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THE COURT AND THE CHANGING CONSTITUTION: A DISCUSSION

Vincent Bonventre:

Welcome to this afternoon's session: The Court and the Changing Constitution: A discussion. By discussion we mean something more akin to a free-for-all. We have various different topics here: we have appointments, we have separation of powers, we have disincorporation (I have no idea what that might be), and we have the exclusionary rule. And among the common denominators I see here are complaints about court of appeals' jurisprudence and complaints about all kinds of stuff, even complaints about one another.

I just told Professor Carl Swidorski¹ at the break that his dissertation on the court of appeals' appointment process, the changeover from elections to the so-called merit selection system, was the first I had ever read. So, Carl, go to it.

Carl Swidorski:

I would like to thank the people who have convened this and for inviting me. When they invited me they asked me to be brief and to try to say something which would get a free flowing, provocative discussion going, and then they asked me to talk about judicial selection. My immediate reaction was that is not that exciting of a topic. The political science literature has sort of had a consensus about judicial federalism for a long period of time.

1. Carl Swidorski is an Assistant Professor of Political Science at the College of Saint Rose in Albany, New York and previously taught at Northeastern University in Boston. Professor Swidorski has a particular interest in public law, bureaucratic politics and political theory.

Then I remembered this Law Review article I wrote that Barry referred to over ten years ago.² And one of the former chief judges of the court of appeals responded to that article in judicial selection by saying it was a “false and defamatory” alleged description of the New York State Commission on Judicial Nomination and an affront to the members of the commission.³ I thought maybe I will say something that is provocative.

Another letter I got in response to that article was from an executive director of one of the good government organizations who suggested the article was filled with factual inaccuracies. And a third response from another sitting judge at the time suggested that the advocates of the elected systems were pointing to that article as evidence that a strong advocate of merit selection had changed its mind. It was also news to me that I had been an advocate of merit selection or that I had changed my mind. So maybe I will say something that will lead to some discussion

2. Carl Swidorski, *Judicial Selection Reform and the New York Court of Appeals: Illusion or Reality*, 55 N.Y. ST. B.J. 10 (July 1983). The following describes the aforementioned article:

One of the quieter developments in state government over the past [fifty] years has been the accomplishments of the judicial reform movement. A substantial majority of states have instituted changes in their judicial systems. While the judicial reform movement has supported a variety of changes, its most visible and controversial proposals have centered on its attempt to change the method of selecting judges to some variant of the Merit Plan. The campaigns for change from an allegedly political selection system to a supposedly more professional one have generated considerable political controversy in many states and have raised a series of questions ranging from the appropriate role for the judiciary to play in a democratic society to discussions of the increasing professionalization and bureaucratization of the American judiciary and the larger political system.

Id. at 10-11.

3. See Carl Swidorski, *Judicial Selection Reform - The Author's Reply to His Critics*, 55 N.Y. ST. B.J. 22 (October 1983). Professor Swidorski begins his “reply to his critics” by stating: “Former Chief Judge Desmond charges that my characterization of the activities of the State Commission on Judicial Nomination is ‘false and defamatory’ and that an investigation by the editor of the New York State Bar Journal would have discovered its ‘total falsity.’” *Id.*

depending on what the people in the audience want to talk about, given the variety of topics they have here.

I have four basic conclusions I just want to throw out. I will not offer too much evidence to support them. See if questions lead to that.

For those who are not familiar, for the court of appeals, New York State made a constitutional change in 1977 from an elective system which often functioned as a gubernatorial appointment system, or generally functioned as a gubernatorial appointment system, and political parties' appointment system, to a so-called merit plan of judicial selection.⁴

My first conclusion is that merit selection has had very little affect on the kinds of individuals selected for the New York State Court of Appeals.⁵ The evidence for this in New York, both evidence that I have done research on and other individuals, tends to conform with over thirty years of evidence in the political science profession looking at a variety of states which comes to basically the same conclusion.

For example, in New York State, if we look at the individuals selected to the New York Court of Appeals on some characteristics, under merits, their average age is 56.4.⁶ Under the so-called non-merit, 56.⁷

4. Swidorski, *supra* note 2, at 13.

5. *Id.* at 14. Professor Swidorski contends that "the new selection method has not lived up to the reformers' professed expectations that 'better' or 'superior' judges would be picked and that politics would be removed from the process of selection." *Id.*

6. In an unpublished paper entitled "*Judicial Selection to the New York State Court of Appeals, 1950-1996: What Have We Learned?*", Professor Swidorski provides the following table illustrating certain characteristics of Court of Appeals Judges under the "merit" and "non-merit" selection processes for the years 1950 through 1996:

Characteristics	"Non-Merit" (N=23)[a]	"Merit" (N=14)[b]
Mean Age at time of Selection	56	56.4
Previous Judicial Experience	78%	93%
Mean Years of Judicial Experience	14.8	16
Appellate Division Experience	48%	50%

In terms of years of judicial experience, under the merit system, they now have 16 years of judicial experience on the average.⁸ Under the elective system, they had 15 years of judicial experience on the average.⁹ Under the merit system, 50 percent have been on the appellate division; under the elective system, 48 percent were on the appellate division.¹⁰ In fact, under the elective system one out of five judges was a presiding judge of the appellate division and none have been under the merit system.¹¹

On those types of criteria it suggests to me that we are not really getting significantly different types of judges. And this evidence supports a lot of other evidence in the profession.

The second criteria I looked at was who is influential in the selection process today as opposed to under the elective system. Under the elective system, my conclusions were that the

Presiding Justice of Appellate Division	22%	0%
Judicial Department		
First	22%	36%
Second	22%	21%
Third	22%	21%
Fourth	35%	21%
Party Affiliation		
Democrat	52%	64%
Republican	48%	29%
Independent	0%	7%

[a] Only twenty-one judges were selected to the Court between 1950 and 1977. However the table includes two other judges who sat on the Court during this period because their presence, with their accompanying set of background characteristics, was a factor in the decisions made about other selections to the Court. These two judges were initially selected in 1934 and 1949.

[b] Judge Kaye is counted twice. She was appointed an Associate Judge in 1983 and elevated to Chief Judge in 1993.

Carl Swidorski, *Judicial Selection to the New York State Court of Appeals, 1950-1996: What Have We Learned?*, at 12.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Swidorski, *supra* note 2, at 14.

governors were the most significant political actors in the appointment process, followed by political party leaders, in that case political party leaders primarily of the democratic party since we had a period of republican gubernatorial leadership, and then the candidates, themselves, were the third most important participants in the selection process.¹²

I see basically the same pattern under the merit selection process. Governors remain the dominant actors in the appointment process. Other political party leaders remain very important, partly because they are institutionalized in the Commissions on Judicial Reform, themselves, partly because political activists are among those appointed to the Commissions on Judicial Nomination. And, third, the candidates themselves remain important.

It is very rare that anyone is selected to the court of appeals unless they have made some effort to get selected to the court of appeals and let their name be known. The range of effort can vary quite a bit from a minimal effort to organizing fairly active lobbying campaigns on behalf of particular justices or judges.

And the third criteria I looked at was what type of factors have been important under both selection systems. And under the old elective system, my research suggested that there was a threshold level of judicial competence expected of people who are going to be appointed to the court of appeals.¹³ After that threshold level of judicial competence was met, then a variety of political factors were taken into consideration.¹⁴ And since it was an elective system, the factors included the affect that candidate might have on the state wide ticket in terms of balancing the ticket or in some years in terms of heading the ticket.

There are political considerations of other positions that will be opened up at lower levels which will lead to more patronage

12. *Id.*

13. *Id.* at 15.

14. In his article, Professor Swidorski provides examples with respect to the replacement of a judge with another of the same political affiliation. *Id.* He further contends that "lobbying, patronage considerations, and the attempted exertion of political influence were all part of [judicial appointments.]" *Id.*

appointments. In some cases it will be promote so and so to the court of appeals.

Those considerations were normal under the elective system, and then there are what I call political representational considerations. It was important during that period of time, at least according to almost everyone I interviewed, that the court have some rough political party balance, that the court have geographic balance in terms of the four departments of the State of New York, and that the court have religious balance in terms of the three major faiths: Jewish, Catholic, and Protestant.

Under the merit selection plan, I see that similar factors probably had operation, although I have not done the kind of extensive interview that would lead me to have a firmer conclusion about it, but it is clear that gender is an issue under the current system. It is clear that race is an issue. It is clear that ethnicity at times becomes an issue.

And if we look at the distribution patterns, in terms of geography, under the old system 22% of the judges were from the first, second, and third departments, and 35% from the fourth department, which shows some interest in keeping representation for all departments on the court and keeping it in some balance.¹⁵

Under the new system, we have 36% from the first department, and then 21% from the other three departments which, again, suggests some consideration and interest in geographical representation. In terms of party affiliation, under the old system, 52% of the appointments were democrats; 48% republican.¹⁶ Roughly equal. Under the new system, interestingly enough, 64% of the appointments have been democrats and 29% have been republicans.¹⁷ That difference probably is accounted for by the different political affiliations of the Governor in the two respective systems, and the fact that at the time merit selection was put in place the court had a slight republican nomination and has now switched to a slight democratic one.

15. *See supra* note 6.

16. *Id.*

17. *Id.*

So, my conclusion, again, on that basis, is that the change in selection systems has not had a significant affect in terms of an interest in political representation as an issue to be considered in who we appoint as court of appeals' judges. Some of the relative importance of the different representational factors may have shifted. Religion does not appear to be as important today, but nonetheless that appears to be a consideration.

My final conclusion is that in terms of policy making, and in terms of the life support in area New Yorkers, the change in judicial selection really has not meant a lot.

I have one other thing I can toss out on the table which perhaps will lead to some discussion. One of the judges who responded to my earlier work suggested that while he did not like the tone of it he agreed with its conclusions, but his comment was the problem with the merit system in New York was not the merit system itself but the kind we had adopted. His argument was when the appointment of nomination commissioned members is left to political figures, political factors in the judicial selection process will not disappear simply because the appointees will continue their relationships with the appointers. The solution, in my view, is to divorce appointment of commissioned members as far from the political process as possible.¹⁸

And then he goes on to suggest that as examples of non-political members of the Judicial Nomination Commission we could have the president of the New York State Bar, the president

18. The mechanics of the selection process is as follows:

The plan . . . provide[s] for a bipartisan screening committee, the State Commission on Judicial Nomination, composed of twelve members. No more than six individuals can be registered members of a given political party. Four members are appointed by the governor, four by the Chief Judge, and one each by the majority and minority leaders of the State Senate and Assembly. The Commission makes recommendations for Court of Appeals vacancies to the governor who must appoint one of the individuals recommended. In the case of the Chief Judge, the Commission recommends seven individuals while for Associate Judge positions it recommends three to five individuals. The person nominated by the governor must then be confirmed by the New York State Senate.

Svidorski, *supra* note 2, at 13-14.

of the League of Women Voters, deans of law schools and etceteras (whatever etceteras is). My initial reaction to that is, having spent twenty some years in academia, that I am not certain deans are very non-political, and I am not too certain that presidents of the New York State Bar Association are very non-political, so my initial reaction to that suggestion of, again, removing politics from the process is skepticism.

And I will leave it there.

Vincent Bonventre:

He referred to the judges of the court of appeals as justices, which reminds me of a story of a friend of mine, Dick Farrell, from Brooklyn Law School, who was down arguing at the United States Supreme Court and insisted on referring to the justices as judges. Finally, I don't know whether it was a red-faced Rehnquist or Scalia said, you know, "we are justices," to which Dick Farrell responded: "Well, in the New York Court of Appeals they are judges. I figure if it's good enough for them, it's good enough for you."

Barry Latzer:

A footnote to that: The Constitution says "judges" of the Supreme Court.¹⁹

Vincent Bonventre:

Next we have Professor James Gardner²⁰ who has kind of made a career out of starting or inciting riots in the State Constitutional Law subfield. He is going to talk to us today about separation of powers jurisprudence in the court of appeals.

James Gardner:

19. U.S. CONST. art. III, § 1. The language referred to states: "The Judges, both of the supreme and inferior Courts" *Id.*

20. Professor of Law at Western New England College School of Law; B.A. 1980, Yale University; J.D. 1984, University of Chicago.

Well, if what Rob Heverly said at the end of last session didn't start a riot, I am not going to start one here.

The basic point that I want to make is that not much has changed at the court of appeals in terms of its state constitutional jurisprudence. There have been some superficial, cosmetic changes, but nothing of any substance. And I want to make that point by talking about the separation of powers jurisprudence. It seems to me that the separation of powers is a bellwether for state constitutional adjudication. There is no Fourteenth Amendment influence, there is no policy considerations favoring uniformity or lack of uniformity. With federal doctrine, there is no search and seizure area that police have to cooperate with. The way a state chooses to structure its own government is a completely independent decision that federal law has no influence over and as a result the field is wide open. The adjudication occurs in something approaching the purest form in this area and others like it.

If that is the case, then the court of appeals' separation of powers cases bode ill for its state of constitutional adjudication in general.

The case I want to talk about is a case from last term: *Bourquin v. Cuomo*.²¹ In *Bourquin*, the court of appeals upheld an executive order by Governor Cuomo that created an outfit called the Citizens Utility Board, the CUB.²² Here is what happened. The Governor decided that the interests of residential utility consumers were inadequately represented before the Public Utility Commission which sets rates that affect everybody. And so the Governor went to the legislature and said, "This is a problem. What you should do is to create the CUB to protect residential consumers' interest." And the legislature said, "We don't want to." And so the Governor said, "No problem. I will do it myself." He issued an executive order. At least judging by the court of appeals' handling of the issue, what the executive

21. 85 N.Y.2d 781, 652 N.E.2d 171, 628 N.Y.S.2d 618 (N.Y. 1995).

22. *Id.* at 783, 652 N.E.2d at 172, 628 N.Y.S.2d at 619. The purpose of Executive Order No. 141 is to protect the interests of residential customers when dealing with public utilities. *Id.* (citing N.Y. Comp. Codes R. & Regs. tit. 9, § 4.141 (1995)).

order did was to create or authorize the creation of this agency and to give it access to state mailings.²³

Now, the separation of powers' argument against this is pretty obvious. It is an example of the Governor legislating. The court of appeals upheld the executive order.²⁴ Their reasoning was that even though there is no specific legislation authorizing the Governor to do this, if we scour New York law we find indications that the legislature has abstractly expressed a goal to protect consumers.²⁵

We know that because the legislature created the Consumer Protection Board, which is an executive agency designed to promote the interest of consumers.²⁶ The court of appeals held

23. *Bourquin*, 85 N.Y.2d at 787, 652 N.E.2d at 174, 628 N.Y.S.2d at 621. The court found a similarity between the instant case and *Clark v. Cuomo*, 66 N.Y.2d 185, 486 N.E.2d 794, 495 N.Y.S.2d 936 (1985), in that both executive orders at issue did not articulate specific policies. *Bourquin*, 85 N.Y.2d at 787, 652 N.E.2d at 174, 628 N.Y.S.2d at 621. *Compare* *Boreali v. Axelrod*, 130 A.D.2d 107, 518 N.Y.S.2d 440 (3d Dep't), *aff'd*, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987) (finding that in creating a comprehensive code to govern tobacco smoking in public areas, the Public Health Council usurped the Legislature's power by employing a scheme which attempted to strike a balance among health concerns, costs and privacy interests which is a unique legislative function); *Rapp v. Carey*, 58 A.D.2d 918, 396 N.Y.S.2d 805 (3d Dep't 1977), *aff'd*, 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978) (determining that an executive order created by the Governor which attempted to regulate certain state employees by prohibiting service in a political party office and regulating outside employment and activity was unconstitutional because the order could not be exacted against state employees who were not subject to removal by the Governor, did not prescribe legislation relating to conflicts of interest and attempted to fill a legislative function by addressing an area of public concern); *Broidrick v. Lindsay*, 48 A.D.2d 639, 368 N.Y.S.2d 212 (1st Dep't 1975), *aff'd*, 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976) (holding that regulations enacted by the Mayor of the City of New York which required construction contractors meet mandated minority employment percentages were invalid because they lacked legislative authority, were inconsistent with applicable state statutes and because they invoked a percentage which was unconstitutional).

24. *Bourquin*, 85 N.Y.2d at 783, 652 N.E.2d at 172, 628 N.Y.S.2d at 619.

25. *Id.* at 786, 652 N.E.2d at 174, 628 N.Y.S.2d at 621.

26. *Id.* at 785, 652 N.E.2d at 174, 628 N.Y.S.2d at 621.

that all the Governor was doing was executing or implementing a generally expressed legislative desire to protect the interests of consumers just simply executing the law.²⁷

Now, in order to reach that result, the court had to take a very broad view of what it means to execute the law, or, alternatively, it took a very broad view of what the reach of positive law is with the unusual and broad conception of positive law.²⁸ The reason it had to take one or both of these views is because the Governor can implement the law not only by carrying out the things that the legislature has told the Governor to carry out, but also by carrying out things that the legislature has not told the Governor to do, and in fact by doing things the legislature has decided they do not want to do.²⁹

Now, obviously on the federal level something like that would violate the separation of powers, but big deal. We are talking about the New York State Constitution. The State of New York is free to structure its government however it sees fit and to take, if necessary, and if desired, a very broad view of executive power. In principle, there is nothing wrong with this decision; however, in practice, there is something at least potentially wrong with the decision, that is the New York State Constitution. The New York State Constitution is filled with suggestions that executive power in this state should be construed narrowly and, if anything, more narrowly than executive power on the federal level.

27. *Id.* at 787, 652 N.E.2d at 175, 628 N.Y.S.2d at 622.

28. *Id.* at 785, 652 N.E.2d at 173, 628 N.Y.S.2d at 620.

29. *C.f., e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (explaining that it would usurp the function of the legislature if the President acts after Congress expressly considered and rejected such action); *American Power and Light Co. v. Securities & Exch. Comm'n*, 329 U.S. 90 (1946) (holding that Congress shall not be vague when authorizing the President to act since a reviewing court must be able to ascertain the precise legislative policy of such action); *Administrative Procedure Act*, 5 U.S.C. § 706 (1977) (providing that courts must set aside government actions not in accordance with law). *But see* *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (sustaining executive order on the issue of whether the President may suspend and settle pending court claims of Americans against non-Americans which issue has historically received Congressional acquiescence).

The court based its interpretation on Article 4, Section 1 of the State Constitution,³⁰ which is the executive power provision from central casting: “The executive power shall be vested in the Governor”³¹

The problem is if you read a little further into the document you will see that is a bit of an exaggeration. In fact, the executive power of the State of New York is vested in the Governor and an independent attorney general,³² and an independently elected comptroller,³³ and independently elected district attorneys,³⁴ and independently elected sheriffs.³⁵ It is disbursed and splintered and divided.

All right. Why is that? Well, in most states, and most states do have a splintered executive in this manner, in most states what you would find is this occurred generally during the progressive reform era of the late Nineteenth Century and was done because of a suspicion that the progressives had of concentrated executive power because of its potential for corruption.

In New York, actually, the tradition of distrust for centralized executive power is much, much older. And what you can find (this is what disturbs me about the court’s opinion) is that under the very first constitution, the 1777 Constitution, the legislature had the power to appoint virtually all executive officials.³⁶ That was continued through the 1821 Constitution.³⁷

It was changed in 1846 in that these offices that had been appointed by the legislature now were made to be filled by

30. N.Y. CONST. art. IV, § 1.

31. *Bourquin*, 85 N.Y.2d at 784, 652 N.E.2d at 173, 628 N.Y.S.2d at 620 (citing N.Y. CONST. art. IV, § 1).

32. *Id.* (citing N.Y. CONST. art. V, § 1).

33. *Id.*

34. *Id.* (citing N.Y. CONST. art. XIII, § 13(a)).

35. *Id.*

36. N.Y. CONST. pmbl., arts. 22, 23, 26 (1777), reprinted in THE FEDERAL AND STATE CONSTITUTIONS 2623 (Francis Newton Thorpe ed. 1909) [hereinafter “Thorpe”].

37. N.Y. CONST. art. IV, § 6 (1821), reprinted in Thorpe, *supra* note 36, at 2644.

popular election.³⁸ So you had people like the Secretary of State, the Attorney General, the Treasurer, and a whole variety of people being independently elected. But the point is that the Governor never had the powers and was stripped of them. The Governor never had these powers in the State of New York.

All right. What can you make of this? Well, one thing that you can make of this is you can say one of two things. First, you can say these powers in the State of New York were never considered to be executive powers and as a result what that tells us is that in the State of New York the people have traditionally taken a narrow view of what executive power is.³⁹ Second, you can say in New York we have the same view of executive power but we are deeply, deeply distrustful in the tradition, going all the way back to the revolution, of concentrated executive power.

To that you can add some other things that the court declined to address. For example, the legislature in the state is part-time, the Governor is full-time. That really tips the balance of power greatly in favor of the Governor. Or how about this, the Governor in the state has an item veto,⁴⁰ giving the Governor a much greater degree of control over the content of legislation than, let us say, the president has over the content of federal legislation. All these things seem to make up a plausible case that executive power in the State of New York should be construed narrowly.

Now, I do not want to be misunderstood. I am not saying that *Bourquin* is necessarily wrong. There could be answers to all of the things I raised that could be distinguished away. I do not know. The point is that the court of appeals did not even make

38. N.Y. CONST. art. V, §§ 1-4 (1846), *reprinted in* Thorpe, *supra* note 36, at 2680-81.

39. The limits of the executive power is not clear and certain. For instance, the prosecutorial function may be considered executive, as in the Federal Constitution, *see, e.g.*, *Morrison v. Olson*, 487 U.S. 654 (1988), or judicial, *see, e.g.*, MISS. CONST. art VI, § 173 (1890) (placing state attorney general in judicial branch). *See* Scott M. Matheson, *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J. L. & Pub. POLICY 1 (1993); Stephanie A.J. Dange, Note, *Is Prosecuting a Core Executive Function?* *Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990).

40. N.Y. CONST. art. IV, §7.

the attempt and did not even acknowledge the existence of these other factors of the constitution and of the separation of powers. In fact, what it did was import a set of federal bromides and platitudes about separation of powers and proceed to apply them to the New York State Constitution as though the document were an appropriate place in which to apply those concepts, and it is not because it is very different in significant ways.

So, this I find disappointing. I find disappointing that after at least a decade of criticism, the court of appeals has done really nothing in terms of changing its ways except perhaps in the very highest profile individual rights case. Although, Rob's presentation says that is not even the case there. Certainly in the meat and potatoes areas, like separation of powers and governmental structure, things are no different than they were before the court was criticized.

Thank you.

Vincent Bonventre:

Thank you, Jim. You accused the court of relying on bromides and platitudes. Bellacosa accuses them of that every session. Next we have Professor Barry Latzer⁴¹ who, by the way, has a recently published book on state constitutional criminal procedure.⁴² It is a magnificent book. He is going to discuss with us disincorporation. We will find out what that is.

Barry Latzer:

I want to thank the Government and Law Center for inviting me and especially I want to thank Professor Bonventre, who has been such a gracious host.

Unlike most of my predecessors, I have come to praise the state courts and not to bury them. In fact, I rather think that there are some implications from state constitutionalism that we have not yet considered, I mean indications for federal constitutional law.

41. Barry Latzer is a Professor of Government at John Jay College of Criminal Justice, City University of New York.

42. BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW (1995).

If you study, the way I have, the vast bulk of state constitutional criminal procedure cases, over the whole nation, not just in New York, I think you cannot help but be impressed at the extent of the redundancy between state and federal constitutional criminal procedure.

I would now suggest that by this next century, which is not far off, most federal criminal procedure rights will have been protected on the basis of state constitutional law in most states in the United States. So I wish to raise this provocative question with you, and given the time constraints I probably will not get very much beyond raising the question, but I am going to suggest what I think the implications are with this development.

If we have such redundancy between state constitutional law and federal constitutional law, and if the state courts are proven rights' sensitive agents, as I think they are, then why do we need the federal floor? Why do we need the same level of federal constitutional protection?

Now, I know this is a radical question. Just to ask the question raises havoc. The assumption is that the federal floor is absolutely essential because it protects basic fundamental rights. Protects them from whom, however? When the federal floor was first laid, the assumption was that the state courts were either unwilling, unable, or incompetent to protect the defendants' rights or anyone else's rights. That assumption has been eroded if not demolished.

We have ample empirical proof that it has been eroded.⁴³ If, for instance, you were to examine the so-called parity debate,

43. Barry Latzer, *The Hidden Conservatism of the State Court Revolution*, 74 JUDICATURE 190 (1991). There are "more than 600 opinions that go beyond the federal minimum standards on individual rights issues." *Id.* (quoting Resnick, *This Court's a Backwater No More*, NAT'L L.J., May 28, 1990, at 1, 30). See, e.g., *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (1989) (holding that the state's interests were insufficient to overcome a patient's right to refuse a life-saving blood transfusion based on the patient's religious beliefs); *Riley v. State*, 511 So. 2d 282 (1987) (declaring that evidence should be suppressed where the defendant had a reasonable expectation of privacy); *Shakman v. State*, 553 So. 2d 148 (1989) (stating that the state has the burden of demonstrating that the method and means used in phone-tapping was the least intrusive means possible); *Bostic v.*

which involved whether or not federal habeas corpus should be maintained or should be altered, we have even more empirical proof from state constitutional law making itself. If the state courts are willing to protect rights on the basis of state constitutional law, as I claim they have, in fact, if they are willing to exceed federal requirements, as they so often do, I do not see how you can argue that the federal floor is needed to protect against the state courts.⁴⁴

In short, I think there is an abundance of empirical proof that the state courts are now proving rights protective.⁴⁵ Now, where do we go from here? I do not want to make the leap yet that just because the state courts are proven rights' protectors we do not need a federal floor. I know we have a long way to go to reach that point. In fact, I am not going to argue we do not need a federal floor. What I am going to argue is that we do not need some of the planks in the federal floor.

How can we approach such an argument? To do so I believe you have to go back to the theory of incorporation itself. Now, incorporation, as you all know, means certain rights are in the Bill of Rights, those rights that are deemed fundamental rights,

State, 554 So. 2d 1153 (1990) (holding that an unlawfully detained bus passenger's subsequent consent to search his luggage did not overcome taint of illegal police conduct).

44. Latzer, *supra* note 41, at 190. "[F]or every state high court decision repudiating U.S. Supreme Court doctrine there are at least two cases endorsing it." *Id.*

45. *Id.* at 191. Professor Latzer states:

[I]t should be emphasized that this not a situation where the Supreme Court's relatively insignificant doctrines have been approved, and its significant ones rejected; there is a mix of important and not-so-important cases on both sides of the equation. Moreover, any suggestion that the "more important" state courts, the ones that set the trends for the rest, are more rejectionist, and that therefore rejectionism is the wave of the future, is also unsupported by the evidence. . . . [W]hile some leadership courts (e.g., New York and Oregon) are fairly rebellious, other vanguard tribunals (e.g., Connecticut, New Hampshire and New Jersey) have very high rates of approval of the output of the Burger/Rehnquist majority.

Id.

are a part of Fourteenth Amendment Due Process, and therefore are incumbent upon the states. After the 1960's had ended, most of the rights provisions in the Bill of Rights had been incorporated.

The Supreme Court of the United States then assumed that all of the laws concerning these rights, all of the subsidiary rules affecting these provisions, all of what came to be known as the bag and baggage of the fundamental rights, was a part of due process and was also to be incorporated.⁴⁶

Notice that I said the Supreme Court assumed that is so, because that is exactly what they did. They assumed it without examining the issue. Now, in what I call the post incorporation era, the period of time after the 1960's, after the fundamental rights of the Bill of Rights were incorporated, the Supreme Court, without reflection or without examination, simply assumed that every Fourth and Fifth and Sixth and Eighth Amendment decision that it made also involved a Fourteenth Amendment due process decision. It just assumed it. It never saw fit to have to prove it. Why? Because Justice Brennan said we are not going to have a watered down version of the Bill of Rights applied to the states.⁴⁷

Now, there is another development in the post incorporation era. During the post incorporation era, the Supreme Court announced a number of criminal procedure rules that it said had questionable basis in the Bill of Rights. I am referring, of course, to the *Miranda* rule.⁴⁸ I am referring, of course, to the Fourth

46. See *Palko v. Connecticut*, 302 U.S. 319, 326 (1937). Writing the opinion for the Court, Justice Cardozo explains how the guarantees "have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption." *Id.*

47. See *Ohio ex. rel. Eaton v. Price*, 364 U.S. 263, 275 (per curiam) (1960). Justice Brennan from the judgment of an equally divided court states that the process of absorption "is not a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us." *Id.*

48. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (stating that before a suspect is questioned, he "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him,

Amendment exclusionary rule and there will be others. In the post *Mapp*⁴⁹ cases, the *Leon*⁵⁰ case in particular, in the post *Miranda* cases, *New York v. Quarles*,⁵¹ for instance, *Elstad*,⁵² and many others.

The Supreme Court made clear that the rules that they require, the *Miranda* rule and the Fourth Amendment exclusionary rule, were not purely constitutional requirements. They were, as Justice Harlan used the phrase earlier, not to refer to *Miranda* and *Mapp*. He used it in another context; quasi-constitutional rules. They are prophylactic rules. They are rules designed to protect fundamental rights. *Miranda* is supposed to protect the Fifth Amendment Self-Incrimination Clause. As Justice O'Connor said in *Elstad*, it is supposed to protect it but it sweeps more broadly than the Fifth Amendment provision.⁵³ You know what that means: that means it is not really the same as the Fifth Amendment.

How does this tie in with my earlier argument about redundancy? Here is the link and here is the provocative part: If

and that he has a right to the presence of an attorney, either retained or appointed.”).

49. See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (holding that the exclusionary rule is “an essential part of both the Fourth and Fourteenth Amendments . . .”).

50. See *United States v. Leon*, 468 U.S. 682 (1984) (concluding that evidence seized pursuant to a search warrant obtained by a police officer in good faith and reasonable reliance should not be excluded from trial even though the magistrate’s determination of probable cause was unsupported).

51. 467 U.S. 649 (1984).

52. *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (holding that “a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.”).

53. *Elstad*, 470 U.S. at 306. Justice O’Connor states: “The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. *Id.* She further explains in a footnote that the “*Miranda* Court itself recognized this point when it disclaimed any intent to create a ‘constitutional straitjacket’ and invited Congress and the States to suggest ‘potential alternatives for protecting the privilege.’” *Id.* (quoting *Miranda*, 384 U.S. at 467).

the state courts are able to protect rights, as I believe they have proven that they are, then I contend that it is time to start questioning some of the planks of the federal floor. It is time to start taking another look at the incorporation process, at the incorporated federal criminal procedure rules.

Which ones should we look at? I submit to you that we should start re-examining those rules that are only quasi-constitutional rules, where the constitutional foundation for the rule is shaky at best, questionable, dubious.

How do we examine those rules? What do I mean by examine? I believe that there is a standard that could be developed that will be both cognizant of fundamental rights, sensitive to fundamental rights, but also sensitive to the Tenth Amendment, sensitive to the authority of the state courts to determine for themselves procedural rules that do not involve fundamental rights.

The standard I suggest is the standard of essentiality. I would contend that the Supreme Court should have to demonstrate from this point on (I hope they are listening) that a right which is deemed to be a part of Fourteenth Amendment Due Process be proven to be essential to the administration of a fundamental right. I did not pull this out of thin air, mind you. Louis B. Henkin (no less authority than Louis B. Henkin) argued during the bag and baggage controversy that this should have been a requirement.⁵⁴

How can you simply say in one breath that only fundamental rights of the Bill of Rights applied to the states and in the next breath say but all the bag and baggage, all of the loss, no matter how fundamental or un-fundamental it may be, also should apply to the states? I don't think you can reconcile those positions and neither did Lou Henkin.

Now, I am arguing that given the changed empirical circumstances, given the proven rights sensitivity of the state courts, proven by state constitutionalism, proven by the redundancy between state constitutional law and federal

54. See Louis B. Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978) (describing how judicial interest balancing is essential to constitutional construction).

constitutional law, the Supreme Court should have to justify imposing procedures upon the states and it should be forced, compelled, and urged to reconsider those rules which they have assumed apply to the states, which they have assumed apply to due process. They should have to demonstrate that all procedural rules that are a part of due process are essential to the maintenance of a fundamental right.

And this is my proposal: That starting with the quasi-constitutional rules -- *Mapp*, *Miranda* -- to give you other examples, the *Wade* Right to Counsel,⁵⁵ to give you another example, the *Chapman* Harmless Error Rule.⁵⁶ All of those rules that the Court has said are just prophylactic rules, quasi-constitutional rules, should be open to challenge, and litigants should ask the Supreme Court to justify imposing them upon the states.

If the Supreme Court feels that they cannot justify imposing a rule upon the states because it is not essential to the maintenance of a fundamental right, then that rule should be disincorporated. That is, it should be excised from Fourteenth Amendment Due Process and the states should be free to develop the law in that area as they see fit. This is only proper because, remember, the theory of incorporation was that only fundamental rights were a part of due process.

So, I think I will leave it just at this. I think I have given you enough, as Professor Bonventre says: "Red meat to attack."

Thank you very much.

Vincent Bonventre:

55. *United States v. Wade*, 388 U.S. 218, 226 (1967) (stating "that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.").

56. *Chapman v. California*, 386 U.S. 18, 24 (1967) (holding "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

If your proposed disincorporation comes to pass I presume you will be willing to move to Mississippi. We will raise that later on.

Next we have Professor Peter Galie,⁵⁷ who really is the father of us all when it comes to writing about the court of appeals' protection of state constitutional rights and liberties. He did this at a time when nobody was writing about the court of appeals and virtually nobody understood that states actually could protect rights and liberties. And you wrote about it and then seemed for a long time thereafter still nobody was writing about it. So, you kind of reminded them in a few other articles. Now all of a sudden there is a bunch of us writing about it.

Peter Galie, we thank you and welcome you here. He is going to talk to us about the New York Court of Appeals' adoption, creation, conjuring up the exclusionary rule.

Peter Galie:

Conjured is the word. You can see from the remarks that going last like this, the last panel, the last speaker, the end of the day, is something like getting up in my house. I grew up in a house full of brothers, lots of them, and the rule was the last up was the worst dressed. But the speakers in the session have been remarkably succinct. I hope I follow in their tradition.

This manuscript is an unedited fax. I had to make the deadline. I scribbled notes to my secretary. None of this is her fault; it is entirely my responsibility. I thought better to have my scribbled notes in there than not to have it in there at all.

This manuscript intends to do two things. First, it is going to be a history of search and seizure law in New York, state based and statutory based, along with the exclusionary rule; and second, it is a look at the contemporary status of the exclusionary rule in New York. In fact, as Vin says, conjuring up. I thought of titling this searching the record and excluding evidence (the curious case of the exclusionary rule) "the silence of the judges."

57. Peter Galie is a Professor of Political Science at Canisius College in Buffalo, New York.

but did not want too many of the associations to be conjured up by that title, so I stuck with the one I have.

I am going to just read parts of this and go quickly to the end of it so you can get the gist of my position. What is fascinating about the history to me was that prior to 1938, constitutional protection against unreasonable search and seizure was non-existent in New York State.⁵⁸ A statute entitled a Bill of Rights adopted in 1787 did not contain any such provision and neither did the constitution of 1777 nor the constitution of 1821, at which we adopted our first formal Bill of Rights, although a look at the record makes it clear that the language of some if not most of the clauses were directly taken from the Federal Constitution.⁵⁹

For the first time in New York's history, in 1828, in a revision and amplification of the statute, the legislature added protection against unreasonable search and seizure. It was essentially the Fourth Amendment with two differences. The Fourth Amendment reads in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not to be violated"⁶⁰ The state statute used "ought" rather than "shall." Similarly, here the federal provision reads, "and no Warrants shall issue, but upon probable cause" The state provision uses "can."

58. N.Y. CONST. amend. IV § 12, which was enacted in 1938, states in pertinent part:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

59. U.S. CONST. amend. IV states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

60. U.S. CONST. amend. IV.

I need to amplify that. That is a very interesting question as to why the language differed when they adopted that statute. I am not sure I will be able to find out, but I do have some hints from Lutz' wonderful book here.⁶¹ He infers that the statute may have reflected an older Whig tradition which rights were expressed in the precatory "ought" rather than the imperative "shall" or "must." Lutz suggests that the difference was significant in that in precatory form these provisions did not effectively prohibit or limit legislative action. The work here is *Popular Consent*.⁶² According to Lutz', the shift from "ought" to "shall" was complete by the beginning of the Nineteenth Century, but yet here we have the State legislature of New York adopting a statute which persists in the use of this "ought" as late as 1828. It is all curious and needs to be investigated.

In 1867, we had a convention which recommended a constitution which included a search and seizure provision as a constitutional provision, but that constitution was rejected. The statute occasioned little litigation, and when it was litigated, the court refused to undertake what the court designated as collateral proceedings, that is, proceedings to determine whether the search and seizure had been unreasonable or not on the grounds that the common law was clear: The character of the search did not affect the use of the fruits thus obtained.⁶³ That position was given its most authoritative status in *Adams*,⁶⁴ which was affirmed by the Supreme Court.

The next step is the 1914 *Weeks*' decision.⁶⁵ You all know that case, except remember it did not affect the state courts since the Fourth Amendment had not yet been made applicable to the states

61. DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL* (Louisiana State University Press 1980).

62. *Id.*

63. *See, e.g., Legatt v. Tollervey*, 104 Eng. Rep. 617 (1811); *Jordan v. Lewis*, 104 Eng. Rep. 168 (1811).

64. *Adams v. New York*, 192 U.S. 585, 595 (1904) (holding that although evidence was seized illegally, it is admissible if it is pertinent to the issues in the case).

65. *Weeks v. United States*, 232 U.S. 383 (1914) (holding that papers obtained from an illegal search must be timely returned to the accused to avoid violating constitutional rights).

through the Fourteenth Amendment. Nonetheless, the argument, forcefully made by the Supreme Court, that without an exclusionary rule the Fourth Amendment “is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”⁶⁶ That argument was unlikely to go unnoticed by the state courts.

In 1926, the court of appeals did address this question in the first major case after *Weeks*, which is *People v. Defore*.⁶⁷ There, in the famous decision by Benjamin Cardozo, the rule is rejected. The court did not address the 1923 change in the amendment. I came across this. I still do not know what to make of it but I throw it out here. I have yet to finish the argument. To which some believe was a response to the *Adams*' decision and the “some” here I specifically refer to a delegate at the '38 convention, Frank Johnson. The argument was, Johnson made it in part, that the movement from the admonitory “ought” to the imperative “shall,” that is what the amendment did, it went and took the “ought” out and put the “shall” in, making it now more identical with the Fourth Amendment.

He argues that negates the effects of the *Adams*' decision authorizing the court to fashion a judicial remedy for effectuating the right. The amendment, so worded now, coincided with its national counterpart, which the Supreme Court had construed to require exclusionary rule. This argument has some force, in my opinion, not very much, the obvious response is that if the legislature wished to require an exclusionary rule, it would have determined whether, and under what circumstances, evidence obtained by trespassing should be rejected.

On an issue of such grave importance, it is not unreasonable to expect more explicit guidance than a change of the word “ought” to “shall.” And I did look. There is no bill, memoranda, no correspondence. There is no legislative history. I only hope that maybe something argued in the brief before *Defore* argued that

66. *Id.* at 393.

67. 242 N.Y. 13, 150 N.E. 585 (1926). In *Defore*, the court held that an unlawful search and seizure would not permit otherwise relevant and pertinent evidence from being admissible in court. *Id.* at 18, 150 N.E. at 586.

change was significant. I did not get the briefs but I will to see if that is the case.

The court never addressed this argument, in any case. Was the court even aware of the change? Had counsel failed to note and argue the point? Did Cardozo believe the change nothing more than an effort of uniformity or housekeeping?

The next major change comes at the Constitutional Convention of 1938. Basically what we do after the very high level of argument, at least a hundred pages of magnificent debate over this question of the exclusionary rule, and after that lengthy debate the convention decides to reject the inclusion of the exclusionary rule but adopts a Fourth Amendment provision into our Constitution. That is what happens in '38.

The first case after the constitutionalization of that protection comes in, *People v. Richter's Jeweler's*,⁶⁸ and the judge there, the brother of Herbert Lehman, who supported this exclusionary rule at the convention, writing for a unanimous court, held that the prohibition against unreasonable searches and seizures did not include a rule excluding any evidence obtained by such searches.⁶⁹ And he makes explicit reference to the Constitutional Convention's decision not to adopt. In the absence of any guidance to the legislature, it would certainly be inconsistent with the institutional regime for a court to explicitly override the decision of a constituent assembly. And they did. I think that is it. Very clear.

Well, after that I go into some of the changes in the law: *Wolf*,⁷⁰ *Mapp*⁷¹ and the like, applying the exclusionary rule to the states. Skip over that. But *Mapp* raised a whole series of issues: What role should the state amendment play?⁷² The Supreme Court decisions said nothing about how the state provision was to be interpreted. Here I list three options. The state could interpret the state clause to mean what the federal provision meant or to interpret the amendment to provide less

68. 291 N.Y. 161, 51 N.E.2d 690 (1943).

69. *Id.* at 169-70, 51 N.E.2d at 694.

70. *Wolf v. Colorado*, 338 U.S. 25 (1949).

71. *Mapp v. Ohio*, 367 U.S. 643 (1961).

72. *Id.* at 657.

protection than its federal counterpart. That may seem paradoxical. And, finally, could interpret the amendment to provide more protection.

Between '49 and '70 the court adopted option one. Beginning in the early '80's the court adopted option three, that's providing more protection. The decision to embark on an independent course and develop a separate body of state constitutional law raised lots of problems for us, I think. And I mention some of these, they are in the headlines today: Pataki's proposals, the attack on the Wall Street Journal and the New York Daily News and the like.⁷³

Here is the theoretical problem, not the political one: If the court was to rely on state grounds what are the criteria for doing so? Can a reasonable or principled basis for such resort be articulated? That is what much of the literature on state constitutional law is about, arguing over that. That is one aspect of the problem.

My argument was to focus on something differently: that was the question of how should the state court deal with the problem of the exclusionary rule when it has rejected or at least it has decided not to interpret the National Constitution, but interpret its own, provide better protection or greater protection at the state level.

Where does that leave it with regard to the exclusionary rule? Here's what I say about that: focus here is on the status of the remedy for such violations. *Mapp v. Ohio* did not overrule *Richter's*. The case involved a question of whether the state constitutional provisions required the application of an

73. See Peter Reinhartz, *Rule of Law: The Court New York Criminals Love*, WALL ST. J., Jan. 31, 1996. The author states:

The U.S. Supreme Court has struggled to strike a balance between criminal suspects' Fourth Amendment rights and the legitimate needs of law enforcement authorities. But the ultimate arbiter of criminal procedure in state court -- where most criminal trials take place -- is the state's high court, which is free to extend additional rights to defendants, based on the state constitution.

Id.

exclusionary rule. That point was made explicitly by Judge Desmond in *Sackler v. Sackler*.⁷⁴

Now, as long as the court's decisions were based on federal grounds, we don't have a problem, but put bluntly the issue is as follows: If the court decision rests on the state provisions and not the Fourth Amendment, what is the basis for the exclusion of the evidence? It cannot be the federally imposed exclusionary rule as that rule is an adjunct of the Fourth Amendment. It must in some way rest on state law.

Here I refer to Cassell, and you might think there is a mistake here found later in, but it is really found in Latzer. There is a "see" left out. I apologize for that.

Back to the point here: The state law question would seem to have been clearly settled by the 1938 convention which after high and thorough debate rejects the proposal to adopt an exclusionary rule, a decision reaffirmed by the court of appeals after the convention.

Nonetheless, the court of appeals did, in fact, exclude evidence in all the cases in which it based its decision on state grounds.⁷⁵ It continued to speak of the exclusionary rule and its importance, but which exclusionary rule, state or federal? In the cases where the exclusionary rule was defended, federal precedents were cited, but no mention of a state based exclusionary rule was found.

What was the status of the rule in New York? Was it a constitutionally mandated extension of the Fourth Amendment or was it like the federal rule, a judicially-fashioned remedy? Somewhere in the constitutional shift from federal to state based protections a crucial step was omitted, or, assumed sub silentio by the court. If there is a state based judicially-fashioned exclusionary rule, are there any exceptions to that rule or, unlike its federal counterpart, is it a hard and fast rule, a bright line?

74. 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

75. See *People v. Class*, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984); *People v. Gokey*, 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983); *People v. Elwell*, 50 N.Y.2d 231, 406 N.E.2d 471, 428 N.Y.S.2d 655 (1980).

When the court has addressed the role of the exclusionary rule, it has done so solely in a federal context. I list cases where the court has cited in every case applying federal precedence they say it's a state -- it is a judicially-fashioned remedy by citing federal law. It is not until *People v. Johnson*,⁷⁶ this is where things came to a head, that the court under the prodding of a stinging concurrence even acknowledged the problem.⁷⁷

In *Johnson*, the court expressly relied on Article 1, Section 12⁷⁸ to decide an issue not settled by the Supreme Court's decision in *Gates*⁷⁹ and excluded the evidence.⁸⁰ In concurrence, Judge Vito Titone wrote:

I agree with the majority that there should be a reversal, but cannot join its opinion which establishes an exclusionary rule under our State Constitution, thus amending the Constitution in a fashion explicitly rejected by the delegates to the 1938 Constitutional Convention, and overruling three decisions sub silentio [*Richter's*, *Defore* and *Adams*].⁸¹

Titone notes that the issue of whether the exclusionary rule is supported by the state constitution was not raised by the parties in this case, nor, in fact, any of the cases in which the court has refused to follow the interpretation given to the Fourth Amendment by the Supreme Court.⁸² He concluded that although it is impossible to anchor the exclusionary rule in the state constitution, his way of dealing with it, at least he faced it, was to say it's a "judge-made common-law rule of evidence."⁸³ How

76. 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).

77. *Id.* at 408, 488 N.E.2d at 446, 497 N.Y.S.2d at 625 (Titone, J., concurring).

78. *Id.* at 406, 488 N.E.2d at 445, 497 N.Y.S.2d at 624.

79. *Illinois v. Gates*, 462 U.S. 213 (1983).

80. *Johnson*, 66 N.Y.2d at 406, 488 N.E.2d at 445, 497 N.Y.S.2d at 624.

81. *Id.* at 408, 488 N.E.2d at 446, 497 N.Y.S.2d at 625 (Titone, J. concurring).

82. *Id.* at 412, 488 N.E.2d at 449, 497 N.Y.S.2d at 628 (Titone, J. concurring).

83. *Id.* at 413, 488 N.E.2d at 450, 497 N.Y.S.2d at 629 (Titone, J. concurring).

could he do otherwise in the face of what the '38 Constitutional Convention did?

It is not clear, however, that the majority did, in fact, ground the rule in the constitution. Judge Simons makes no explicit statement to that effect. Indeed, the only response to Titone's challenge came in the following footnote in Johnson: "Insofar as the concurring judges contend that exclusion is a common-law rule rather than a constitutional doctrine under New York law, we would but add that, notwithstanding the history they recite, the court has excluded evidence on State constitutional grounds in the past"84

Now they cite these three cases. Of course, like dutiful scholars we go back and read those cases. I read them carefully again and again. The footnote can be read to claim constitutional status for the rule or that the majority had acquiesced in Titone's understanding of its status as judicially fashioned.⁸⁵ I cannot tell and I would like some help here. An examination of the cases cited by the majority, however, does not lend support for the argument that the court has excluded evidence on the basis of a state exclusionary rule. Those cases make no such statement about an adoption, constitutional or common law, in character.

In no case has the court of appeals made an explicit decision to adopt a state based exclusionary rule to determine the status of the rule, or to articulate its relationship to the federally based rule. Titone's challenge was left essentially unanswered. It appears that the court is willing to continue acting on the unstated assumption that there is a state based exclusionary rule, whether it is constitutionally-mandated or a judicially-fashioned rule of evidence, and that its contours and exceptions, if any, will be determined the way all common law courts work things out: on a case by case basis.

Left unanswered is the question of how or why the court could adopt such a rule in the face of a constitutional convention's decision to the contrary, and the consistent decisions of the court

84. *Id.* at 398, 488 N.E.2d at 446, 497 N.Y.S.2d at 625 (citations omitted).

85. *Id.*

of appeals for almost two hundred years. Moreover, if the rule is a judge-based rule of evidence, then it is fair game for legislative action of the kind advocated by Governor Pataki.

The court of appeals' treatment or non-treatment of this issue raises troubling questions about the New Federalism and lends support to the view expressed by one of the early critics of state based rights protection triggered by changes in Supreme Court doctrine: It is a constitutional "shell game." In facing the challenge raised by Governor Pataki's proposals to curb the court' activism, the court may have unwittingly provided the Governor with the needed ammunition. Thank you.

Vincent Bonventre:

Professor Galie, are you intimating that the court of appeals has fudged up on this issue? I am wondering if we should send a copy of the videotape to the judges of the court of appeals.

It reminds me of something Rehnquist said when I was in Washington for the year. I was asking him about some of the court of appeals' recent decisions, and Rehnquist said to me, "the New York Court of Appeals is free to do what it wants for New York, but it ought to have some basis for what it's doing".

Now comes the time we are going to open up the floor for questions, comments, diatribes, anything you want to say or ask, preferably about something that was said here at this session or earlier in the day. I open it up.

Helen Hershkoff:

This is directed to Professor Latzer. There is literature of course, on redundancy, which is the flip-side of parity in many respects. There are at least some scholars who try to ground arguments in favor of redundancy, not on empirical grounds, but on structural grounds.

I am thinking, for example, about the discussion of habeas and the redundant uses of jurisdiction between state and federal

courts. They see jurisdictional redundancy⁸⁶ like constitutional redundancy, as a structural check on government. Just as a court is the check on the legislature, so the state is a check on the federal government, and the federal government is a check on the state government. The argument proceeds to whether or not each particular form is favorable or respectful of rights. The argument proceeds, almost despite the empirical evidence, since it is intended as a prophylactic, a bulwark or a preventive.

Your argument places a great deal of weight, in fact, on empirical evidence. The fact that states now have evolved over the last thirty years, comes back to the historic role and we have about a hundred years that were pretty bad. But now, we can go back to trusting the states. And I wonder where the structural

86. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). Jurisdictional redundancy is a structural solution that will frequently give relief. *Id.* at 661. It is the suspicion of corruption, so often unproveable, that leads a litigant to invoke a parallel forum. *Id.* Even if one of the litigants expects to benefit from corruption and opts for the corrupt forum, the potential of a system of concurrency for synchronic redundancy inhibits the operation of corruption. *Id.* The development of data to prove or reinforce the suspicion of corrupt complicity will be greatly aided by an independent forum, even if its outcome must compete with those of the corrupt forum for ultimate implementation. *Id.* If a party to litigation is "about to get railroaded by a corrupt system, [he will] greatly value the opportunity to invoke a fair forum even if the corrupt forum's verdict does not bear its corruption on its sleeve and, thus, will compete with that [forum]." *Id.* at 661-62. See also Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play On Double Jeopardy*, 95 COLUM. L. REV. 1090, 1111, n. 29 (1995). Congress has endorsed relitigation as a suitable form of jurisdictional redundancy in habeas corpus statutes where federal civil rights violations by state actors are alleged. *Id.* In a situation where an individual feels that he is in state custody in violation of the United States Constitution, he must bring his claim to a state court. *Id.* "As a result, state and federal courts achieve [a] relationship. . . [whereby]. . . [t]he state courts have the first chance to remedy the constitutional missteps of their employees, while the federal courts hover in the background to provide an incentive for the state courts to render reasonable decisions, or, if necessary, to overrule unreasonable decisions." *Id.*

arguments⁸⁷ fit in to your approach since no mention was made of them.

Barry Latzer:

I am not sure what you mean by “structural arguments.” Are you referring to the role of the federal courts as checks upon the state court?

Helen Hershkoff:

And vice versa. And that each one provides an important outlet for the other. That there is some kind of reciprocal relation. That part of the reason, for example, we expect state courts to now be protective of rights (is that) there has been policing by the federal courts. Likewise, the reason that federal courts might be hospitable or not hospitable to rights would depend on a relationship they have with state courts. It is hard to imagine how any particular actor would behave in the absence of other agents in the governmental structure.

Barry Latzer:

I think I understand. My response to that is, I favor maintaining that relationship. I do not favor eliminating the relationship because I do not favor eliminating the federal floor. I simply favor questioning some of the planks in the federal floor. I simply favor reviewing whether every single Supreme Court decision, that is somehow tied to the Bill of Rights, should also be automatically put into Fourteenth Amendment due process. I am simply asking that they reopen the question.

⁸⁷ See, e.g., *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 9 (1994). Structuralism is “literary criticism [that] aims to reveal the fundamental principles which govern literariness, systematizing the components of literary discourse in novel categories. Systematization is the fundamental and revolutionary attribute which structuralism introduced into French literary criticism.” *Id.* Structuralism is founded upon the belief in universal laws and structures. *Id.*

So my answer to you is this: I would maintain the federal floor. I would maintain the check on the state courts, but I would only maintain it with respect to either a fundamental right or some procedure that it is demonstrated to be essential to the maintenance of a fundamental right.

And so I am not just making an empirical argument; I am making a constitutional law argument. The constitutional law argument is this: if the Court cannot demonstrate that a procedure is either itself a fundamental right or essential to the maintenance of a fundamental right, then I do not think there is any constitutional warrant for imposing it upon the states for due process.

If you accept that proposition and you accept the argument that the states have now proven themselves to be sensitive to defendants' rights, then I think it does follow that the Court ought to reconsider some of its incorporation decisions.

So my short answer to you then, is: I would not eliminate the federal floor. I think the federal floor has been salutary and I think it is still advisable to maintain it with respect to either fundamental rights or those procedural requirements that are so directly supportive of fundamental rights that we can say they are essential to fundamental rights.

Helen Hershkoff:

Your argument is really a substantive quarrel with the Court's Fourth,⁸⁸ Fifth⁸⁹ and Sixth Amendment⁹⁰ jurisprudence. It is not

88. U.S. CONST. amend. IV. The Fourth Amendment provides in pertinent part:

"[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

89. U.S. CONST. amend V. The Fifth Amendment provides in pertinent part:

"[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in

really an argument about state courts because the empirical discussion about state courts is interesting, but it does not really further the argument. What you have is a quarrel with Federal Constitutional doctrine. You do not like these cases whether or not they are applied to the states, you do not want them applied to federal court proceedings either.

Barry Latzer:

No. I do not think so. If a Supreme Court decision is based directly on the Fourth Amendment, such as where the Court defines what is a reasonable or unreasonable search, I do not believe that should be eligible for disincorporation.

Helen Hershkoff:

I do not mean to interrupt. I am focusing on the examples that you used. I am not taking them at your word. I am looking at *Miranda*.⁹¹

Barry Latzer:

Yes, but I am not picking them because I dislike them; I am picking them because the Court said that they are not based

jeopardy . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law” *Id.*

90. U.S. CONST. amend VI. The Sixth Amendment provides in pertinent part:

“[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” *Id.*

91. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”). *Id.*

directly on interpretation of the Constitution. They are quasi-constitutional, and that is why I am picking them. There are lots of Fourth Amendment decisions that I do not like, but I would not think they should be eligible for disincorporation because, rightly or wrongly, the Supreme Court has the authority to tell us the meaning of the Fourth Amendment. That is all they are doing when they are saying this search is reasonable and that one is not. So, I am not just arbitrarily picking decisions that I dislike. I am picking decisions the Court itself has undermined. It has undermined the constitutional foundation by saying that it is not required by the Constitution.

Helen Hershkoff:

Thank you.

Vincent Bonventre:

Would there be any substance, any essence, whatsoever, to the federal government's Fourth Amendment check against the states and the Fifth Amendment check against the states if there was no exclusionary rule⁹² or *Miranda*? What would the check be?

This is a search. This is a seizure. We are not going to do anything about it, but that is what it is.

92. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (holding that the exclusionary rule is "an essential part of both the Fourth and Fourteenth Amendments . . ."). See also *Wong Sun v. United States*, 371 U.S. 471 (1963). Defendants were convicted of "fraudulent and knowing transportation and concealment of illegally imported heroin." *Id.* at 473. The Court noted that "an arrest with or without a warrant must stand on firmer ground than suspicion . . . though the arresting officer need not have in hand evidence which would suffice to convict." *Id.* at 479. The Court held that the search was unlawful and stated "[i]n order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person . . . evidence seized during an unlawful search could not constitute proof against the victim of the search." *Id.* at 485. Furthermore, "verbal evidence which derives so immediately from an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." *Id.*

Barry Latzer:

Well, the Supreme Court will still be interpreting the Fourth Amendment. Cases could still be appealed to the Supreme Court asking about the meaning of that Amendment and requiring them to rule on the meaning of it. The Court would interpret the Fourth Amendment just the way it always had. It simply would not be able to order the suppression of evidence.

Vincent Bonventre:

Say this is a search and it was illegally conducted, period. What good is that? What is the check?

Barry Latzer:

It is pretty much the same check you have today. The fact that they exclude the evidence in and of itself really is not what makes the impact. What makes the impact is that most state courts and most lower federal courts want to comply with Supreme Court rulings. It is essentially their commitment to the system. They know damn well that the Supreme Court is not capable of reviewing the thousands and thousands of Fourth Amendment cases. We have essentially a voluntary compliance which would remain in place. The only thing that the Court would not be able to do is it would not be able to order the exclusion of the evidence on its own. I do not see that as a major problem.

I might add, by the way, that this coincides with Professor Galie's work.⁹³ I studied state constitutional exclusionary rules and virtually every state has announced that they have their own constitutional exclusionary rule.⁹⁴ So, lest you fear there could be no exclusion of evidence, you are mistaken, because many

93. See PETER J. GALIE, *ORDERED LIBERTY, A CONSTITUTIONAL HISTORY OF NEW YORK* (1996) (providing the historical background to the adoption of the New York State search and seizure provision).

94. See Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation* 87 J. CRIM. L. & CRIMINOLOGY 101 (1996) (stating that at least 74% of the states have a suppression policy grounded upon state law)

states would continue to exclude evidence on State Constitutional grounds even though they may not have always done so.

Peter Galie:

Barry, you have got the wrong word. They have not “announced.” They have “decided.”

Barry Latzer:

That only shows their right sensitivity, because here we have a constitutional history, as you have excellently demonstrated. Here in New York, we have a constitutional history that runs against an exclusionary rule, and here we have the New York Court of Appeals that is so anxious to protect rights that it goes ahead and excludes the evidence anyway until one judge calls them on it and then they ignore him and continue to exclude evidence.⁹⁵ I think that says quite a bit for their rights sensitivity.

My point is even if *Mapp* were disincorporated, there would be a heck of a lot of exclusion anyway. I only found one state, the state of Maine, which sort of very quietly announced “we have no State Constitutional exclusionary rule.”⁹⁶ That is the only

95. *People v. Johnson*, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985) (despite historic opposition to suppression, the New York Court of Appeals has excluded evidence on state constitutional grounds a number of times). *But see* The concurring opinion, where Judge Titone recited the history of opposition to a state constitutional exclusionary rule and urged that exclusion be grounded upon state common law. *Id.* at 409-15, 488 N.E.2d at 446-51, 497 N.Y.S.2d at 625-30 (concurring opinion).

96. *See, e.g., State v. Tarantino*, 587 A.2d 1095 (Me. 1991) (holding that, although the credibility of informants was not established, “the aggregate of those tips and the corroborating information of the officers who encountered Tarantino on Vinalhaven Island were enough to create probable cause to justify the search of Tarantino’s vehicle.”); *State v. Giles*, 669 A.2d 192, 194 (Me. 1996). Defendant argued, “that the random stopping of boats . . . absent any articulable suspicion of wrongdoing and absent any restraint on the officers’ discretion, constitutes a violation of his right . . . to be free from unreasonable searches and seizures.” *Id.* at 192. The court held the searches to be

state I found that actually said that. Of course California has none but that was not by case authority, that was because of Proposition 8.⁹⁷

Vincent Bonventre:

You seem to be arguing that we do not seem to double check. You really do not seem to be arguing with disincorporation. We would be maintaining one.

Barry Latzer:

I am arguing that the need for the double check is not as great as it once was, and, that we do not need incorporation the way we once did. The assumptions underlying the incorporation doctrine were right, but the Supreme Court has really failed to justify incorporating these quasi-constitutional rules. It should have to justify incorporating those rules because if their constitutional support is questionable or dubious, then it seems that they are ripe candidates for a determination as to whether or not they should be a part of due process. I am asking the Court to make that determination.

Luke Bierman:

Is that not a problem, though? Are we not just saying that we are going to fight, as we did fifty or seventy-five years ago, as to whether something is a fundamental right⁹⁸ or whether the

Constitutional and stated, "we have not adopted an exclusionary rule for illegal search and seizure beyond that mandated by *Mapp v. Ohio*." *Id.* at 194.

97. See *In re Lance*, 694 P.2d 744 (1985) (Proposition 8, adopted in 1982, amended the California Constitution so as to abolish the state constitutional exclusionary rule.)

98. See *Lochner v. New York*, 198 U.S. 45 (1905). A New York statute provided that no employee shall "work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day." *Id.* at 46. The Court found that the statute at issue interfered "with the right of contract between employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer." *Id.* at 53. The Court held that the right to enter into a contract

procedural rights are supportive or essential. Are we not back where we started; a seventy year tradition of fighting over these things?

Barry Latzer:

My answer is no. I do not think anybody is going to turn back the clock to the day we say that the Self-Incrimination Clause⁹⁹ is not a part of due process, or the Double Jeopardy Clause¹⁰⁰ is not a part of due process, or the Fourth Amendment is not a part of due process. No one favors that. I do not think any credible

related to employment or business “is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution,” *Id.* The Court subsequently ruled the statute unconstitutional. *Id.* at 64-65.; *Palko v. Connecticut*, 302 U.S. 319 (1937) (articulating a test for determining whether the Bill of Rights applied to the states). Justices Cardozo and Frankfurter, both strong proponents of selective incorporation, developed this test as whether the guarantee is of “the very essence of a scheme of ordered liberty” and further, whether it is a “fundamental [principle] of liberty and justice which [lies] at the base of all our civil and political institutions.” *Id.* at 328. The ban on double jeopardy was found to be insufficiently fundamental, and thus was found not to be applicable to the states. *Id.*; *Adamson v. California*, 332 U.S. 46 (1947). *Adamson*, a United States citizen, “was convicted without recommendation for mercy, by a jury in a Superior Court of the State of California of murder in the first degree.” *Id.* at 47-48. The challenged California law permitted “the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury.” *Id.* at 48. The Court assumed that such comment “would infringe defendant’s privilege against self-incrimination [if] this were a trial in a court of the United States.” *Id.* at 50. The Court held that the Fourteenth Amendment did not incorporate the privilege. *Id.* at 51.; *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan* the test adopted in *Palko* was modified as to, whether the guarantee is “[f]undamental to the American scheme of justice,” *Id.* at 149. The Court found that the right to a jury trial in state criminal prosecutions was guaranteed, and did apply to the states by the 14th Amendment. *Id.*

99. U.S. CONST. amend. V., which states in pertinent part: “[n]o person shall . . . be compelled in any criminal case to be a witness against himself” *Id.*

100. U.S. CONST. amend V., which states in pertinent part: “. . . [n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb” *Id.*

argument can be made for it. I do not think we can go back that far.

What I do think we could question is the *Miranda* rule. We could question the *Wade*¹⁰¹ rule, which said you had the right to counsel if you were in, a line-up and if there was not compliance with that, they exclude the identification, which is an extremely harsh rule and very difficult to support on constitutional grounds.

I would question the need for the *Chapman*¹⁰² rule. I would question, in other words, the quasi-constitutional, subsidiary, and prophylactic rules which have dubious constitutional warrant. Those would be subject to challenge and those perhaps should be disincorporated, but I do not think it would undermine the most basic fundamental rights. I am not calling for a challenge to a fundamental right, I am calling for a challenge to a non-fundamental right; a right that is not essential to a fundamental right.

Luke Bierman:

But, of course, that is what they fought over for seventy-five years: defining what is a fundamental right.¹⁰³

Barry Latzer:

101. *United States v. Wade*, 388 U.S. 218 (1967). In *Wade*, the Court was presented with the issue of "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to witnesses before trial at a . . . lineup . . . without notice to and in the absence of the accused's appointed counsel" in violation of his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to the assistance of counsel. *Id.* at 219-20. The Court held that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226.

102. *Chapman v. California*, 386 U.S. 18 (1967) Defendants were convicted of first-degree robbery and simple kidnapping. *Id.* at 18. The Supreme Court held that, "[b]efore a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*

103. See Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982).

Do you think there is any lobby? Do you think there is any significant support for eliminating the basic principles of the Bill of Rights from due process?

Luke Bierman:

Does that not bring us back to the original premises? We use New York a lot, but what about other states? I mean are the states as supportive as we think they are?

Barry Latzer:

Good question. In the longer version of this argument I have a chart in which I try to show that the level of redundancy is not only deep, but it is broad. I try to show that states all over the country, including the southern states, which are always targeted for being the most conservative, have to a much greater extent than is acknowledged, either adopted Federal Constitutional procedures on state grounds or broadened them.

If you wish, I will show you cases from West Virginia,¹⁰⁴ from Texas¹⁰⁵ and even from Mississippi,¹⁰⁶ that have done so. While these are conservative states, and while they have not broadened rights perhaps the way, say, Massachusetts and Hawaii have, nonetheless, they have adopted many rights on state constitutional grounds.¹⁰⁷

James Gardner:

104. *See, e.g., State v. Goff*, 272 S.E.2d 457 (W.Va. 1980) (enlarging vehicle impoundment and inventory rights on state constitutional grounds).

105. *See, e.g., Autran v. State*, 887 S.W.2d 31 (Tex. Crim. 1994) (expanding state constitutional rights respecting inventory search).

106. *See, e.g., Threlkeld v. State*, 586 So. 2d 756 (Miss. 1991) (adopting an "innocent owner" exception in forfeiture actions based on the state constitution).

107. Massachusetts and Hawaii are among the most liberal state courts when it comes to expanding rights on state constitutional grounds. *See* BARRY LATZER, *STATE CONSTITUTIONAL CRIMINAL LAW* (1995) (collecting cases from all 50 states and analyzing those that reject federal constitutional doctrines in order to establish broader rights).

I just wanted to jump in and make a slightly different point or make the same point as Professor Bierman is making, but in a slightly different way. I fear that the task that you are setting is an impossible one. In fact, the approach here, I find to be a sort of interesting mix of formalism, either that or radical legal realism. It is formalistic in this way: we draw a distinction between fundamental rights and then other stuff that is tacked onto it, which is formalistic almost in a platonic way. Come on out of the cave and I will show you what the Fourth Amendment really is.

I think that is not possible; that the content of a right is not distinct from the ways in which it is enforced, so that part seems to me to be impossible to achieve. What you are suggesting goes to the other extreme of radical legal realism, where you are saying, "Hey, Supreme Court, we do not need this, so take it out of the Constitution," as though the Court is completely free to put in what belongs there and take out what does not belong there. That seems to me to ignore the dynamic of judicial decision-making, which is supposed to be principled. That is what everybody here is complaining about, it is too unprincipled.

Audience Member:

If you were to remove the exclusionary rule as being a matter of procedure and being non-essential, what sanction do you have left for enforcing the Fourth Amendment right against unreasonable searches?

Barry Latzer:

Well, that, of course, is an excellent question, and although I think it can be argued that it is not essential, I think that is the kind of analysis that has to be engaged in. All I ask is that the Court engage in it and that the Court at least demonstrate that a rule which it has conceded is not a constitutional mandate is nonetheless essential to the maintenance of a fundamental right.

And, by the way, this is an answer to Professor Gardner as well: it is not I who said that these procedures are not solidly

grounded in the Constitution, it is the Supreme Court that said that. The Supreme Court said that in *Leon*¹⁰⁸ about the exclusionary rule. I did not say it, they said it.

As for alternative mechanisms of enforcement, you are leaving out the main mechanism that I want to rely upon, and that is the exclusionary rule based on state constitutional law. I am willing to trust the state courts to develop the appropriate mechanism of enforcement. That is, it could be a state exclusionary rule. It could be some alternative to it. It could be a modified exclusionary rule. Professor Amar just wrote a whole long article¹⁰⁹ on presenting what he argued, perhaps not persuasively, are alternative methods for enforcing the Fourth Amendment.

I say leave it to the state courts. If the state courts are sensitive to defendants' rights, and I think they are, if they are competent to handle search and seizure cases, and I think they are, then I am willing to leave it up to them to decide the cases. If it is not a fundamental right, it should not be jammed down the state courts' throats. They should be free to determine for themselves the best enforcement mechanism.

Maybe you are right; maybe exclusion is the best way to enforce the Fourth Amendment. And to that I say two things: one, the Court should demonstrate that it is so, and two, if they

108. *United States v. Leon*, 468 U.S. 897 (1984). The Burbank, California, Police Department initiated a drug trafficking investigation which employed surveillance of the respondents' activities. The Court stated that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." *Id.* at 919. Furthermore, the purpose behind refusing to admit evidence that was not properly obtained, is to hopefully "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Id.* Suppressing evidence "remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Id.* at 923.

109. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

cannot, they should leave it up to the state courts to come up with appropriate alternatives.

Peter Galie:

It should be remembered that the guy who started all this, John Wilkes, had his papers ransacked, in fact, succeeded in getting a hefty penalty for such ransack.¹¹⁰ It is not crucial to either argument. There is the tort remedy, in fact, which has operated on occasions. But leave that aside a minute. As a dabbler in Protestant theology, it seems that a parallel argument was made by one of the most famous of them who wrote a book.¹¹¹ And the point of that was, could we separate the core of Christianity from the husk, the stuff that was accidental or historic,¹¹² to get to the heart of what it is to be a Christian. He started the ball rolling and before you know it, you seem to get less and less of this belief and more and more seems to be myth.

I do have a comment on your paper, James. One of the points you make, if you go back in the state court history of New York, is a history of decentralized power in earlier times in terms of the Governor's power. Two major corrections to that. One, when we started, the Governor of New York was probably the strongest of any of the states.¹¹³ Two, since 1894, the entire direction of the Constitution has been toward a strengthened, centralized, protective party, so we can pick the 1970 period out, skip over '77; and look at the period of decentralization. While not looking at the 20th Century, we can look at the beginning and the later developments. The direction, from the court point of view is, we

110. See *Stanford v. Texas*, 379 U.S. 476, 483 (1965) (citing *Wilkes v. Wood*, 19 How. St. Tr. 1153 (1763)) (stating that Wilkes, the publisher of an anonymous opposition newspaper was entitled to damages from the Secretary of State for an unreasonable search and seizure designed to inhibit further production of the newspaper).

111. HANS BARTSCH & RUDOLPH BULTMANN, *KERYGMA AND MYTH: A THEOLOGICAL DEBATE* (1961).

112. *Id.*

113. PETER J. GALIE, *ORDERED LIBERTY, A CONSTITUTIONAL HISTORY OF NEW YORK* 42 (1996).

are centralizing and giving the government more power in terms of the argument.

James Gardner:

I am grateful to know that. The only point I am trying to make is that in ten minutes of flipping through the history of the State Constitution, it gives you an idea of things you ought to think about and respond to and the court did not do that.

Peter Galie:

I do not think they did. You are right.

James Gardner:

Can I ask Professor Swidorski a question? This actually comes back to Vin's questions about IQ. The only adjective that you did not mention among all the adjectives was quality. Obviously you are not purporting to measure the quality of the decisions. Would you care to hazard a guess? I assume one tinkers with the selection process not because one desires to get a certain justice or certain profile in terms of age and region but because one wants better judges.

Carl Swidorski:

Well, that is the argument of the judicial reform movement. I did talk about quality in the sense that under the old system when I studied from 1950 to 1975 and introduced about sixty to seventy individuals in it; I invariably mentioned quality as a threshold or byline consideration, and even times paid lip service to it.¹¹⁴ A general point they made: the argument of the judicial reform movement was that somehow the quality was going to improve.

I have a theoretic problem with that and I have a problem if we look at the justice appointments. If we look at the transition

114. Carl Swidorski, *The Politics of Judicial Selection: Accession to the New York State Court of Appeals, 1950-1975* (1977) (unpublished Ph.D. dissertation, State University of New York at Albany).

period, the exact same individuals were selected in the first four to five appointments to the Court under the merit system that either had been selected or were leading candidates under the old system.¹¹⁵ I do not see any transition in quality. We have the exact same human beings. Otherwise getting into measuring issues of quality is somewhat problematic in that sense. The other thing on quality in a theoretical sense, David O'Brien, one of the leading scholars of the U.S. Supreme Court, talked about the attempt to measure merit, judicial quality and temperament, and the argument was all of the judges who talk about it have a fundamental problem.¹¹⁶ They cannot define it. And he said it is sort of similar to what Stewart said about pornography, "I know it when I see it."¹¹⁷ So, it is a fundamentally difficult question to sort of say "are these fourteen people smarter and in some ways higher equals than the twenty-three who went before them."

If you wanted to look at one kind of measure, New York State Bar Association ratings, or Association of the Bar of the City of New York ratings, under the old system everyone was found qualified.

Under the new system, almost everyone was found qualified to the degree those people suggest they can assess quality. Not making significant assessments.

Luke Bierman:

I do not think there is any doubt about any of that. Usually when merit selection, merit appointment or so-called merit plans are adopted, the idea is to sort of alter the prevailing dynamics of judicial selection. Carter's merit selection programs when he was President was to shift primary responsibility from the Senate to

115. Carl Swidorski, *Judicial Selection Reform and the New York Court of Appeals: Illusion or Reality*, 55 N.Y. ST. B. J. 10 (1983).

116. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 67 (1993).

117. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

the Presidency, which is what the studies indicate.¹¹⁸ Missouri went from local, back room politics to the more state wide politics so that the goal was sort of to upset things.¹¹⁹

In New York, let me suggest that the motivation for adoption of merit selection, merit appointment, was precisely the opposite. To maintain the power, where you suggest it was, with the Governor and the political party leaders, through a series of highly contentious Court of Appeals elections in the '70's, democracy ran amuck and we allowed it, and the candidate got on the ballot without the parties' support.¹²⁰ Jacob Fuchsberg¹²¹ got elected with not only no party support, through a petition process, as the only person to be not qualified by the prevailing bar associations.

Carl Swidorski:

118. See, e.g., ALAN NEFI THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES 151 (1981) (stating that President Jimmy Carter's merit selection process redistributed power, giving the President more power in selecting judges); LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: IT'S MEMBERS, PROCEDURES AND CANDIDATES 183 (1980) (concluding that although the nominating committee was effective, it was partisan); Elliot E. Slotnick, *Federal Appellate Judge Selection: Recruitment Changes and Unanswered Questions*, 6 JUST. SYS. J. 283, 291 (1981) (asserting that a less magnanimous motivation toward merit selection was a transfer of power from senate to the presidency); Elliot E. Slotnick, *The U.S. Circuit Judge Nominating Commission*, 1 L. & POL'Y Q. 465, 491 (1979) (stating that although politics is still a significant factor in judicial merit selection of federal judges, it is now "played to a greater extent . . . in the President's own ballpark.").

119. RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NON-PARTISAN COURT PLAN (1969).

120. See CYNTHIA OWEN PHILIP ET AL., WHERE DO JUDGES COME FROM? (1976).

121. In 1974, Jacob D. Fuchsberg was elected to New York's highest court, the New York Court of Appeals and served on the bench as an associate judge for eight years, from 1975 to 1983. Following his resignation in 1983, Fuchsberg founded his own law practice in New York City. His expertise in civil litigation pertained to negligence, products liability, medical malpractice, railroad and commercial law.

Under the old system there were four people found not qualified, or three and a half depending on how you count Sol Wachtler.¹²² The best evidence is, he was found not qualified initially and after a number of phone calls both from the Governor's office and Joe Margiotta's office, he was found qualified within the necessary forty-eight hours before the convention.

The other people found not qualified were Jacob Fuchsberg and two women, the only two women nominees at the time: Annette Gemis and Constance Cook. So it is clear that in one sense, in the case of Wachtler, their concern was; age was disqualifying, and you could make an argument that they had serious reservations, at least in the early '70's, whether women had sufficient judicial temperament, IQ, background and experience, to be qualified.

Luke Bierman:

But their attainment of the ballot and their successes against the wishes of the traditional party leaders and Governors indicate that perhaps the New York merit system, which does not use the retention elections that are a traditional standard in merit appointment or the merit selection process and instead using the Commission on Judicial Nomination appointed by the Governor, political party leaders, the Chief Judge, and the State Senate confirmation, indicates that they attempted to keep power where it was before rather than alter it.

So, it is, from my perspective, a shift on the traditional approach in the political science literature that they adopt merit selection to alter prevailing dynamics with judicial selection. Here merit selection may well have been implemented to maintain the traditional dynamics of the process.

122. Judge Sol Wachtler was elected to the bench in 1973 and was later appointed Chief Judge of the New York Court of Appeals in 1986. He served as Chief Judge from 1987 to 1992. Judge Wachtler resigned from the bench in 1992 and served 15 months in jail for attempting to extort money from his former lover.

Peter Galie:

I am trying to remember the history. Part of that race involved, was it Chief Judge Breitel?¹²³

Luke Bierman:

Breitel.

Peter Galie:

Was Breitel angry with what was happening and did somebody get nailed on the bench?

Luke Bierman:

Harold Stevens.¹²⁴

Peter Galie:

Was he an Afro-American? Some concern about this process, in fact having a material affect, not just on an Afro-American, but the process itself, of knocking people off in the Populistic kind of system. The concerns here, seem to me to be not entirely intentional against the political interest of the party and the Governor in that respect.

Luke Bierman:

There may be elements of that.

Peter Galie:

But there are other reasons.

123. Judge Breitel served on the New York Court of Appeals from 1966 to 1978, and served as Chief Judge from 1974 to 1978.

124. Harold Stevens was the first African-American to hold the position of Presiding Justice of the Appellate Division's First Department. After serving for 5 years, in 1974, he was appointed to the New York Court of Appeals to fill an interim position, and was later defeated in the election for a full term.

Luke Bierman:

Sure. Our experiences in other states indicate that different kinds of people can win in all different kinds of systems, as the studies show. There is not a whole lot of difference with the kinds of people you get. I think if you keep digging and looking at, for example, who gets to run, you will see that under the elective system, you did not have multiple candidacies. People ran and won or lost.

We do not have that in an appointed system. We have a bunch of people who get nominated a bunch of times but never get picked, indicating perhaps there are a bunch of nominees who fill up the numbers when there is one person that the prevailing party, the prevailing governor, wants.

Peter Galie:

You are suggesting that the groups recently had been calling for a change in the selection of judges in New York, especially downstate, because of the lack of both women and ethnic groups. Would those changes not in fact result in changes they expect?

Luke Bierman:

It may well result in those changes because the selection system that is utilized now does not produce a lot of diversity in the kinds of people you get. That is what the literature shows, certainly.¹²⁵ So, I do not think that if you change the system you might not see more African-American, more Hispanics and more women. You may very well see that, but it is not necessarily because of the change in system. In fact, the studies indicate that the numbers of those kinds of nontraditional judges, that demographic diversity is occurring anyway, even with the

125. *See* N.Y. STATE COMM'N ON GOV'T INTEGRITY, BECOMING A JUDGE: REPORT ON THE FAILINGS OF JUDICIAL ELECTIONS IN NEW YORK STATE (May 19, 1988).

continued elective system.¹²⁶ There is some response. What the concern was, and I think this is what your dissertation shows, Carl, is that even with the elective system, the idea of popular selection, there was none. It did not occur that way. That the Governor or the political leaders were the ones actually selecting who were going to be the candidates. The idea behind electing judges was that we would have great accountability through the electoral process and that simply was not occurring.

Vincent Bonventre:

Is quality, do you think, largely irrelevant in the change from election to so-called merit selection?

Carl Swidorski:

What do you mean is it irrelevant?

Vincent Bonventre:

Do we think that the quality of the panel from the Court of Appeals has improved or not, over the last few generations when we went from election to the so-called merit selection? Has the Court of Appeals improved the quality? As subjective as quality might be, do you think it is improved?

Luke Bierman:

126. See N.Y. JUDICIAL COMM. ON WOMEN IN THE COURTS, 1993 ANNUAL REPORT OF THE NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, (NOV. 26, 1993); N.Y. JUDICIAL COMM. ON WOMEN IN THE COURTS, FIVE YEAR REPORT OF THE NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, (June 1991); N.Y. TASK FORCE ON WOMEN IN THE COURTS, UNIFIED COURT SYSTEM, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS 244-48 (MAR. 31, 1986) (noting the under representation of women in New York's highest judicial posts); N.Y. STATE JUDICIAL COMM'N ON MINORITIES, 1 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, Executive Summary, 94-95 (Apr. 1991) (concluding that "minorities are underrepresented on the bench.").

The Constitution defines well qualified, I believe. It tells us what well-qualified is under merit appointment.

Vincent Bonventre:

Do you think the court is better today than it was?

Luke Bierman:

That is a different question.

Vincent Bonventre:

I do not need to go back that far to Cardozo, but before the election system, the Cooke court, the Breitel court, the Fuld court, what have we had since then? The Wachtler court and now we have the Kaye court.

Luke Bierman:

Based on what we said today it does not sound like we think too much of these folks with regard to their state constitutional adjudication.

Vincent Bonventre:

We probably would have said the same thing twenty years ago.

Peter Galie:

The problem with modern social science, is when social science makes an assumption we cannot qualify. Political science is uncomfortable making judgments about the noble or the virtuous.

Vincent Bonventre:

I am a social scientist. I will go out on a limb. The courts were better before the appointment system.

Barry Latzer:

There is one way to do it. They do these surveys of the constitutional historians and ask them who are the best judges and who are the worst judges.

Peter Galie:

Yes, this amazes me. This is just taking a popular opinion poll except of experts. That is what we do.

Luke Bierman:

Would anybody argue the court is not as good as in Cardozo's day? That Cardozo's court is the paradigm state court?

Vincent Bonventre:

Would anybody argue what?

Luke Bierman:

That the court is not at a level, it is not respected nationally, the way it was in Cardozo's day. Is the Cardozo court sort of the paradigm of a state court, of a quality state court?

Certainly that is what citation studies would tend to indicate.¹²⁷ Cardozo is sort of the common law epitome that we all use as the example. I do not think anyone would disagree this court is not that, but no court is because Cardozo's is the paradigm.

Barry Latzer:

Who are the rest of them?

127. See John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 401-03 (1977); John Henry

Luke Bierman:

Andrews.¹²⁸

Peter Galie:

Was Lehman¹²⁹ on the court?

Vincent Bonventre:

Andrews, Pound,¹³⁰ Lehman, there is a court!

Luke Bierman:

Judge Medina said arguing before the New York Court of Appeals in the '40's was like appearing before a graduate seminar in law. We do not get the sense that something similar is going on there. Certainly we did not give it that sense.

Vincent Bonventre:

I thank you, panelists. Thank you members of the audience. And Rob, do you have some farewell remarks?

Merryman, *The Authority of Authority; What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 667-68 (1954).

128. Judge William S. Andrews served on the court of appeals from 1921 - 1928.

129. Judge Irving Lehman served on the court of appeals from 1933 - 1945.

130. Judge Cuthbert W. Pound served on the court of appeals from 1915 - 1934.

Robert Heverly:

Just farewell, everybody. Thanks very much for coming. I hope you enjoyed it. If you have comments or suggestions, feel free to talk or to write to me. We would love to hear them. And we appreciate everybody coming to our lovely city and we hope to see you all again.

