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A SYMPOSIUM WITH WOMEN CHIEFS

MS. BONNIE STEINGART: This is a very special event for Cardozo Women and Cardozo Law School. We have with us today Chief Justices from four of our highest state courts. We have Judge Judith Kaye, who is Chief in New York; we have Justice Deborah Poritz, who is Chief in New Jersey; we have Justice Jean Toal, who is Chief in South Carolina, and Justice Barbara Pariente, who is Chief in Florida. It is an amazing act of generosity that they have come here and they have agreed to do these panels with us, and we are truly, truly grateful.

To moderate our first panel, we have Bettina Plevan, who most of us in New York know as a member of Proskauer Rose LLP, but also as President of the City Bar, and it is also wonderful for her to be here with us.

I just want to say a word about why we are here, and what Cardozo Women, and indeed Cardozo Law School is about. I have never spoken to any lawyer about why they do what they did without them saying they wanted to make a difference. Indeed, when you speak to people in almost any profession, they say they want to make a difference. I think as human beings we need to believe that we can make a difference. The ironic thing is that all of us do make a difference. We make a difference in terms of the relationships we have. We have all seen "It's A Wonderful Life," and we have all been chastened by that to value the kinds of impacts we have on people who are close to us, but it is undeniable that lawyers want to make a difference in widening circles of people. And the question is how do you do that? You do that the way you create change of any kind. You do it incrementally. You have to believe in the value of the things that you are trying to change, and the importance of the difference that you want to make, and if we continue to believe that we can do that, we each will have an impact. We each will make a difference.

The people here on our panel today are people who have made a difference in any number of endeavors. But most of all, for women lawyers, they are an example of what is achievable and what is achievable incrementally. None of them got where they are overnight. Each of them got there one step at a time, and that really is, for me, inspirational, because I know that as long as we have groups like Cardozo Women, as long as we create change and support for one another there will be greater opportunities for each of us to occupy positions where we make more and more of a difference. Thank you very much. Bettina?

MS. BETTINA PLEVAN: Thank you, and it is really an honor for me to be among these great women Chief Judges here this morning, and I do have a feeling this group does not need a moderator, but I am pleased to play that role. I am going to approach the introductions slightly differently, because these are all extremely accomplished individuals. They have all succeeded in their professional lives before they were on the bench, and obviously succeeded after they joined the bench, and all of them are the recipients of numerous awards. But what I think at programs like this, my sense always is from people in the audience especially that it is an opportunity to hear from them, how they got where they are, so I am going to ask each one of them just to spend a few minutes to say what was their path to the positions that they hold now, and perhaps adding a little of their personal lives as well for the benefit of all of you. So I will start on my far left with our Chief Judge in New York, Judith Kaye.

CHIEF JUDGE JUDITH KAYE: Thank you, Betsy, and I might add, yourself a very accomplished woman. I hope you will tell your story, too. I do not know how far back you want us to go. I think I will eliminate the ballerina days.

[Laughter]

But it was clearly a very good life choice, as you can see, not to go in that direction. The direction I did pursue, really all through college, was journalism. I very much wanted to be a journalist, and went to law school only to give myself an additional credential as a journalist, because back in the late 50s the newsrooms of our wonderful newspapers were not really open to women at all. I worked as a social reporter. In fact, I started going to law school at night, working as a reporter in the daytime, but it soon became apparent that the law was far more interesting. Sadly, I found the opportunities for women—the mountains—were as large in the field of the law. For some reason I still do not understand, when I finished law school in the year 1962 at New York University, the firm of Sullivan & Cromwell hired me. I think it is their burden to explain why on Earth they did. I do not know. But they did hire me, and I guess if I had to choose a theme for my response I would say it is important always to dream large, not to be put off by the small frustrations that life offers.

I went from Sullivan & Cromwell to IBM for a short time, and then worked part time during three pregnancies, ultimately leading to a litigation practice. It was always my dream to be a great trial lawyer, as Betsy Plevan is. But then—I say this is part of the ‘dream large’ theme—in the year 1982, Mario Cuomo, in his campaign for Governor, announced that if he could appoint a woman to New York State’s highest court, he would like to do so. There

had never been a woman on that court. There were not all that many of us around back then who had the years of experience that would be appropriate, and gee, it turned out to be me. Again, this is part of the 'dream large,' not to be put off by the reality that no, this is never going to be happen.

So in 1983 I was named to the State's highest court, and had ten glorious years there as an Associate Judge of the Court of Appeals. And in 1993 we had a tragedy—a great misfortune—when our Chief Judge had to resign, and there was Governor Cuomo again looking for a Chief Judge, and lo and behold, it was me. So here I am, thirteen years later, the Chief Judge having had the greatest opportunity—privilege—that anyone could possibly imagine.

And that, in short, is my path to the Chief Judgeship. And by the way, I might say right at the outset, the four Chiefs here today, we're very good friends. I do not know how much gender bears on that, but we have a special relationship.

MS. PLEVAN: Thank you. Judge Poritz?

CHIEF JUSTICE DEBORAH PORITZ: I did not follow a traditional path. I did not go to law school until I was thirty-seven years old, and my children were ten and twelve at the time. I commuted from Princeton to Philadelphia to the University of Pennsylvania Law School, and remember coming back that first day of classes with all of my law books, not realizing I could have left them there, thinking I had to bring them all home. And my husband was late; there were two fighting boys in the back of the station wagon. Then they were station wagons—not SUVs—and I stood there with tears coming down my cheeks thinking, how can I do this? I cannot commute and be with my children and do all of this. And so I would pay tribute today to the young women who manage to do all of this from the time that they have very small children or from the time their children are born. When women ask me about those years and what advice I have to give, I say to them that the best thing you can learn from me is that you can take some time off and come back, and still have a wonderful career, and still have high goals, as Judith said.

When I finished law school, I went to work in the Attorney General's office, and that was in part because I did not want to commute to Philadelphia or to New York from Princeton, and I wanted to be available for my children. Again, career choices made by women. Trenton was nearby, and the office was a good office, and that's where I started. I ended up as the Director of the Civil Division, and then became Chief Counsel—the first woman Chief Counsel to Governor Kean in his last year. Although I was not politically involved, we had gotten to know one another when I was Director of the Division of Law through litigation in which the Division had represented the Governor. I knew I would have to leave government at that point, and I was

in private practice for four years and enjoyed it immensely. I found both my public and my private careers very rewarding. I went back when Governor Whitman asked me to be Attorney General.

I was the first woman Attorney General, and I still remember walking into a meeting of the Officers of the New Jersey State Police—the Colonels and the Majors—and they were staring at me. I knew they were saying, “Who is this woman that thinks that she can be the supervisor of the State Police?” The Attorney General in New Jersey is the civilian authority over the State Police.

I was Attorney General at the time that our last Chief Justice, an extraordinary man—Chief Justice Wilentz—became ill and resigned, and Governor Whitman asked me to be the first woman Chief Justice in New Jersey. It was a wonderful opportunity. I have been in the position now for a little under ten years and cannot think of a more rewarding or a more challenging job. I think, as Judith does, that one has to aim high and then take each step one at a time, and do as well as you can as you go through each day.

That is my story.

MS. PLEVAN: Thank you. Judge Toal?

CHIEF JUSTICE JEAN HOEFER TOAL: In the 40s and 50s when I grew up in South Carolina, rigid segregation was the rule of the road in my beloved state and in the South. I grew up as the oldest of five children in a Roman Catholic family. Roman Catholics were less than one percent of the population in South Carolina, and we knew early on what being different was. There were not any lawyers in my family. My father was first-generation college educated; my mother was not. I went to college and thought I would be a teacher—a college teacher. I majored in philosophy, got into the University of Michigan, a good graduate school for philosophy at the time. I cared a lot about civil rights, and was very much involved in civil rights activity, including voter registration drives and demonstrations to desegregate places of public accommodation. These were dangerous times to be involved in such activities in the South, and particularly for a white Southern woman to be involved in civil rights was a very unusual thing. The law I saw as a great engine for change. I will never forget in 1954 when *Brown v. Board*¹ was announced, and just the personal feeling in my heart as a ten-year-old what that would mean to the South. But I was going to go teach. A judge—father of a friend of mine from college—said in my senior year, “Jean, I want you to take a law course at Emory University and just see what you

¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

think, because I do not think you ought to go to graduate school in philosophy. I think you ought to go to law school.” I said, “Judge, I do not have any idea about that,” and really thought there were not any jobs available for women who would go into the law. He said, “Just try it.” I did. Of course, I fell in love with the first class in Constitutional Law I took. I decided to go home and go to school cheaply, and live with my parents and kind of see for one year whether that is what I wanted to do. Michigan was nice enough to defer my admittance for a year. I stayed in law school. Of course, the rest is history.

I was one of four women in my class. I was the Managing Editor of the Law Review, and my husband Bill was the Editor-in-Chief. We married in our junior year in law school. When I graduated, there were only two women in the active practice of law in South Carolina. There were no women on state court juries at the time. Bill, our school’s top graduate, got a clerkship with the Chief Judge of the U.S. Fourth Circuit Court of Appeals, Clement Haynsworth, so we moved to Greenville, South Carolina. I took a job with the largest firm in the state. I was number sixteen and in the library doing all the research for everyone else until women got put on state court juries, and my male colleagues started getting some terrible results with the women who sat on these juries. Juries became all women for a time, because we did not have any job-related exemptions like the men did. Many men would be exempted from jury service. Women would be anxious to serve, and they would listen to some of the most incredible arguments. Do you know how sometimes you can look at somebody, but you do not really see them? The male lawyers would make these very condescending arguments to these juries. These women would be very deadpan; they would not react in any way whatsoever. They would go back to the jury room and they would sock it to my defense firm. So they came to the back carrel of the library and said, Toal, we are going to make you a litigator. We need somebody who can speak with these women.

[Laughter]

The first trial I attended, they were going to teach me how to try a case. Of course, I was just a “gofer” for the young man trying the case, who was not much older than I was. I would hand him papers and do various clerical chores. The jury was all women. He made a very condescending argument, which I begged him not to do. The jury did not like it. They ruled with the plaintiff, and then they sent a note out, which I still have buried somewhere in my papers. It read, “Why didn’t the little lady lawyer get to speak with us?”

[Laughter]

So the lesson is you got to be diverse, but you sure better let those diverse folks do a little something in your trials. Do not just let them be the pick-me-ups to the guy who is doing all the heavy lifting. I came back to Columbia when my husband finished his clerkship and embarked up on the practice of law firm in my hometown.

CHIEF JUSTICE BARBARA PARIENTE: *[interposing]* Let us make sure they understood. That is not Columbia University in New York.

CHIEF JUSTICE TOAL: Columbia, South Carolina, the capital of my state. I went to work practicing law in a very conventional-type practice, except I began to accept civil rights cases, ACLU cases. I even accepted one case where a young woman wanted to be a page in the South Carolina Senate and was turned down. Early on in that case, I made contact with a wonderful organization here in New York called the Center for the Study of Women and the Law, a collaboration of Columbia University and Rutgers. There was a young go-getter professor who educated me about the difference between gender and race bias. I had no idea “compelling state interest” would not be the test. Boy, did I find out differently. She helped me write the brief in the case; we ended up winning. I got pregnant and had a baby during the trial of the case. That kind of frightened people when I was up there representing my client. The baby is rocking and rolling as I am addressing the judge. But this professor did a beautiful job and is still to this good day someone who reaches out and encourages people like me who are trying to follow in her footsteps in the judging profession. The young professor’s name is Ruth Bader Ginsburg. She is, of course, a Justice of the United States Supreme Court now, but she does not forget us or where she came from, or what she did to help a few of us in the practice at the time.

I served in the state legislature for thirteen years, and I was a litigator for twenty. Judges in South Carolina are elected by a joint vote of the South Carolina House and Senate. I ran three times over a course of seven years before I finally became the first woman in South Carolina history to sit on our State Supreme Court. I am also the first woman to serve as Chief Justice of South Carolina. I have served for eighteen years. My law school sweetheart and I have two girls and one grandson. I have juggled a lot of balls in the air. It iss not easy. I would be interested to hear everybody else’s story

CHIEF JUSTICE PARIENTE: How do I follow that?

[Laughter]

I concur. I have nothing to add.

CHIEF JUSTICE TOAL: No. She has got a great story.

CHIEF JUSTICE PARIENTE: One of the most wonderful things about my tenure as Chief Justice has been becoming a member of the Conference of Chief Justices. And that is how we all got to know each other, because the Chief Justices around the country meet twice a year. Of course, Judge Kaye's reputation preceded her. I am an avid *New York Times* reader, and had read articles about her many accomplishments. So, getting to know Judge Kaye and these other remarkable women has really been a highlight of my time as Chief Justice. And I am very, very humbled to be here in the company of these incredible women.

Now, you may detect from my accent that I am not from the Deep South. Actually, I have been in Florida for my entire legal career—thirty-three years—but I was born in New York City, and I went to elementary school, junior high school and high school in Tenafly, New Jersey. I was born in 1948 and grew up in the fifties and sixties. I did not know any lawyers growing up—male or female. Neither of my parents attended college, but they wanted the best for my sister and me. I always had this idea that I wanted to make a difference. I wanted to help others. I went to college at Boston University's School of Public Communications. I did take a course in Constitutional Law on the First Amendment. I was fascinated by that course, but still it did not dawn on me that a legal career would be a potential career path.

But in my third year in college, I made a documentary for a college course. My subject—Harvard Law School's legal services program. They had just started a program for legal services for the poor—a way to help poor people obtain legal rights. To me, it seemed like a great way to make a difference. So I decided to apply to law school and began at George Washington University Law School in 1970. Women were very much in the minority, but I was determined to do my very best.

I loved my law school career, but mainly because I loved all of my outside activities. I worked at the Public Defender's Office; I worked in Legal Services in Washington. I was involved with Law Students in Court, and the early seventies, was an exciting time. We practiced landlord-tenant law and it was just at the beginning of favorable law for tenants.

After law school, I relocated to Florida because I decided I could not stand the traffic in New York—or the cold. And I thought it would be a kinder, gentler environment than practicing law in a big city. So in 1973, I obtained a federal clerkship in South Florida. After a two-year clerkship, I obtained a position with a civil trial firm, but I remained very, very involved with legal services for the poor through service on the Board of Directors for Legal Aid,

and through pro bono. But, basically I pursued a “traditional male path,” becoming the first woman lawyer in my firm.

I became a trial lawyer. I was told women jurors were going to be offended by my long hair and that I should pull my hair back and look as innocuous as possible. I gave birth to my son while I was with the firm. There was no discussion about my pregnancy or a leave policy. My son is now an adult (in fact he is now a lawyer) and is doing just fine. But, I regret that the culture back in the seventies did not encourage balance between the practice of law and raising a family. I was on a partner track and I felt I had no choice.

I was very involved in bar activities. I always pursued both the traditional bar activities as well as involvement in women’s groups, because there were very, very few women lawyers in Florida. After seven years of practice, I formed my own law firm with another lawyer. We practiced together for ten years and I remained involved with bar activities.

We have the merit selection system for selecting appellate judges in Florida. In 1993, after twenty years of practice, I decided to put my name in for an appellate court position. The first time I applied, my name was not sent out of the committee. But shortly a second opening arose; my name was sent to the Governor and I was appointed by Governor Lawton Chiles in 1993 to the intermediate appellate court in West Palm Beach. By then my son was in high school. His observation: “Why could you not have done this back when I was younger?” Because by being a judge, there was more control over my time and life than as a litigator, so I had the time to do things with and for my son that I was unable to do when he was younger.

I was an appellate judge for four years when then there was an opening on the Florida Supreme Court. There had been only one other woman in the history of the Supreme Court—Rosemary Barkett. She had been appointed to the federal Court of Appeals. So in 1997 there were no women on the Court, and this opening was considered to be the “Cinderella seat,” at least that is the way I saw it. If you were a qualified woman, you should put your name in to make sure there were great choices. I applied and my name went up with five other people—four women and one man.

My husband was not happy about my choice, because we lived in West Palm Beach, and the Supreme Court is located in Tallahassee. Basically the culture is to require that the Justices live in Tallahassee. And my husband said, “How could you do this to us?” So he was not encouraging, but he also knew that if he told me “no” I would regret it forever. What he did not tell me until later is that he had seriously thought that this move would end our relationship. I share this because I think it is important to know that the ladder of success is not always easy just because you get to a certain place in

life. But eight years later, my husband is very proud of me. He is still not thrilled that I did this “to us” but our relationship remains strong and he is now an appellate court judge. We joke about the fact that in an effort to discourage me from applying he asked, “Why do you want to go on the Florida Supreme Court? They do not decide anything important.”

[Laughter]

He has had to eat those words a few times since. My name went up; Governor Chiles, again, in 1997 appointed me, so I have been on the Florida Supreme Court for eight years now, and the last two years as Chief.

MS. PLEVAN: Thank you very much, and I will just take a minute on myself, as Judith suggested, because many of you may not have the opportunity to become a Chief Judge of a state, you may follow a slightly different path. This will be just a very abbreviated version. One thing I wanted to mention is that I went to a women’s college—Wellesley. Very few people do that any more, but for me it was a very important part of what led me on the path to a career—a career in the law, in particular—but it was an opportunity as a woman to be a leader, to be able to speak without anxiety. I never had that anxiety, but I know many people do. I probably should have at times. But it was helpful to see role models of women professors who had careers, and families, and were high-achieving people. And when I talk to my classmates, and I am still in touch with many of them, I think we all feel it was an important part of what led us to many things that we are doing today. Then I went right to law school as well, and came to New York after a brief stint in the Northwest where I was the only woman in the firm that I worked for there, because my husband—this was the time when I had to follow him—was doing service in the Air Force JAG during the Vietnam War. And when we came back to New York, I selected a firm that already had a woman partner, which was pretty unusual. This was 1974, and it was a signal to me, I thought, and indeed it was that this was a firm that, even though they did not have many women, that was very open to promoting women. I went into the litigation department and was given the opportunity to be a front-line litigator, and I think it was Judge Pariente who mentioned being competitive, and I do think that is a characteristic that sometimes maybe women think of as a negative characteristic, but I think for many people, a desire to succeed—a competitive nature in the sense of wanting to achieve and to accomplish something we should not be afraid of. And I think all of the people here to my right and left are in that category, whether they have spoken about it or not.

And like Judge Pariente, I have always been involved in outside activities—bar activities—especially. Also, as a person who went to college and law

school in the 60s and early 70s that doing something in the public arena was very important to me, and I chose a practice that was not going to put me in that direction, but nevertheless, it was very important to me to do that, and I found a way to do that and to feel that I could make a contribution by being active in the bar and it has been very satisfying to me.

I, too, have had the work life balance issues as well. I have two boys, now a grandson, actually, and as I said this morning my boys are both out of the house. I am not sure they are grown yet, but they are on their way, but sometimes still needy, so we all do that balancing act. I never took much time off, either, and I did not ask, so in fairness to my firm, I do not know what would have happened if I had said I want three months off when I had my second son there. But at the time, I was also on a partner track and there was something important that was going to happen in a case that I had a very important role in, and I was going to miss that opportunity if I stayed away. And I did not think twice about it, but I have enjoyed my practice very much and really would not have done it any differently.

So I think we still have some time for some questions, and I wanted to pick up on the reference to the Conference of Chief Justices that was mentioned. All of our panelists participated in that, of course. And because it is one of the great legal institutions that exist, and there are many other legal institutions or organizations that are very important to the law in the United States that have been dominated by men for decades. And no doubt, the Conference of Chief Justices was dominated by men for decades; however, it has changed a great deal, and probably changed much more than some of the other institutions, and I would like each of panelists perhaps, who would like to comment on how that institution has changed as a result of the women being selected. These are not the only four, by the way, in the United States. There are many, many others who have been or are today chief judges, and perhaps I will start with Judge Kaye, because she was the Chair of that conference.

CHIEF JUDGE KAYE: Certainly. Well, a wonderful question, Betsy, and the fact is my experience there and over time has persuaded me more and more of how important it is that people facing similar problems have an opportunity to come together, whether it is chief judges or women's groups, or whatever identifies you a little bit separately from others. It is awfully nice to have an opportunity to share problems with others in a similar situation. Very strengthening.

I became Chief Judge in the year 1993. As I recall, women were Chief Judges in just a very few of the fifty-six jurisdictions that make up the Conference of Chief Justices. I remember Ellen Peters, the Chief Justice of Connecticut.

There may have been another woman Chief at the time. I do not remember. It was a very different organization, and a very, very different experience for a woman. Today we are nineteen women Chiefs of the fifty-six jurisdictions, and while we do not have a women's committee of the Conference of Chief Justices, we do really gravitate to one another a lot. And the organization, I think, has changed a great deal too. Issues have become much more important today that should have been important thirteen, fourteen, twenty years ago, like family law issues, children's issues. Those were barely on the radar screen at all. Is it because of us? I do not know, but maybe. Could be that we have changed the agenda not just of the Conference of Chief Justices, but also of the work of Chief Justices as they go out into their own jurisdictions.

I think the organization has evolved as well. Thirteen-plus years ago, when the Chiefs were overwhelmingly male, and times were different for women as well, the men usually had their wives traveling with them to our week-long meetings, which made the atmosphere a bit more "vacation-y." Over the years, our sessions have been shortened and totally packed with business, beginning to end. We have a very good time together, but we are very serious about the business of the Conference.

Are these two changes attributable to the growth in the presence of women Chiefs? I do not know.

As a personal aside, I would like to note the presence of my wonderful Law Clerk Devin Burstein in the audience—he is a Cardozo graduate! And as a second aside, I promised Devin I would ask Jean Toal to repeat a great line of hers. I was making a presentation during a meeting of the Chief Justices when Jean raised her hand and said, "Judy, that dog don't hunt." I got the message.

CHIEF JUSTICE TOAL: That dog don't hunt, ain't all I said in that meeting.

[Laughter]

One of the things I think that is important to remember in setting our role as State Court Chiefs in context is this: If you took the entire book of business in the Federal system from magistrates all the way through the United States Supreme Court, all cases, all jurisdictions, all over the country and the territories, and slapped them all together, they would not fill one day's docket in the State of New York State Court System. How about that? I mean, the huge work courts in this country do and the continued vitality of the Rule of Law in America really works itself out in the state court systems where about ninety-eight percent of the business of the courts in this great democracy takes place. So set that in context that there are about sixteen of

us—or maybe nineteen of us women who are state court chiefs—at the present time. Our numbers really bob up and down among the fifty-six state and territorial high court jurisdictions. This is a lonely business. It is a combination of performing your court's business and also being the administrative head, the CEO, of the court system for your state. We all work it out in various ways, but it is very much a split responsibility. You are rarely trained for this job, even if you spent some time as a management partner in your own law firm. You are not trained by any external device as you come to this position. So, boy, you are really a deer in the headlights when you get there, and what you pick up and learn from this network of women—Judy Kaye is an icon in our Conference, and not just for women. Most of the really progressive ideas that the Conference of Chief Justices has put forward in the last fifteen years have come out of her brain.

CHIEF JUDGE KAYE: Thank you for inviting Chief Justice Toal.

CHIEF JUSTICE TOAL: I am telling you. The women in the Conference really do make an enormous difference, and I think will change the face of the legal system in this country, but here is the interesting divide: Although our numbers are increasing as chief judges, women are still a miniscule part of the workaday judges in the trial system and state courts in this country. They are much more involved in the federal system—I can give Judge Ricardo Urbina a lot of credit for that. That and the omnibus judges bill of the late 70s. It was a big shot in the arm putting a lot of women on in the federal system, but in the state system, you may think our leadership impacts at the top, but there is still a real challenge for diversity on the trial bench.

CHIEF JUSTICE PORITZ: I want to pick up on that, because what we are seeing in New Jersey is very encouraging. I was going over the numbers with my administrative director just recently - our trial bench is now thirty percent women. We have over 400 judges, so that is a substantial number of women. In New Jersey, the Governor appoints judges with the approval of the State Senate. But the Chief Justice in New Jersey, as the administrative head of the court system, has the power of appointment within the system, so I appoint judges to different vicinages, that is, the different counties in New Jersey, and we have twenty-one county courthouses. I appoint the head judges of the courthouses; I appoint the presiding judges of the different divisions—family, civil, criminal. When, after my first meeting with the head judges of the New Jersey system, I came home, I said to my husband, “That is the first time that I felt as though I had walked into an all-male preserve.” There was not a woman in the room. That was not quite ten years ago.

Today one-third of the head judges are women. We have three women on our Supreme Court. Now that is also by gubernatorial appointment with

approval of the State Senate. The head judge appointments, as I have indicated, are my appointments. One-third of the presiding judges of all of the different divisions are women. We reflect the numbers of women that we have been getting through appointments, and because you cannot get to be a presiding judge in our system until you have been there a number of years, we are really way ahead of the curve.

I think things are changing, at least in some states. I see a difference in the judges who manage, I see a difference in the way the system is governed. We were a very autocratic system when I came. We still are. By the New Jersey Constitution, the Chief Justice has essentially absolute power, but our method of governance is really through the Judicial Council, the head judges, the presiding judges, and that has become governance primarily by consensus. It is a very different institution, and I do believe that has something to do with the numbers of women on the Council and in the presiding judge conferences, because I think that women approach issues somewhat differently. This is my personal opinion. I have read the articles; I understand that there are differences of opinion about this, but I have seen it. I have seen it firsthand.

As Judith has said, the membership of women in the Conference of Chief Justices has changed that organization; I believe I am seeing that change in the state court system in New Jersey.

CHIEF JUDGE KAYE: And New York as well.

CHIEF JUSTICE PARIENTE: Leadership of Chief Justices, such as Judge Kaye, has changed the conversation. In my experience, the majority of male judges are more resistant to collaborative problem solving. In my view, women judges, predominantly extroverts, are more likely to discuss and confer with others, more likely to seek collaborative solutions, and more likely to use networking as a problem-solving strategy. This is borne out by studies. I am not sure whether this is because women who achieve these leadership positions are more likely to possess those traits — I never see a problem that I want to ignore. I always want to solve it, which, on a day-to-day basis, can be quite daunting even for me.

The fact that almost a third of the heads of state court systems are women is exceptionally important. The state court system is not only where ninety-eight percent of the judicial business in the country occurs, but it is where the issues involving children and families predominate. I really believe that gender does play a role in redefining the conversation, and also not being as adverse to change. We are more willing to promote problem-solving models versus traditional adversary models.

To be part of an organization such as the Conference of Chief Justices, and then have mentorship from other women in an informal way, has been tremendous. One aside about the Conference of Chief Judges: I do not want you to think for a second that when women became a force in this organization, it meant all socializing went out the window. When Judge Kaye hosted the Conference of Chief Judges last January in New York, we went to Tavern on the Green; we went to Broadway plays; we went to the basketball game—the NBA. We went to the Harvard Club. We just did it in a compressed period of time. So, I definitely believe having the leadership of Chief Justices such as Chief Judge Kaye and Justice Poritz and Justice Toal have made a difference.

MS. PLEVAN: Thank you. I think it is interesting. We have touched on a number of issues from the perspective of women in the judiciary that are very commonly discussed in programs on women and the profession. Work-life balance, mentoring, glass ceiling—it is all a part of the experience of our panelists, and, of course, you have heard the number—the thirty percent—with respect, the number of chief judges and, at least in New Jersey, the number of judges, and that is in stark contrast to, let us say, the comparable numbers in the profession in law firms where, if you use large law firms as an analogous group to examine, the number of women partners is hovering at fifteen percent, and not making much of a move year to year, and I do not know if anybody on the panel has any observations about that. It certainly is a subject worth studying, I think, as to what has facilitated or enabled the judiciary in the states to make that kind of change, and yet the institutions run by lawyers have not made that kind of progress.

CHIEF JUSTICE TOAL: Let me throw one thing into the mix that is a little worrisome to me. In the early 90s, it was more the style for state courts to have futures conferences and to start looking thirty years out and try to predict what the court system and what the profession would look like. One of the things that was predicted about the court system is that, of course, the demographics of the country will change, the country will become more ethnically diverse, ethnic minorities will become larger in the population, but leadership of the profession in the public end of it—what we do for a living—judges, attorney generals—was predicted to start reflecting that diversity, but the leadership of the private bar was not predicted to do that, and many of these futurists and others concluded that the elite would cede control of the state court system to the diversity of our citizenship, because it would have less real authority and power. With the rise of alternative dispute resolution and other ways for corporations and the business community to resolve their disputes other than to use this public court system of dispute resolution, courts would become less important. So as we became more important in the

court system, the court system itself would become less important in deciding the ruling and governing and economic issues of this country. Now, I still worry a lot about that. I am proud to be on this panel with three brilliant women, all of whom are in much more sophisticated jurisdictions, economically, than South Carolina. I would be very interested to hear what my colleagues think. I am worried that it will not change much, but maybe I am being too pessimistic.

CHIEF JUDGE KAYE: Well, I think we are right to worry, all of us. We should be worried, and I think there is a little phrase in there, Jean, you used that is a universal proposition, and that is, “People do not cede control easily or willingly.” Who could dispute that? And in the private bar, the people who are in control are not ceding control easily or willingly. What is at work among the courts is the political influence, whether we are elected or appointed. We have come onto our courts both ways. The current political climate makes it necessary that there be some diversity reflected in the judiciary, and I think just to start the conversation going, I think we have to be really vigilant about the private bar, and gather our forces and see that we can bring about some of the same change. But Betsy, without veering too far off of where we are going with this, I just wanted to observe when you talk about the mentoring and the glass ceilings, we are reflecting, all of us, having come up in another time, that we are at a point now where we are comfortable with ourselves and who we are. When I sit in the van going to dinner in Albany with my Court of Appeals colleagues—four of the seven of us are women—I mean, we talk about pantyhose if that is what we feel like talking about. That is great, let me tell you, for all of you struggling to reach that point just where you can be yourself.

CHIEF JUSTICE PARIENTE: [*interposing*] Can I ask what specifically about pantyhose use is good?

[*Laughter*]

CHIEF JUDGE KAYE: Where to buy a better product. That conversation has taken place. But I do not want to take you away from the core issue here: progress for women in the private bar. It was just an observation that I had when you made your remark, Betsy. To return to the private bar and coming up through the private bar—I do not know if anyone has any solutions to offer. We are still making the pathways.

CHIEF JUSTICE PARIENTE: I am very concerned. I am thrilled to be on the panel with you, Betsy. Again, being a *New York Times* reader, I read the article that was in the *New York Times* a few weeks ago about the lack of any increase in the percentage of women partners, over the last ten years. And that the bottom line—the billable hour—has taken over. Of course, when we

focus on partnerships in big firms, we are still viewing just a slice of the legal profession. But what distresses me is that, as women become a critical mass, there has not been comparable success in changing law firm cultures to recognize values other than business getting, and the billable hour.

In Florida, we have an integrated bar of 75,000 members. Thirty percent are women; fifty percent of women are graduating law schools. The county judges, which is our lowest tier court, is at twenty-eight percent; women circuit judges at twenty-one percent; appellate judges at twenty percent, and there is one other woman besides myself—the first African-American woman on the seven-member Supreme Court.

I think that the profession of judging is very suited to women. It really lends itself to using analytical skills, so I think there is self-selection with more women applying to judicial positions. But I also think that there is political pressure to have diversity reflected on the bench.

As far as self-selection in the profession, perhaps women are just saying, “I only have one life to lead, and I am not going to lead it billing 2400 hours a week and seeing my child two hours a week. I want to have a balanced, healthy life. Life is too short.” So maybe that is part of it. But we must continue to have the conversation and ask the Conference of Chief Justices to also focus on what can be done to help change this conversation and move things along. In my state, when you mention the word “diversity,” eyes roll. They think, “We had that conversation already. Why are we having it again?”

But a recent Florida survey shows that if you are a woman in our state, thirty percent do not believe men and women are treated equally in the court system, while seventy percent of men think men and women are treated equally, so there is obviously a big difference in perspective. Bottom line is that I think it is a big problem, and I think we need to help you do something about it.

CHIEF JUSTICE PORITZ: I just want to add my support to the notion that at least in state court systems, whether judges are elected or appointed, there is enormous political pressure to find women and minority candidates, and the response has in part been due to that political pressure. Women’s bar associations in New Jersey exert that pressure on the legislature and on the Governor’s Office, and that makes a difference. It is more difficult to change the culture, I think, and exert that pressure on private law firms in the same way. Politicians respond to the pressure differently and as a group.

I was in private practice at a law firm in central New Jersey—I was telling someone about this earlier. I was the second woman partner. We had

women associates who were thinking about having children, and who were worrying about the partnership track, and it was really difficult to change the culture at my law firm. It was a fight. I saw, in partnership meetings, meeting after meeting, over the course of a year what it took to fight that battle. There was a lot of resistance. It took a long time to effect change, and I think one of the things that has to happen is that the women who become partners have to continue to fight for others. I do not think the culture changes when there are some token women at the partnership level. It is necessary for the women who make it to continue to fight the fight. That was my own personal experience, but I have talked to other women who said the same thing, and I see that as a very important function for the women who do go to private firms.

MS STEINGART: I think we are having too much fun, but there are two things that I would like to do. One thing is I would like to give recognition to someone in the audience who has been from my first day in law school my model of all I wanted to be as a lawyer, and that is Eva Hanks. From the first time I sat in her classroom, I thought, this is one of the smartest, most able people I have ever met; someone who did not hide her light under a bush, who is not afraid to say, "I am smart. I want to achieve things. I want you to work hard to achieve things." And I did not want to let her presence here go unnoticed, nor my admiration of her. Also, I thought maybe—I know we're a little over, but we could take, if the panel could do a couple of questions from the audience, just so that they could have some interaction. Anyone? Any questions for the panel?

MS. PLEVAN: Do we have some questions? Good.

QUESTION FROM AUDIENCE: You raised the issue—glass ceiling or changing the culture in private law firms, especially with large firms. Anyone have some concrete thoughts about how we can partner in to do that?

MS. PLEVAN: I would like to start, if that is all right, because as a woman in a large law firm and in my role as President of the New York City Bar, we have been trying to take some steps in that direction, and I do think we are making some progress. One of the things that it's a tradition for the President of the City Bar to do is to invite the heads of all the major law firms in periodically for a meeting, and they come, so that is really nice. And we try to discuss different topics when we do this a couple of times a year, but diversity has been at the top of my list while I have been President, and I find that the heads of the law firms get it now. That is not to say that they are able to bring all their partners along with them. In fact, we have openly discussed the challenges that they face in changing the culture of the firm.

This is a very difficult issue, and we have a lot of work to do. I do think we will get there; it is much slower. One of the analogies I thought about to the political pressure that has been referenced is that clients are beginning to put some pressure on law firms. Major corporations are making diversity—not just gender but all aspects of diversity—an important part of their process for selection of counsel, and they are asking law firms to provide information about who is on the client service team broken down by gender, race, ethnicity, and this will have an impact. It has only started about two years ago that this is going on, and some corporations do it and do it not so seriously, but some are very serious about it, and women who are in powerful positions in corporations are making their voices known that they want to see diverse teams; they want to give business to women. I think the flex-time issue is a real difficult one, and there a lot of younger women in law firms just say this is just not worth it.

CHIEF JUDGE KAYE: I have a small thought, too. I spent twenty-one years of my own life in that culture with large law firms, and went directly to the state's highest court from a large law firm. Something that Betsy has said is very—everything Betsy says is very significant, but something especially pertinent. She thinks now the law firms “get it.” I remember when I practiced law being on a litigation in Jacksonville, Florida. I had three children under the age of three, and I went every Sunday night. My husband drove us out to the airport, and I went to Jacksonville, and I came home every Friday night. And we did that for many months, until one day I decided I had no alternative but to resign from the law firm, and I submitted my resignation. And they said, what is wrong? We thought everything was going so well, and I said, you know, things are not really good. I have three children under the age of three, and they said, oh, my goodness. We never realized that. I never said anything. I just was so intimidated and so grateful to be part of that law firm. I was not yet a partner; I ultimately became one. Well, today I think that would not happen. But clearly, in retrospect, I should have said something too. Consciousness has been raised, on both sides.

The point I want to make—I think if not everybody gets it, a lot of people do get it that something must be done. And the small thought is that there are lots of firms that really are trying, and Betsy has mentioned now we have many women general counsels, too. Because face it—getting business really matters. And I think one thing that might be helpful will be to find the people who are doing good things, and recognize and reward them very publicly. That makes a difference. I think firms care whether they are on or off the radar screen in terms of popularity among the brightest and the best graduates. And maybe that is just a small idea, but it is a tangible idea. I

think firms today want to be thought well of as good employers. So what are they doing to earn it? Let us find it; and then let us replicate it.

CHIEF JUSTICE PARIENTE: I just want to add something about where the conversation takes place. This is a tremendous symposium. By publicizing a conference on “Women Chiefs,” we mainly attract a women’s audience, so we end up having this conversation with each other and do not have the same impact.

CHIEF JUDGE KAYE: Well, there are some non-women here.

CHIEF JUSTICE PARIENTE: I see a few non-women, but a very small minority; not the way the world looks. In my state, I decided after a women lawyers’ session on diversity with an all-women audience that diversity training and values should be emphasized as an aspect of professionalism. We now have some standard diversity training courses offered to law firms so that they can be done in-house. And other programs sponsored by our Professionalism Commission. So that is a small suggestion. I agree with another suggestion of Judge Kaye’s —publicly recognizing firms that have engaged in successful diversity initiatives.

In Florida, we have had such a severe problem with the lack of Black lawyers in law firms as associates and partners, that a lot of our energy has been focused on that aspect of diversity. Every year the Florida Bar holds a diversity symposium, and every year I look around and ask, “Okay, I want to know how many managing partners are here?” And a few raise their hands. I then ask, “Now how many managing partners are here who are not part of the panel?” And nobody raises their hand. So the challenge has been how to engage everyone, including white males in the conversation.

QUESTION FROM AUDIENCE: I worked at a big law firm, and I think that there are a lot of law firms that are trying diversity programs. They schedule time to discuss the problem, but I think that essentially, they are unsuccessful, even though that there are counting their programs, but I think not only for women, because I find there are a lot of young men who are also very unhappy. They do not want to get home and not be, you know, they want to be active fathers to their children, or have a relationship, but they are not [? may be wrong] able to do that. It ends up being that they work sixty hours a week instead of eighty hours a week, ultimately. So my question, I guess is, can we find a different business model? Can we work on a different business model? Why do we have this old business model that has been here forever and ever?

CHIEF JUSTICE TOAL: That is a conversation that really does need to be had within our Conference and in legal circles around the country, because I, like

you, am now seeing young people—men and women—who want to have a life outside their office. What kind of business model can we use for the practice of law that will change the war of paper, that will change way you try cases, the length cases take to try, how you handle business clients, what the expectations are?

COMMENT FROM AUDIENCE: Excuse me, but I think the associates will take cuts in pay. They do not want these big salaries.

CHIEF JUSTICE TOAL: Right. But to make the profession such that what drives that engine does not have to take place within such an extended period of time in their life. We got technology; we got all kinds of different business models now about how to approach analyzing and solving legal problems. We need to begin to have a conversation, and judges can lead here, because lawyers listen to us.

CHIEF JUDGE KAYE: Jean is the incoming President of the Conference of Chief Justices. Do you not think it has gotten a little worse? You can work 60 hours a week and have your Blackberry and everything else to fill in all the rest of the time?

CHIEF JUSTICE TOAL: Exactly.

COMMENT FROM AUDIENCE: The business model would have to more replicate the public sector. A lot of people from the public sector are willing to take very low-paying jobs in order to have that time. I worked at the Housing Authority, and that is why I am there. I have got a five-year-old daughter—I am a single mom. There is no other job that I know of in law where I can do all of that and do it all well, and I want it all. I want to be a good mother, I want to be involved, and I want to be a good lawyer, and working in the public sector I feel is the only way I can do that. It means that we have to compromise on a lot of things. I live in a one-bedroom apartment; I live with a five-year-old, but... [y]ou do what you have to do in order to live the life that you want, and there are some areas I am willing to compromise, and that is my standard of living. I am not willing to compromise on what I am willing to give my child, and what I am willing to give my career, and I think that has to be more of a business model defines [phonetic] itself if you want to include mothers be in a private sector as well.

MS. PLEVAN: Well, I think that is a good topic for another seminar or symposium which maybe those women will sponsor. I want to thank all of our panelists for this great program.

[Applause]

CHIEF JUDGE KAYE: Well, you know that we have a State Constitution. Every state has a State Constitution. That sometimes gets lost. Do you teach that here at Cardozo Law School?

[Laughter]

Can you believe it? I was speaking at the City Bar Association years ago, and I talked about the State Constitution. A lawyer came up to me afterwards, and said, “Judge Kaye, I feel like I am swimming in a whole new sea of culture. I didn’t know we had a State Constitution.” Well, the fact is we have had a State Constitution since 1777. Our State Constitution has many provisions that are different from the United States Constitution, and many that are the same, neither of which should be a surprise, since all across the nation State Constitutions preceded the Federal Constitution. The Federal Constitution drew on State Constitutions. But we have a document that you cannot put in your hip pocket. We have the width of ski trails in our State Constitution; we have Workers’ Compensation and many, many issues that are unique to the State of New York in our State Constitution. And it has been amended countless times. There is no banner headline when we decide a case under a unique State constitutional provision, although there are exceptions—like the *CFE* decision,² which was decided under our unique education clause.

But I think the real issue here, and where all attention is being focused at the moment is on the State and Federal clauses that are the same. And the challenge to the state courts is where litigants are turned away at the federal level, whether the issue is one of land use or search and seizure. The interesting question is what will be the significance of changes at the Supreme Court level and will that lead more to litigation under the State Constitution, and I will only make one observation about it, then turn this over to my colleagues. I reread my concurrence in *Scott/Keta*,³ and I was reminded of the fact that when a matter is put before us as one of State constitutional law involving a clause that is identical to the federal Constitution, invariably it divides our court. We have more divided opinions on that sort of issue than we have on any other kind of issue. I dredged out an opinion I had written years ago—1991—where the seven Judges of our Court issued four separate opinions. We never do that, but when the State Constitution is involved, somehow it excites all kinds of arguments and divisions on our Court.

I think the real challenge to Cardozo Law School, to law schools and to lawyers, is to really do a good job developing issues under the State

² Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14 (N.Y. 2006).

³ People v. Scott, 79 N.Y.2d 474 (N.Y. 1992).

Constitution. If you think the Court ought to go in a different direction, if you think we should part company from the United States Supreme Court, if you think we need to be a champion of individual rights that are being neglected or abused, and if there is some reason for us to do things differently at the state level, do your homework and tell us why, and how, and what the history is, and why we should diverge from the Supreme Court. And then I am confident the seven of us will divide four, five or six different ways, but at least we will be onto the issues. Deborah?

CHIEF JUSTICE PORITZ: I think that the focus on using the State Constitution as a source of individual rights in New Jersey, as opposed to the Federal Constitution, came to us through Justice Brennan. He was the initiator, if you will, as he looked at his own Court and was disturbed by majority opinions that he thought were not protective of individual rights—many were cases in which he dissented. He became a proponent of State constitutional interpretation and wrote a Law Review article that I understand is the most widely quoted Law Review article in the case law of individual rights. And so, as our Justice from New Jersey, there was an inevitable impact on the New Jersey Supreme Court.

Another one of our Justices, Justice Pollack, who was on our Court when I first came ten years ago and has since retired, followed Justice Brennan and wrote and lectured about individual rights and the importance of State Constitutions, and that also had an influence on our Court. Another one of our Justices, Justice Handler, wrote a detailed exposition of what are now called “the divergence criteria,” which enumerated the bases for state constitutional decision making, including criteria for deviating from federal decisions interpreting federal constitutional provisions that are the same as or similar to provisions in State Constitutions. Indeed, those divergent criteria have been discussed in Law Review articles and court opinions from all over the country. There have been battles about whether the divergence criteria are even necessary—after all, the State Supreme Courts, the state’s highest courts, were the first courts in this country to deal with individual rights. The Federal Constitution was not implicated until modern times. And the argument goes, well, why do you need specific divergence criteria? Whatever the state’s particular needs are, whatever the state’s history may be, will of necessity shape the constitutional argument. For example, our history in New Jersey vis-à-vis jury trials, derived both from the common law of the state and other sources, may lead us to a different view, and appropriately so. Or, why not reconsider the legal argument relied on by the United States Supreme Court? That can be a legitimate basis for State Constitutional decision-making. If the logic of an opposing argument leads a State court to a different result, that is entirely appropriate.

I was looking at some of our decisions—some of our more recent decisions—and in most of our cases now where there are issues of search and seizure, or privacy issues, our lawyers routinely make a claim under the State Constitution. It is standard. In the case before our Court right now, *Lewis v. Harris*,⁴ the gay marriage case that we have not yet decided, the plaintiffs only raise State Constitutional issues. I was looking at a recent decision by one of my sisters on the Court, and she said, as best I recall, “We decline to adopt *Belton* [the United States Supreme Court] and its progeny, because to do so would require us to accept a theoretically rootless doctrine that would erode the rights guaranteed by the New Jersey Constitution to be free from unreasonable searches and seizures.” And so there you have as an example a case that follows earlier decisions of the United States Supreme Court but then later takes its own path on the constitutional issue. Our case, by the way, had to do with the search without a warrant of an automobile after the occupants were removed and an arrest had taken place.⁵

CHIEF JUDGE KAYE: Was it unanimous?

CHIEF JUSTICE PORITZ: It was not unanimous, but there were not many separate opinions. We rarely have many opinions in a case, even on constitutional questions. Chief Judge Kaye, when she speaks of the division on her Court, I will respond that yes, those are the more difficult decisions for our Court, and you will less frequently see 7:0 or even 6:1 decisions on those questions, but it is very, very rare that we have multiple decisions, even in constitutional adjudication.

I will give you one example that I like to talk about wherever I go. The New Jersey Supreme Court in a case called *Pierce v. Board of Education*,⁶ I think it was decided in the 1880s if I remember correctly, said that separate school facilities for persons of color were unacceptable in New Jersey and that was a long time before *Brown v. Board of Education*. The decision was rooted in our State Constitution and a state statute. There were other cases too that were decided subsequently that had to do with, for example, swimming pool facilities in a school that were available to both African-American children and white children, but the African-American children had to use the pool at a different time of day, could not be in the pool with the white children. And so there was no argument that these were unequal facilities in any physical sense—they were the same facilities. And the Court said, no, for reasons that became a hallmark of *Brown v. Board of Education*: separate but equal is inherently unequal. So there are wonderful things that State Supreme Courts

⁴ *Lewis v. Harris*, 188 N.J. 415 (N.J. 2006) (decided on October 25, 2006).

⁵ *State v. Eckel*, 185 N.J. 523 (2006)

⁶ *Pierce v. Union Dist. Sch. Trs.*, 46 N.J.L. 76 (Sup. Ct. 1884) aff'd 47 N.J.L. 348 (E.&A. 1885).

can accomplish under State Constitutions, and they accomplish them sometimes in cases that, as Chief Judge Kaye said, come to us way before they make their way to the United States Supreme Court.

The other thing we can do is influence United States Supreme Court decision-making. We have seen recent decisions of the United States Supreme Court about the death penalty, in which opinions of the state courts are considered, in which it is noted that the state courts are moving in a certain direction. At least some of the Justices believe that it is appropriate to look at those trends to get a sense of where the country is. Some judges think that understanding what public attitudes are is especially important in state court adjudication.

One of the ways that I see our Court dealing differently with those kinds of issues is in the development of a new test as a means toward deciding a constitutional issue. It is not simply that we are taking a similar provision of our Constitution and the United States Constitution, and looking at our unique history or some other factor, or even that we are following the logic of the argument, but it is also, occasionally, finding a new approach. And one example that comes to mind in our jurisprudence is the tiered equal protection analysis of the United States Supreme Court, rejected in the 1970s by our then Chief Justice Weintraub as not the best way to go about equal protection analysis. He proposed instead an equal protection methodology that is a balancing test in which the court does not look at whether there is a fundamental right, or a suspect class, or whatever, but rather balances the individual or class interests with the interests put forward by the State. I am doing a sort of shorthand description of this test, but the test later came to be used in equal protection analysis under the New Jersey Constitution and provided greater rights for classes of people that were seeking protection from the New Jersey Supreme Court. It was not that we openly said we are going to deviate from the Federal Constitution; it was that we applied our own test. We used the test that had been described by Chief Justice Weintraub, and as a result, our jurisprudence moved in a different direction. Our balancing test led us to appreciate the power of the interests that were being brought to the Court, not by rigidly classifying them, but by understanding, what the substance of the interest was about.

Judith spoke a little bit about the power of the Chief Justice, and I think that is a crossover from constitutional adjudication to our roles as administrators. We use the power of the court—our Court does—we do it as a court. It is not a Chief Justice power only, but through the court rules, we administer the court system. We said very early on that our obligation is to administer so that justice can be meted out fairly, and without resorting to constitutional doctrine, we have broadened individual rights through that administrative

responsibility. So you will find requirements in our court rules related to the recording of confessions and the evidence that can be presented in the criminal courts. And so that is another way in which State Supreme Courts in exercising their authority over the court system can impose requirements that help make the system fair and that go beyond the floor, perhaps, that is found in constitutional adjudication.

One other source is the common law. Chief Justice Souter said to me that one of the things he missed most after leaving the State Supreme Court in New Hampshire was the common law. The common law is the source for us in New Jersey, and I think in many states, of notions of fundamental fairness, of privacy interests, and of the interest of being freed from government tyranny. The common law had that role in New Jersey and continues to have that role, so I see these other sources as operating alongside of constitutional adjudication. I think I should stop.

CHIEF JUSTICE TOAL: It has been said that a page of history is worth a pound of logic, and that is very much the story of South Carolina. I think probably within many of the Southern states, our approach to protecting individual rights has not been through our state constitutional source. So, the answer is no, unfortunately. In many Southern states, race is such an overlay on everything you talk about in the history of our legal system—our state court legal system. Those of us who began to try to introduce reform as lawyers, as well as in our role as judges, into our state system in terms of making progress about individual rights relied exclusively on the United States Constitution. Just to get the state court systems to understand the importance of recognizing what the U.S. Supreme Court was doing with the United States Constitution, particularly in *Gideon v. Wainwright*,⁷ *Escobedo*⁸ and *Miranda*⁹—all those cases came in while I was in law school—was quite a task. As a practical matter, in the South, the adoption of more modern rules in the criminal procedure areas has been mostly a response to federal jurisprudence.

CHIEF JUSTICE PARIENTE: [*interposing*] Remember, *Gideon* came out of Florida.

CHIEF JUSTICE TOAL: Exactly. In my earlier years of practice, we never saw the State Constitution as an independent source of protection for individual rights given our state history. The State Constitution had been used to achieve the exact opposite of what you are trying to achieve with

⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁸ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁹ *Miranda v. Arizona* (*consolidated with Westover v. United States, Vignera v. New York, and California v. Stewart*), 384 U.S. 436 (1966).

constitutional litigation as far as individual rights. We never saw it as a source. Now the landscape has changed dramatically at the United States Supreme Court level, and where are we now? This is going to be the fascinating question for jurisprudence in many Southern states, and very problematic in that discussion is going to be the political infusion of a lot of the issues that will come before us.

All state courts now are grappling heavily with school financing cases. Judge Kaye's decision is included in our materials, but I can tell you everybody from South Carolina to Kansas to Texas to California to Georgia to every place is now in this very tough battle about fair financing, and it all revolves around the State Constitutions. Gone are the days now—the U.S. Supreme Court has gotten well away from using the United States Constitution to bring any sanity into the school financing and equity issue, so we are having to rely on State Constitutions. That is a very new and scary thing for us in Southern states.

There are going to be some other highly-charged issues that will come to us. The Northeast has begun the conversation about what marriage means with decisions up here, and it will come to us, I feel sure. In many of these cases the individual rights will be litigated in terms of a State Constitutional model. What will we do as courts? And you can go down the list of the other hot button issues, whether it be tort reform, abortion—so many of those now are going to be litigated in our state court systems on the basis of State Constitutional provisions. Not the provisions that are individual to our state, because there are a ton of those. We do not have ski runs, but we sure got shrimp fishing all through the Constitution and many other local peculiarities.

[Laughter]

We do not have the tradition of taking the Bill of Rights and looking at the parallel provisions, and then looking at divergence criteria. That is new landscape for us, and what worries me a little bit is that many of us in state courts in the South will be considering whether to develop our own state constitutional law tradition in the context of political issues that are highly charged. Will we have the will to look at our constitutions as its fair interpreters, or will we be terribly impacted by the political pressures that these cases bring to us?

It is well known that judicial selection is hotly debated all over the country, not only because of diversity issues, but because groups—single issue groups—inject themselves heavily into the process, whether it is public election, as it is in many states, this is public election, and in other states it is a combination. But if you have ever had your state designated by the U.S.

Chamber of Commerce as having a couple of judicial hell holes, I can tell you that that impacts the U.S. Chamber of Commerce's view of what your state courts' venue provisions are like and can have a lot of influence on how judges decide State Constitutional issues and how they get elected. So, Dean, I simply conclude this tale of woe from the South by saying to you that the notion that now that the U.S. Supreme Court has taken a hard turn right, that the state courts will save individual liberties by interpreting our constitutions is not completely accurate. Do not assume that when the state courts get into the business of using their own constitutions as a source, that that is necessarily going to mean that individual liberty will continue to be protected. There may be some other kind of pressure there that gets into the picture.

CHIEF JUSTICE PARIENTE: I do not know whether we were seated on opposite sides of the panel like the North and the South but the issue of constitutional rights definitely has a North/South dichotomy. I grew up in the law at the time of the Warren Court, and in law school we studied only Federal Constitutional Law. I do not even think that I was entirely aware that such a thing as a State Constitution existed. I daresay that even after becoming a lawyer in Florida, I considered federal courts to be the champions of individual rights.

Some of that was due to the reputation at that time of our state Supreme Court. When I began practicing law in the seventies in Florida, we had one of the worst judicial scandals ever. At that time, we had elected Supreme Court Justices. Several of them were accused of taking bribes, and they were removed or resigned. Good came out of the scandal when voters approved merit selection for appellate and Supreme Court judges in reaction.

But, in Florida there had been a tradition at times in the past of the state Supreme Court vindicating individual rights based on the state Constitution. I have now studied Florida's constitution, and a history of the Supreme Court's constitutional decision-making. It is incredible to read that in the 1800s and early 1900s, the state Supreme Court were at times champions of individual rights. In 1905, the Court ruled that a state statute segregating street cars violated the guarantee of equal protection. In 1908, the Court overturned the conviction of a Black man after he proved that African-Americans were completely excluded from jury service in the county where he was tried. In the mid-1800s, the Court held a statute unconstitutional because it restricted the right to jury trial, and talked about the "venerable right of trial by jury."

Now let us fast forward to the decision of *Brown v. Board of Education* in 1954. The Southern states did not exactly hop to it, and integrate their

schools. Not only that. The Florida Supreme Court actively resisted integration efforts at the University of Florida Law School.

So when I started practicing in Florida, we had ascendancy of federal constitutional rights, and at that point, Florida's separate state constitutional rights were at a low point. We then get into the 80s, and we discover that there are, in fact, separate provisions of the Florida Constitution that and the state Supreme Court did begin to reach divergent interpretations of parallel provisions of the state and federal constitution in the area of search of seizure. And two years before the U.S. Supreme Court case of *Batson v. Kentucky*,¹⁰ holding that peremptory challenges could not be racially motivated, the Florida Supreme Court had held that way.

Unfortunately, our state constitution can be amended fairly easily by the voters and the recent trend in Florida has been that in reaction to every decision that protects individual rights or sets a threshold that is higher than a federal provision to limit that expansion by placing a constitutional amendment on the ballot. So for example we are now restricted from interpreting our constitution differently than the United States Constitution in the area of search and seizure.

QUESTION FROM THE PANEL: [*interposing*] Do you know, Barbara, do other states have that as well?

CHIEF JUSTICE PARIENTE: I do not know if other states have a similar restriction. I know that we do. We then interpreted our cruel or unusual punishment clause more expansively than the federal clause. The legislature reacted and placed an amendment on the ballot to interpret it consistently with the federal Constitution. But we are one of four or five states that has a separate Right of Privacy. Does New Jersey have the freestanding Right of Privacy?

CHIEF JUSTICE PORITZ: No. The right of privacy has been found in a broader "rights" paragraph that includes, among other things, the right to pursue and obtain safety and happiness. Yes. Happiness—that is there.

CHIEF JUSTICE PARIENTE: Our State Supreme Court held that the express right of privacy required holding a statute unconstitutional that required parental consent before a minor child obtained an abortion. And, more recently, we held that the parental notification statute was unconstitutional under the same state constitutional provision. I quoted the New Jersey Supreme Court. What happened then? The constitution was changed the next year to expressly allow for parental notification.

¹⁰ *Batson v. Kentucky*, 476 U.S. 79 (1986).

And so the tale of woe in Florida is two-fold. One is that there has been a reaction every time a decision comes out that provides greater rights than is provided in the United State Constitution. The voters, led by the legislature, go back and amend the constitution to restrict their rights. Unfortunately in this country, although we fervently believe in individual liberties, we have fear-based reactions. With 9/11, there is more willingness to restrict rights to obtain greater security, and there is more complacency about individual rights.

CHIEF JUSTICE PARIENTE: So we are now really in a situation where if we interpreted an identical constitutional provision differently, we would be accused of activist judging.

I made reference to the fact that our constitution was amended each time in reaction to a decision. I will also say that the people have a right to amend their constitution, so if they do not want greater rights than provided in the United States Constitution, that is their right.

Lastly, I concur with Judge Kaye that state courts do protect rights by addressing unrepresented litigants. We have a vast number of people in our country who are unrepresented, so when we really talk about equal rights, equal justice, and individual liberties, if we do not have equal representation then do we truly have equal access. And we must also do more to provide lawyers for children in the foster care system.

CHIEF JUDGE KAYE: Can I add a footnote, because I made almost a very casual reference to this point, and I cannot tell you how strongly I feel about this. And I think this is a great place to say it. I think this very much comes back to lawyers and to law schools, because as you have heard from my colleagues, when the state court diverges from the Supreme Court to grant greater rights—not that we do not do it or will not do it—we would have to think very, very long and hard about doing it. The political consequences were referred to; there will be hue and cry, junk justice, activist, political judges. We know these things. That does not deter us, but you think about it.

Also, when we diverge from the Supreme Court and grant greater constitutional rights, it is the last word on the subject, not appealable anywhere except by way of a constitutional amendment. When a state high court decides something as a matter of State constitutional law, it is really embedded in the law. It is hard to change the common law, although we do. We do in small steps; we take corrective steps, or steps to fit a common law rule into modern life. We do that all the time. But a state constitutional decision really is heavily embedded in the law. So you know it is going to be the last word. You know there is going to be a tremendous hue and cry.

You know that there is going to be one concurrence and a couple of dissents. We know all those things.

But what I want to emphasize to lawyers and to law schools is this: We have become so federalized in our thinking. In law school the really jazzy, great issues of constitutional law tend to concern federal constitutional law. So the problem is in our state—unlike what Deborah has told you about New Jersey—is that state constitutional law is not raised well by the bar in our Court. When I came on the Court in 1983, what we would get at most would be a parallel citation to the state constitution by the Legal Aid Society. The Legal Aid Society was pretty good about doing that.

Well, a state high court is not going to go to the archives and dig out the state constitutional law and construct an argument that counsel has not bothered to present at the trial level, at the intermediate appellate level, and at our level. And if counsel urges that we diverge from the Supreme Court of the United States on an issue, there had better be good reasons for doing it, not just the reason that we think the Supreme Court is being too curmudgeony on this. The state constitutional issue must be raised at the trial level; there must be reasons that the federal constitutional protection is inadequate; those reasons must be grounded in law and in history. What is the history of our state constitutional provision? We are not going to invent that in Albany. That has to be presented to us, and let me tell you, it is not.

In cases like *CFE*, what was at issue was a state constitutional provision unique to the State of New York providing a free public school education to every child in the state. The state constitutional issues were raised by the lawyers, and they were explicated. And we had lots of good materials about our history and about the reasons for resting our decision on the state constitutional law. In the State of New York, our due process clause is equivalent to the Federal Constitution; our equal protection clause is equivalent to the Federal Constitution. We do not have an explicit right of privacy. We have to read it into the State Constitution. So if a party believes that the law should be different, tell us and tell us why. Before state high courts become the “champions” of individual rights, there is a stop, and that is the responsibility of the law schools, and the Bar. I wanted to be sure you got that message.

DEAN DAVID RUDENSTINE: Are there any other comments? I would have a question, which is one of the hallmarks of the federal court system, is life tenure for federal judges, and it is assumed that it helps to protect the independence of the federal judiciary. I do not think any of the judges on any of the state’s highest courts have life tenure. I believe this is right. You do.

CHIEF JUSTICE PORITZ: In New Jersey, judges are appointed for seven years, and then if the then-sitting governor renominates, and the Senate approves, the judge gets life tenure - to age seventy. Life is over at seventy; what can I say?

[Laughter]

CHIEF JUDGE KAYE: There are other pressures, David. We do what we have to do, but it is hard to be the subject day after day of “junk justice.”

CHIEF JUSTICE PORITZ: [*interposing*] That is part of it, and I think that Barbara Pariente talked about another. We have been threatened with constitutional amendments. There have been elections won and lost on disagreements with Supreme Court decisions in New Jersey, so there is certainly a fair amount of pressure, and we do have life tenure so I think that is not the only consideration.

State courts are often more responsive to their citizenry. Some even may be controlled by their citizenry through the process of constitutional amendment. Yet most state courts have the capacity to be truly independent, although maintaining that independence is sometimes very difficult.

CHIEF JUSTICE PARIENTE: Massachusetts, by the way, has life tenure for its state court judges, and I think that is significant because the most earth-shattering decision in terms of state constitutional rights came out of the Massachusetts Supreme Court. In Florida we have constitutional senility (mandatory retirement) at age seventy, not life tenure, plus we have the Merit Selection System, and we are on the ballot every six years for a “yes” or “no” vote.

Right after the *Bush v. Gore*¹¹ decision, two of the justices that were up for Merit Retention became targets. Rosemary Barkett was part of the Court that decided parental consent unconstitutional under our state right of privacy. There was a concerted effort to remove Judge Barkett and her colleagues through a “no” vote on merit retention. Although no justice or appellate judge has been voted out of office, the threat hangs over your head.

Our Court just came out with a decision holding school vouchers unconstitutional under the State Constitution, and there have been outcries from those who disagreed with the decision to remove us when we are on the ballot again. So I think that, unlike the federal system, there is subtle pressure. Of course, judges must make decisions based on principled beliefs. But if we want to preserve our balance of power, and separation of powers, we

¹¹ *Bush v. Gore*, 531 U.S. 98 (2000).

must do a better job of educating the electorate of the importance of our separate branch of government.

So I do think that the Merit Selection System is better than an elected system, but there is that subtle pressure that every six years when your name is on the ballot. I think that a longer term, like the fourteen-year term in New York is an interesting alternative. I am not sure about life tenure as we have for federal judges. I think there is a benefit to have the continual refreshing of the Court, and the new blood on there, but independence is more likely to be preserved when there is not a constant threat of removal because of disagreement with opinions.

CHIEF JUDGE KAYE: If I could just give you a little historical footnote, since you have mentioned the fourteen-year tenure, Barbara. You know, the intention when the judges of the New York Court of Appeals got fourteen-year terms was that that would be life tenure. Seriously. This goes back to the Constitution of 1869. There were debates between those who wanted judges to have life tenure for the very reasons discussed—essentially to give them genuine judicial independence. And then there was a populist movement, and people feared investing judges with too much power. Life tenure is powerful. The compromise that they reached was to look at all the years actually served by federal judges who had life tenure, and the average number of years served was fourteen. And that is how—that is how we got to fourteen years. I daresay if we did that today, we would probably get to twenty-five years, right?

CHIEF JUSTICE PORITZ: And in New Jersey, the retirement at age seventy was essentially developed for the same reason, on the same basis, that is that is how long people work; that is the longest one might expect that a judge would live. So with changes in life expectancy, and all the other changes, that seems odd now, but that was the reason then. It was considered life tenure.

CHIEF JUSTICE TOAL: Well, your materials have a good deal that points out interplay between judicial independence and judicial accountability. Actually, about eighty percent of the state court judges are either popularly elected, or have a popular election dimension as a part of their selection process. And the two questions that present themselves: Does that system make the independence more vulnerable, and at the same time, does it balance by making the system more diverse? I think the reality is that many minority groups at home assume that popular election is the way to diversify the system, but it had not worked out that way. In South Carolina, we have a legislative selection system, which is unique to us and Virginia in the way we do it, and we have age seventy-two retirement, and pretty long terms—ten

years for my court, and a pretty good tradition that you are reelected if you perform capably the first time, and a system for using retired judges, those above the age of seventy-two, if they are screened. We do have a screening process.

But frankly, I am like Judy. I do not think the term of office is what defines the independence in the state court system. There are a lot of other pressures, and one of them is the attitude that the United State Supreme Court has about the state court system. *Bush v. Gore* and *Republican Party of Minnesota v. White* are two troubling, troubling decisions in what they reflect about the attitude of ¹²the highest court in the country about the judicial independence of the state court system. *Bush v. Gore* speaks for itself in terms of whether the Florida Supreme Court was going to be honored in its interpretation of its own election laws. Very outcome driven, but *White* may be even more troubling than that, because that was a decision in which the U.S. Supreme Court stripped state supreme courts of their ability to regulate what can be said in judicial elections. Under the guise of upholding the First Amendment, and free debate about selection of judges, they have basically said y'all are no different from legislative elections, what is so bad about coming with biases to be a judge. Independence—the heck with that. Accountability is the mantra. I mean, all of that is said in the Scalia opinion, and even in Justice O'Connor's opinion. There is a disdain for how the state judges are selected and the assumption that since you are already in the political hurly burly, kind of anything goes. You can promise how you are going to rule on cases, and the State Supreme Court cannot use its ethical rule authority to constrain that. That introduces a pressure I would suggest, Professor, that is far beyond the pressure people feel about their term of office. I think state court judges perform pretty courageously in the face of how they are elected and how the long their term of office is. It is the broader attitude about what the state court judge's role is in the process that I worry about.

CHIEF JUDGE KAYE: And I want to say now, having nearly twenty-four years on the bench, that in my youth and innocence, I supported what used to be called merit selection. I no longer speak of it as merit selection. I speak of an appointive and elective system. I know that you, Jean, and possibly Barbara, have observed that the appointive system yields a greater, or in your states, has yielded a more diverse bench. I think it very much depends on who the appointing authority is. I think that is really what it comes to down to. And what I have seen and what I have learned in my years on the state bench is that we do pretty well with the elective system too. Now, if the United States Supreme Court is going to say there are no bounds whatever on

¹² *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

raising money, you can raise endless amounts of money and you can say anything you please, then we are going to have difficulty. Our Court has defined some limits on campaign speech and campaign spending. In the State of New York in the past decade or so, women, minorities have done a lot better through the elective system than the appointive system.

CHIEF JUSTICE TOAL: Would you say that it is because of political attitudes about what the bench ought to look like in terms of public confidence in the process?

CHIEF JUDGE KAYE: I think the minorities, women, have learned how to access the elective system. One of the problems, of course, is the need to root out the worst parts of the elective system for judges, like campaign spending. The fact is judicial elections are different. And I think some sensible accommodation can be made, and that the elective system can give us the best judges, just as the appointive system can give us the best judges. And I have to say when you look at the bench in the State of New York, women are doing okay. Not bad. You know, we did not do that well before. So before we scrap the elective system for something else, I think we have got to take a hard look. And I never thought I would say this thirty, forty years ago.

CHIEF JUSTICE PARIENTE: If anyone has not read *Minnesota v. White*, I urge you to. It is an important decision with significant implications, expanding what judges are permitted to say in judicial elections. I agree with Justice Toal. Lawyer advertising has done more in Florida to demean our legal profession. If you read the original *Bates* decision, the Supreme Court thought advertising would improve access for low income people. That was the motivation. Well, now it has just cheapened the profession in my humble view.

I think that the *Minnesota v. White* decision has the potential to really affect the fairness of elections and the impartiality of judges. In the states that have judicial elections for their highest court—Alabama, Michigan, West Virginia, Ohio—just read the advertisements. We have a battle of big money between the trial lawyers and the Chambers of Commerce, so at the highest level of the court I cannot agree with an elected judiciary

CHIEF JUDGE KAYE: And I agree with that. And, of course, in New York our highest court is an appointed court.

CHIEF JUSTICE PARIENTE: But of course, the appointing authority is also key. After *Bush v. Gore*, there was a very significant reaction from the legislative and executive branches. We had the Merit Selection System with an independent nominating commission. The Republican-dominated Legislature and Governor Bush changed the composition of the commission

so that all of the appointees are now approved by the governor. Before that, the Bar appointed three members, the Governor appointed three, and then there were three lay people. Thankfully, the quality of the candidates appointed under Governor Bush has been excellent. My two colleagues who were appointed by Governor Bush are wonderful, wonderful people and the Governor has made diverse appointments. But the potential for partisanship has increased.

But, if we are talking about independence, I daresay that Justice Poritz in New Jersey with life tenure feels a little bit comfortable when faced with a controversial decision. If you are asking philosophically what the better system is, I think that an appointive system is the better way to go to maximize the potential for independence. Now, for diversity issues, we could debate back and forth. In Florida, it has not been the case that there is much more chance to be appointed to the bench through the elective process than through the appointive process.

MS. BONNIE STEINGART: I know that I had said I was going to save some time for questions, but the clock says it is a quarter of, and our judges are going to be with us through lunch, and so what I would suggest is that we adjourn to the other side of the wall, and just have informal conversation. Please join me in thanking our guests. Thank you. You all were really terrific.

CHIEF JUSTICE TOAL: Thank you very much.

MS. BONNIE STEINGART: Thanks very much.

