 Leg., 230th Sess. (N.Y. 2007).

⁹³ S.B. 1257, 2007 Leg., 230th Sess. (N.Y. 2007).

“coercive.” The Court stated that “Deadlock instruction jurisprudence is, literally, a matter of life and death, and the Court is right to declare that an execution based on an unreliable sentencing verdict is constitutionally unacceptable and cannot be justified in the name of deference to the legislature.” In so ruling, the Court nevertheless acknowledged (albeit somewhat disingenuously) legislative perquisites: “We cannot . . . ourselves craft a new instruction because to do so would usurp the legislative prerogative.”⁹⁶

Judge Robert Smith, joined by Judges Graffeo and Read, authored the dissent in *La Valle*, arguing that “the deadlock instruction required by [the death penalty statute] is not unconstitutionally coercive,” though even if it were, it could be severed and the law allowed to stand.⁹⁷

Proponents of a “consistent” or “seamless garment” approach to life issues,⁹⁸ *i.e.*, preserving the right to life of the innocent and the guilty alike, take solace in the fact that the assembly is blocking passage of a narrower bill that responds to the Court’s decision in *La Valle* and would be more likely to withstand review by the Court.⁹⁹ This is particularly likely given

⁹⁴ See Yancey Roy, *Kaye Becomes First Chief Judge Reappointed*, JOURNAL NEWS, Mar. 7, 2007 (discussing criticism of Chief Judge Kaye for concurring in the striking down of the death penalty in *La Valle*).

⁹⁵ *Id.* (N.Y. 2004) (discussed *infra*).

⁹⁶ *Id.* at 131.

⁹⁷ *Id.* at 134 (R.S. Smith, J. *dissenting*).

⁹⁸ See, e.g., Position statement of the New York State Catholic Conference, http://www.nyscatholic.org/pages/our_agenda/show_issues.asp?issue=Family%20Life/Respect%20Life. In addition, there is an Assembly bill to repeal the death penalty. A.B. 542, 2007 Leg., 230th Sess. (N.Y. 2007) (Sponsored by Wright).

⁹⁹ See *News in Brief*, N.Y.L.J., Apr. 26, 2007 (noting that 96 of 150 Assemblymen voted against allowing a death penalty bill conformed to the holding in *La Valle* from coming to the floor).

that Judge George Bundy Smith, author of the *LaValle* opinion, has been replaced by the more conservative Judge Pigott.¹⁰⁰

In sum, continued protection of life and the prevention of passage of harmful legislation depends in large part on the State Senate, which in the past has vacillated in its commitment, remaining in Republican hands, given the Assembly's and executive branch's hostility. As described more fully in the "Judicial Restraint" section below, the Judiciary--committed by and large to the principle of legislative deference--would not likely intervene to curb the anti-life excesses of wayward legislation.

II. JUDICIAL RESTRAINT

The Court as a whole, as evidenced by the decisions of Judge Robert Smith in *Hernandez* and *Serio*, is not an activist one but one which by and large appreciates distinctions between the roles of the legislature and the judiciary and the principle of legislative deference.¹⁰¹ Two contrasting poles exist in Associate Judge Robert Smith and Chief Judge Judith Kaye,

¹⁰⁰ While *LaValle* essentially dismantled the death penalty statute, New York does have one convict on death row – the cold-blooded killer of five fast food workers in the infamous Wendy's Massacre in Flushing, Queens. When the murderer was sentenced to death prior to the *LaValle* decision, the judge there informed the jury that if it deadlocked, he would "almost certainly" impose consecutive sentences totaling 175 years upon the killer, thereby avoiding the "coercion" issue that lay the crux of the *LaValle* decision. The argument that the sentence in the *sui generis* Wendy's case does not run afoul of *LaValle*'s holding will be presented to the Court by the Queens County District Attorney later this term. See Joe Stashenko, *Attorney General Opts Out of Death Penalty Case: Argument for 'Dismantled' Law Left to Queens D.A.* N.Y.L.J., Apr. 5, 2007 (noting that new Attorney General Andrew Cuomo, a vociferous death penalty foe, will not seek to intervene in the case).

¹⁰¹ See *Hernandez*, 7 N.Y.3d at 361,363-64 (applying a rational basis test and holding that the New York Constitution does not compel recognition of marriages between members of the same sex – a "question to be addressed by the legislature") and *Serio*, 7 N.Y.3d at 528 ("The Legislature has decided that to grant the broad religious exemption that plaintiffs seek would leave to many women outside the statute, a decision entitled to deference from the courts."). But see *La Valle*, 3 N.Y.3d at 131 (striking death penalty statute, albeit on narrow grounds and refusing to explicitly usurp the legislative function).

around whom the other jurists coalesce: Judges Graffeo, Read, and Piggott form the majority around Smith, with Judge Ciparick siding with Kaye. (Judge Jones is too new to have become predictable and, as discussed below, may have maverick tendencies.)

Judge Smith certainly is the Court's most forceful and philosophical proponent of judicial restraint. At his state senate confirmation hearing, Judge Smith stressed his personal commitment to the principle: "[L]egislation is not there for judges to rewrite according to their wishes. I would add that the Constitution is not a blank piece of paper either. The Constitution should not be used by any judge as a device for getting what you want or overcoming legislative will."¹⁰² He referenced similar themes when receiving the James Madison Award in 2004 from the New York Lawyers Chapter of the Federalist Society, an organization with which he was involved prior to ascending to the bench.

In addition to his *Hernandez* and *Serio* opinions, Judge Smith authored a plurality opinion in *Pataki v. New York State Assembly*,¹⁰³ upholding the governor's power over the state budget, and a dissent in *People v. LaValle*,¹⁰⁴ in which the majority ruled that the death penalty was unconstitutional. The latter is notable because Judge Smith is personally ambivalent about the death penalty; as a private practitioner, he represented two death row inmates in appeals before the USSC.¹⁰⁵

¹⁰² John Caher, *Legislature Confirms Litigator for Seat on Court of Appeals: Robert Smith Approved After Promising No Judicial Activism*, N.Y.L.J., Jan. 13, 2004, at 1.

¹⁰³ 4 N.Y.3d 75 (N.Y. 2004) (holding State Assembly altered governor's appropriation bills in ways not permissible under the State Constitution).

¹⁰⁴ 3 N.Y.3d 88 (2004)(R.S. Smith, J., *dissenting*).

¹⁰⁵ John Caher, *supra* note 102 ("Pro-death penalty senators had also expressed concern that Mr. Smith, a one time liberal Democrat who later became an active member of the conservative Federalist Society, had defended two death row appellants at the U.S. Supreme Court and has admitted having mixed thoughts about capital punishment.").

Judge Eugene F. Pigott, Jr., likewise appears to be emerging as an articulate proponent of judicial restraint. Within two hours of being sworn in on October 10, 2006, the former presiding justice of the appellate division fourth department heard argument in the contentious *Campaign for Fiscal Equity* school funding case. In a prior decision the Court had found that the state's mechanism for funding urban schools violated constitutional minimums.¹⁰⁶ This time, Judge Pigott authored the opinion, which signaled a willingness to constrain the judiciary from entering domains rightfully belonging to other governmental branches: “[I]n fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of the government. . . . Devising a state budget is a prerogative of the Legislature and Executive; the Judiciary should not usurp this power.”¹⁰⁷

Thus, while Judge Pigott's tenure has been too short to have built up a portfolio of decisions on life issues, the Buffalo jurist's reasoning in *Campaign for Fiscal Equity* indicates a judge who is cognizant of the rights and obligations of the various branches of government.

Since her ascension in 2001, Judge Graffeo has been a restrained judge, identified with the Court's conservative wing.¹⁰⁸ Both she and Judge Read have been identified as “reliably conservative voices” who are kindred spirits ideologically.¹⁰⁹ In discerning differences between the two women on social issues, it is perhaps worth noting that Judge Read joined Robert Smith's opinion of the Court in *Hernandez*, but Judge Graffeo wrote her own somewhat more nuanced concurrence.

¹⁰⁶ *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 919 (N.Y. 2003).

¹⁰⁷ 8 N.Y.3d 14 (N.Y. 2006).

In *Hernandez*, Judge Graffeo drafted a separate concurrence that demonstrated sound deference to the legislature: “Absent a constitutional violation we may not disturb duly enacted statutes to, in effect, substitute another policy preference for that of the Legislature.”¹¹⁰ However, she also signaled that her personal sympathies may lie with the same-sex plaintiffs, stopping just short of calling upon the legislature to consider rewriting the state’s marriage laws: “It may well be that the time has come for the legislature to address the needs of same sex couples and their families, and to consider granting these individuals additional benefits through marriage or whatever status the legislature deems appropriate.”¹¹¹

Like Judge Smith, whose principled dissent in *LaValle* indicated that, despite unease with the death penalty, he would have upheld the statute’s constitutionality, Judge Graffeo’s *Hernandez* concurrence indicates a jurist who is able to distinguish predilections from principle.

The Court’s activist faction, such as it is, is centered around the chief judge. In fairness to her, the Court during Chief Judge Kaye’s tenure has adhered to a principle of restraint, as opposed to overt activism, more often than not, despite the chief judge’s (apparently) activist instincts at times getting the better of her, evidenced by her vociferous dissent in

¹⁰⁸ John Caher, *Opinions in Current Session Show Growing Fragmentation: Judge Robert Smith Fosters Debate on Role of Government*, N.Y.L.J., Aug. 16, 2005, at 1.

¹⁰⁹ *Id.* (depicting Judge Robert Smith as more difficult to pigeonhole).

¹¹⁰ 7 N.Y.3d at 367. Governor Spitzer has stated he supports “same sex marriage,” and there is a growing constituency among Democratic legislators in favor of making New York the first state to legalize same sex marriage via legislation. (The California legislature passed a “gay marriage” bill that was vetoed by Governor Schwarzenegger, who believed the matter should be decided by either referendum or, disconcertingly, the Courts.) Alternatively, certain Democratic lawmakers favor a civil unions “compromise.” Jacob Gershman, *Gay Marriage Gains May Not Yet Produce Law*, N.Y. SUN, Mar. 14, 2007.

¹¹¹ *Id.* at 379.

Hernandez, wherein she declared homosexuals a “suspect class,” denied “the fundamental right to marry,” and decried the Court’s retreat from a “proud tradition” of upholding equal rights.¹¹²

While her inclinations are liberal and, in hot button cases like *Hernandez*, evident in her jurisprudence, the chief judge moved with the Court to the right, particularly on criminal justice issues, during the course of her long tenure. An example of a restrained approach taken by the Court with regard to the abortion issue, well before Governor Pataki’s appointment of more “conservative” jurists, is the Court’s above-referenced 1994 decision, *Hope v. Perales*.¹¹³ The Court affirmed, in a unanimous decision authored by Chief Judge Kaye, that it is “not the role of the courts to pass upon the wisdom of the Legislature’s policy choice,” though it referred elsewhere (in *dicta*) to abortion being a “fundamental right” inherent in the state constitution’s due process liberty guaranty.¹¹⁴

Some commentators see a turning point from an activist court to one more cognizant of its constitutional role in Governor Pataki’s publicized rebuking of the Court for its leniency in criminal cases and pettifogging over technicalities.¹¹⁵ Indeed, a fair assessment of her decisions might be that the emergence of a “conservative” faction centered around Smith has

¹¹² *Id.* at 381, 387 (N.Y. 2006) (Kaye, J., dissenting).

¹¹³ 83 N.Y.2d 563 (N.Y. 1994). George Pataki was elected governor in 1995.

¹¹⁴ *Id.* at 575-78.

¹¹⁵ See John Caher, *supra* note 2 (citing surveys showing that prior to Pataki assuming the governorship, Chief Judge Kaye voted for the criminal defendant about 60 percent of the time in divided cases, but in the wake of the Governor’s criticism, that number dropped to 27 percent – “precisely mirroring the voting pattern of her Court as a whole”).

allowed Kaye the freedom to follow her instincts, whereas during the majority of her term as chief judge, she felt obligated to build a more centrist consensus.¹¹⁶

The chief judge has also provided a paper trail that can be followed to divine her interpretive philosophy. Returning to her *alma mater*, New York University School of Law, in 1995 to give the school's inaugural "Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice," Chief Judge Kaye hailed Justice Brennan's "marvelous contribution" to the law, calling his example of bringing "the full measure of our human capacities to bear in resolving cases before us" as a "beacon" to her on the bench.¹¹⁷

In her lecture, Judge Kaye noted that state courts often serve as a front in a larger Culture War:

Today's state court dockets comprise the battlefields of first resort in social revolutions of distinctly modern vintage: whether frozen embryos are marital property to be distributed equitably upon divorce; whether it is a crime to assist a terminally ill patient in committing suicide; whether DNA evidence should be admitted to establish a defendant's guilt.¹¹⁸

Given that legislative language often is imprecise, Chief Kaye opined that her

own firsthand experience, study, and good sense convince [her] that state judges construing statutes are more than pharmacists filling prescriptions written by the legislature: often they are involved as well in treating the ailment. And that task becomes considerably more difficult when the legislature's handwriting is hard to decipher.¹¹⁹

¹¹⁶ See John Caher, *supra* note 108 (quoting an anonymous "downstate criminal defense attorney" who noted that the emergence of a Smith-Read-Graffeo bloc, deferential to the Legislature and strict constructionist, has nudged the Chief Judge to the Left, whereas previously she was inclined toward the Center).

¹¹⁷ Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 2 (1995).

¹¹⁸ *Id.* at 4 (citations omitted).

¹¹⁹ *Id.* at 28.

While distancing herself somewhat from now-sitting second circuit federal judge Guido Calabresi's proposal that courts "simply and openly [] 'update' obsolete statutes to ensure that the law remains responsive to changes in society," she sees the legislature's ability to predict future conditions as limited, and, therefore, by necessity, judges must "have no choice but to 'make law' in circumstances where neither the statutory text nor the 'legislative will' provides a single clear answer."¹²⁰

One of her consistent themes has been the stand-alone authority of the New York state constitution, which should be interpreted as guaranteeing civil rights separately and, often, more broadly than the federal Constitution. In her Brennan lecture, she bemoaned the fact that, "Many of us had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution."¹²¹ She has also stated that where "the Supreme Court has changed course and diluted constitutional principles," the Court of Appeals has "responsibility to support the State Constitution when [it] examine[s] whether [it] should follow along as a matter of State law."¹²²

This solicitude for the powers of the New York state constitution, however, did not lead her to

¹²⁰ *Id.* at 30-34 (seeing Judge Calabrese's proposal as having "a great deal of value").

¹²¹ *Id.* at 11-12.

¹²² *See People v. Scott*, 79 N.Y.2d 474, 504 (N.Y. 1992) (Kaye, J., concurring). Elsewhere, the Court has held that the New York State Constitution's guaranty of freedom of speech (Article I, Section 8) is "based on an adequate and independent ground" in the State Constitution separate from that found in the Federal, and is in fact broader than that contained in the First Amendment. *See O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 529 n.3, (N.Y. 1988) ("The protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment.") (citation omitted). *Cf. People v. Harris*, 77 N.Y.2d 434, 437 (N.Y. 1991) (rejecting the United States Supreme Court's interpretation of the Fourth Amendment's protections as too narrow and holding that citizens of New York State enjoy broader rights with respect to search and seizure than those provided by the United States Constitution); *Sharrock v. Dell Buick Cadillac, Inc.*, 45 N.Y.2d 152, 159-60 (N.Y. 1978) (holding that the State Constitution's due process clause provides broader protections than those afforded under the federal constitution).

interpret the New York state constitution's free exercise clause more broadly than the majority's decision in *Serio*, perhaps signaling a hierarchy of state constitutional liberty principles in the chief judge's jurisprudence, where some liberties are more cherished than others.¹²³

Nevertheless, her record in recent years has been less camouflaged. In addition to the *Hernandez* dissent, she concurred in the opinion striking down New York's capital punishment statute as unconstitutional, in *People v. LaValle*,¹²⁴ and dissented in *Campaign for Fiscal Equity v. State of New York* over whether or not the Court could take over legislative and executive functions by directing how much money be spent on public education.¹²⁵ In *Campaign for Fiscal Equity*, she was particularly jingoistic about the primacy of the judicial branch over the legislative: "[I]t has been the province and duty of the judicial branch to enforce compliance with constitutional norms, including . . . as against the other branches of government."¹²⁶

Regardless of one's assessment of the Chief Judge's judicial philosophy, her output during the course of her 24-plus years on the bench has been tremendous, and her contribution to the bar in the state of New York significant.

The only judge who could be predictably tabbed as activist is Associate Judge Carmen Ciparick, who remains the jurist most evidently hostile to life issues and the most likely to allow her predilections to sway her opinions. Lacking the gravitas of the chief judge, Judge

¹²³ See Brief for Campus Crusade for Christ, Inc. and the Catholic League for Religious and Civil Rights as Amici Curiae Supporting Appellants Catholic Charities of the Diocese of Albany et al., *Serio*, 7 N.Y.3d 510 (available by request from the authors).

¹²⁴ 3 N.Y.3d 88 (N.Y. 2004) (discussed *supra*).

¹²⁵ 8 N.Y.3d 14 (N.Y. 2006) (Kaye, J., dissenting).

¹²⁶ *Id.*

Ciparick was nominated by Governor Mario Cuomo as the first Hispanic member of the Court. Pro-life groups called upon the state senate to reject her nomination, due to her holding, as trial judge, that the state's pre-natal PCAP program was *unconstitutional* because it did not include abortion services, judging the statute's exclusion of abortion to be a violation of the state constitution's guarantee of due process.¹²⁷ Among the first cases heard by the Court after her confirmation was her decision in *Hope v. Perales*, discussed above, wherein the Court unanimously reversed her ruling, with Judge Ciparick recused.

Her term ends in 2008; if she were to be reappointed, she could remain on the bench until 2012. Regardless of whom Governor Spitzer appoints, that person is unlikely to be more doctrinairily hostile to life as the judge being replaced.

Governor Spitzer's first appointment to the Court had less to do with heeding the needs of ideological constituencies than racial ones. Minority groups pressured the Governor to name an African-American jurist, and he responded by picking Judge Theodore T. Jones; since the expiration of Judge George Bundy Smith's term, the Court had been without an African-American judge.¹²⁸

There is relatively little in Judge Jones' background to indicate what his attitudes toward life might be or what is his overarching judicial philosophy. His resume includes service as a captain in the navy. He also worked for a period as a legal aid attorney and has a reputation for being pro-plaintiff.

¹²⁷ James Dao, *Court Nominee Questioned on Abortion Case*, N.Y. TIMES, Dec. 16, 1993, at B8.

¹²⁸ See John Caher, *Lack of Diversity on Top Court and in Pipeline is Criticized*. N.Y.L. J., Dec. 5, 2006, at 1; see also John Caher, *Pataki Nominates Pigott for High Court: Would Be First Buffalo-Area Judge Since 1980s*,

At his confirmation hearing, when pressed by a liberal state senator from Bronx County as to whether his judicial philosophy would make “no allowance for society change,” Judge Jones equivocated. While he was “reluctant to create rights over and above those enumerated in the state or federal constitution,” he added that occasions may arise when “problems that have not been anticipate” might warrant greater activism.¹²⁹

Judge Jones’s most publicized decision occurred with regard to the illicit transit strike that crippled New York City just before Christmas 2005.¹³⁰ Bucking progressive sentiment that favored the striking workers, then-Justice Jones of the New York State Supreme Court sentenced the president of the New York City Transport Workers Union, Roger Toussaint, to 10 days in jail and fined the union \$2.5 million for violating the state’s Taylor Law,¹³¹ which prohibits strikes by public service employees. Given that organized labor was another one of Governor Spitzer’s principal constituencies, Judge Jones’ decision to take a hard line demonstrated a willingness to make a politically unpalatable decision, regardless of the personal consequences. Indeed at this confirmation hearing, he came under attack from the Left for this decision, and was defended by conservative Republicans.¹³²

N.Y.L.J., Aug. 1, 2006, at 1 (noting criticism of Governor Pataki for failing to either reappoint George Bundy Smith for a truncated term or another minority judge).

¹²⁹ John Caher, *Jones Takes Seat on High Court*, N.Y.L.J., Feb. 14, 2007.

¹³⁰ *New York City Transit Authority v. Transport Workers Union of America*, 12 Misc.3d 943 (N.Y. Sup. Ct. 2006).

¹³¹ The formal name of the “Taylor Law” is the “Public Employees’ Fair Employment Act,” codified at N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1999 & Supp. 2000).

¹³² Judge Jones was pointedly criticized by State Senator Bill Perkins of Harlem, who termed the decision “harsh,” leading some to perceive him as “anti-union” and “anti-worker.” Judge Jones did not back down, arguing that the million-dollar-a-day fine imposed on the union, the docking of two days’ pay for every day a worker was on strike and the holding of the transit workers’ union leader in contempt was not “an extraordinary penalty,” but warranted given the cost and disruption the illegal strike caused the City in the midst of the Christmas shopping season. Judge Jones was in turn praised by Senator Michael Nozzolio, from the scenic Finger Lakes region in central New York, for “strictly construing the statutes of the State of New York.” John Caher, *supra* note 129.

Judge Jones replaced Albert M. Rosenblatt, a Pataki-appointed Republican maverick who recused himself from the *Hernandez* homosexual marriage decision reportedly due to his daughter's advocacy on behalf of plaintiffs in similar cases in New Jersey, Washington, and California.¹³³ Though no doubt Judge Jones will be his own man, the last African-American jurist on the bench, Judge George Bundy Smith, though typecast as a "liberal," was by no means an activist when it came to deciding contentious social matters, voting to uphold New York's traditional understanding of marriage in *Hernandez*. Judge Jones may similarly emerge as an independent voice on such issues.

Overall, then, the Court is not an activist court but one where a majority of judges adhere to a restrained view of the judiciary's role. It will defer to the legislature on the issues that come before it, carefully weighing the legislature's prerogative as the maker of laws against traditional liberties, like the free exercise rights at issue in *Serio*.¹³⁴

It is, however, the Court's ruling in *Serio* that is the most nettlesome to pro-lifers committed as a matter of general principle to judicial restraint and opposed to results-oriented jurisprudence. For, in *Serio*, the Court exercised deference in *upholding* legislation impacting upon conscience, religious liberty, and, given the fact that contraceptives often function as abortifacients--the right to life. In so doing, the Court may have cast a template that may increasingly be followed in the years ahead, even if the Court retains its restrained four-judge

¹³³ See Arthur S. Leonard, *N.Y. Same Sex Marriage Cases Development*, Leonard Link, http://newyorklawschool.typepad.com/leonardlink/2006/05/ny_samesex_marr.html (May 23, 2006).

¹³⁴ The Court, in *dicta*, did set certain boundaries against which the legislature could not transgress, such as any legislation that might seek to violate the seal of confession. 7 N.Y.3d at 527.

core: The Legislature passes legislation that is, at its root, pernicious, and the Court, committed to legislative deference, refrains from striking it down.

III. THE COURT

The New York Court of Appeals was founded in 1847 to replace the Court for the Trial of Impeachments and the Correction of Errors as the state's highest court. It has a storied past, whose most famous jurist was undoubtedly Benjamin Cardozo, author of many opinions memorable to generations of law students (including *Palsgraf v. Long Island Rail Road Co.*,¹³⁵ *MacPherson v. Buick Motor Co.*,¹³⁶ *Meinhard v. Salmon*¹³⁷ and *Wood v. Lucy, Lady Duff-Gordon*¹³⁸) and a subsequent USSC justice.

The distinctive nomenclature of New York's judiciary often bedevils out-of-state attorneys, who mistake the state's highest court for an intermediate one; the "Appeals" contained in its name are of a last resort, at least where only state-guaranteed rights are implicated.¹³⁹ The right to have an appeal heard by the Court, however, is qualified; though there are instances where an appeal as of right may be had, as set forth in N.Y. Civil Practice Law and Rules 5601,

¹³⁵ 249 N.Y. 511 (N.Y. 1928) ("Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.").

¹³⁶ 217 N.Y. 382 (N.Y. 1916) ("If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.").

¹³⁷ 249 N.Y. 458 (N.Y. 1928) ("A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.").

¹³⁸ 222 N.Y. 88 (N.Y. 1917) ("The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.").

¹³⁹ New York's trial and intermediate courts are both part of the "Supreme Court," with the intermediate courts being referred to as the "Supreme Court, Appellate Division." (The Appellate Division in turn is divided into four "Departments," following geographic boundaries that roughly track those of the federal district courts.) Supreme Court jurists – both trial and intermediate – are referred to as "Justices," whereas the more pedestrian appellation "Judge" is actually reserved for the seven jurists who sit on the Court of Appeals.

the Court is primarily a court of *certiorari*, and thus may choose which appeals it wishes to hear. As such, its role is akin to that of the USSC, “declaring and developing an authoritative body of decisional law for the guidance of the lower courts, the bar, and the public.”¹⁴⁰

Members of the Court are not directly elected. Rather, seven nominees for an open Court slot are put forward by the State Commission on Judicial Nomination--an entity whose 12 members are appointed equally by the Governor, the legislature, and the chief judge of the Court--from which the governor selects one, subject to confirmation by the state senate.¹⁴¹ The state bar association plays no official role in the process, though it will issue an evaluation of the qualifications of each nominee.¹⁴²

The state senate must hold an up-or-down vote within 30 days of the selection.¹⁴³ Though it is not supposed to be a rubber-stamp process, the senate has never rejected *any* governor’s nomination for a Court position since direct election of Court judges was abolished in 1977.¹⁴⁴ Most recently, for example, Chief Judge Kaye was renominated to serve as chief jurist for a second, truncated term, with only two state senators voting against her confirmation.¹⁴⁵

¹⁴⁰ ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS*, §1 at 4 (Delmar Publishers, 3d ed. 1997). See N.Y.CONST. art. VI, § 3(a) (“The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death.”).

¹⁴¹ See Sewell Chan, *Spitzer Selects Black Jurist for Top Court*, N.Y. TIMES, Jan. 15, 2007. Pro-life groups unsuccessfully urged the Senate not to confirm Associate Judge Carmen Beauchamp Ciparick when she was nominated. See discussion *infra*.

¹⁴² See *id.* The New York State Bar Association found all seven nominees for the most recent spot to open to be “well qualified,” its highest rating. *Id.*

¹⁴³ N.Y. JUD. LAW § 68(4)(a).

¹⁴⁴ See John Caher, *By Tapping Jones, Spitzer Reveals Hands-On Style of Picking Judges*, N.Y.L.J., Jan. 14, 2007.

¹⁴⁵ Two Republican State Senators, Sen. Stephen Saland and Sen. George Maziarz, voted against her reappointment due to her perceived liberal activism, criticizing her decisions in *Campaign for Fiscal Equity* and *LaValle* (discussed *supra*), respectively. Senator DeFrancisco, a pro-life stalwart (see *supra*), iterated several areas of disagreement with Chief Judge Kaye, but nevertheless voted for her confirmation. See Yancey Roy, *supra* note 94.

Judges of the Court serve a fourteen-year term, unless they reach the mandatory retirement age of 70 in the interim. There is currently a recommendation that the state constitution be amended to push back the retirement age, which Governor Spitzer reportedly backs.¹⁴⁶

Four of the seven Court judges are women, with New York in 2003 becoming the first state where women constitute a majority of judges appointed to a state's highest court.¹⁴⁷

Current Members of the New York Supreme Court

Member	Appointed by/ Year	Term Expires	Miscellaneous
Judith S. Kaye (Chief Judge)	Cuomo/ 1983 (Chief Judge 1993); Spitzer/ 2007	2008 ¹⁴⁸	- Education: Barnard College (A.B. 1958); New York University School of Law (LL.B 1962) (<i>cum laude</i>). - Political Affiliation: Democratic. - Co-Chair of the Commission on the American Jury of the American Bar Association; Chair of the Permanent Judicial Commission on Justice for Children; Member of the Board of Editors of the New York State Bar Journal. - Past President Conference of Chief Justices; Past Chair of the Board of Directors of the National Center for State Courts. - Noteworthy Opinions: <i>Hope v. Perales</i> ; <i>Hernandez v. Robles</i> (dissent); <i>Campaign</i>

¹⁴⁶ Joel Stashenko, *Move to End Forced Judicial Retirement Gains Momentum in N.Y.*, N.Y.L.J., Mar. 21, 2007. Cf. N.Y. CONST. art. V, § 25(b) (mandatory retirement requirement).

¹⁴⁷ See John Caher, *Read Tapped for the Court of Appeals*, N.Y.L.J., Jan. 7, 2003 at 1 (noting women also constitute a majority of judges in Washington and Ohio, which provide for direct election).

¹⁴⁸ Chief Judge Kaye's first term expired in 2007. She requested that she be reappointed to a second, truncated term. Governor Spitzer obliged her, and she thereby became the first New York Chief Judge ever reappointed to a second term. She will turn 70 next year, however, and thus must step down by December 31, 2008. See Yancey Roy, *supra* note 94.

			<p><i>for Fiscal Equity v. New York State</i> (dissent).</p> <ul style="list-style-type: none"> - Selected articles published: “State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions,” 70 N.Y.U. L. Rev. 1 (1995); “Things Judges Do: State Statutory Interpretation,” 13 Touro L. Rev. 595 (1997). - Promoted from Associate Judge to Chief Judge during a period of turmoil, replacing disgraced former Chief Judge Sol Wachtler in 1993.¹⁴⁹ - First woman judge on Court of Appeals and first Chief Judge to be reappointed.
Carmen Beauchamp Ciparick (Associate Judge)	Cuomo/ 1994	2008 ¹⁵⁰	<ul style="list-style-type: none"> - Education: Hunter College (A.B. 1963); St. John’s University School of Law (J.D. 1967). - Political Affiliation: Democratic. - First Hispanic member of the Court of Appeals. - Former Legal Aid Society Staff Attorney. - Former Justice, New York Supreme Court First Judicial District. - Noteworthy Opinions: <i>Hope v. Perales</i> (trial court opinion). - Regarded as jurist most hostile to life, having authored trial court decision in <i>Hope v. Perales</i>, holding that the State’s pre-natal PCAP program was <i>unconstitutional</i> because it did not include abortion services and judging the statute’s exclusion of abortion to be a violation of the State Constitution’s guarantee of due process. - Pro-lifers unsuccessfully lobbied State

¹⁴⁹ Chief Judge Sol Wachtler, elevated to the Court in 1972 and appointed Chief Judge in 1985, while acknowledged for his probity on the bench, gained tabloid notoriety when he was arrested in 1992 for stalking his former paramour and subsequently convicted. *SEE SOL WACHTLER, AFTER THE MADNESS: A JUDGE’S OWN PRISON MEMOIR* (Random House, 1st ed. 1997).

¹⁵⁰ If reappointed, she could remain on the bench until 2012. John Caher, *2 Black Judges Among 7 Court Candidates*, N.Y.L.J. Dec. 1, 2006 at 1, 6.

			Senators to vote against her appointment to the Court of Appeals.
Victoria A. Graffeo (Associate Judge)	Pataki/ 2000	2014	<ul style="list-style-type: none"> - Education: State University of New York at Oneonta (B.A. 1974) (with honors); Albany School of Law of Union University (J.D. 1977). - Political Affiliation: Republican. - Noteworthy Opinions: <i>In Re M.B.; Hernandez v. Robles</i> (concurrence). - After five years private practice, Judge Graffeo spent nearly 20 years in state government, serving in all three branches, including service as chief counsel to Republican Assembly Minority Leader Clarence D. Rappleyea, Jr. from 1989 to 1994. - Former New York Solicitor General.
Robert S. Smith (Associate Judge)	Pataki 2003	2014	<ul style="list-style-type: none"> - Education: Stanford University (A.B. 1965) (with great distinction); Columbia University School of Law School (L.L.B. 1968) (<i>magna cum laude</i>). - Political Affiliation: Republican. - Past member, Federalist Society (New York Lawyers Chapter). - Recipient, 2004 James Madison Award, New York Lawyers Chapter of the Federalist Society; in his acceptance speech, Judge Smith commented on the importance of judicial restraint. - Editor-in-Chief <i>emeritus</i> Columbia Law Review. - Past Visiting Professor, Columbia Law School (1980-1981). Noteworthy Opinions: <i>Catholic Charities of the Diocese of Albany v. Serio; Hernandez v. Robles; Pataki v. New York State Assembly; People v. LaValle</i> (dissent). - Former Member, Paul, Weiss, Rifkind, Wharton & Garrison.
Susan Phillips Read (Associate Judge)	Pataki/ 2003	2017	<ul style="list-style-type: none"> - Education: Ohio Wesleyan University (A.B. 1969) (<i>summa cum laude</i>) (Phi Beta

			<p>Kappa); University of Chicago Law School (J.D. 1972).</p> <ul style="list-style-type: none"> - Political Affiliation: Republican. - Former Presiding Judge of the Court of Claims.¹⁵¹ - Former chief environmental counsel, General Electric.
Eugene F. Pigott Jr. (Associate Judge)	Pataki/ 2006	2016	<ul style="list-style-type: none"> - Education: LeMoyne College, (A.B. 1968); Buffalo School of Law, State University of New York (J.D. 1973). - Political affiliation: Republican. - Noteworthy Opinions: <i>Campaign for Fiscal Equity</i> - Former Presiding Justice, Appellate Division Fourth Department, where he gained a reputation as a seldom-reversed jurist. - Past President, Legal Aid Society of Buffalo. - As a native of Buffalo, the perceived need for geographical diversity played a role in Judge Pigott's selection; Buffalo had been unrepresented for 21 years, which was considered a slight given its status as the State's second largest metropolis.¹⁵² - Selected twice before to be among the seven finalists for the top Court before finally being selected. - Practiced for 19 years as a partner in a Buffalo law firm, Offerman, Cassano, Pigott & Greco.
Theodore T. Jones (Associate Judge)	Spitzer/ 2007	2021	<ul style="list-style-type: none"> - Education: Hampton University; St. John's Law School (J.D. 1973). - Noteworthy Opinions: <i>New York City Transit Authority v. Transport Workers</i>

¹⁵¹ The Court of Claims hears claims against New York State. There, she had a reputation for favoring the State, though she also awarded considerable damages where she believed it to be warranted. See John Caher, *supra* note 147.

¹⁵² See John Caher, *Pataki Nominates Pigott for High Court: Would Be First Buffalo-Area Judge Since 1980s*, N.Y.L.J., Aug. 1, 2006, at 1.

			<i>Union of America.</i> - Former Justice, New York Supreme Court Second Judicial District. Former Captain, United States Navy. - Former Legal Aid Society Attorney.
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CONCLUSION

In sum, New York’s highest court is largely committed to the principle of legislative deference and wary of the siren’s song of judicial activism. Given that four of the Court’s seven members will have been appointed by the present governor’s predecessor and, barring premature vacancies, will constitute a majority into the next decade, the Court is likely to continue to navigate an even course. Unlike in other states, legislative deference does not, however, translate into certain victory for life, for that presupposes a legislature committed to protecting society’s most vulnerable. New York serves as a reminder that, even with a principled state judiciary, reversal of *Roe v. Wade* simply means that the battle for life will shift from the courthouse to the statehouse.