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When Less is More: Changes to the New York Court of Appeals' Civil Jurisdiction

Luke Bierman*

*"The difficulty in life is the choice."*¹

I. Introduction

January 1, 1986, was Independence Day for the New York State Court of Appeals. On that date, New York's highest court gained almost total discretion over its civil docket through an amendment to the statutory provisions governing its appellate jurisdiction.² The court's mandatory civil caseload, largely dependent on disputes between or within lower courts, was essentially abandoned and replaced with a predominantly discretionary system of jurisdiction. This was no small accomplishment considering that as-of-right appeals constituted 75% of the court's civil caseload and approximately 60% of its total caseload.³

These new jurisdictional rules, enacted following extensive study,⁴ are designed to improve the court's efficiency.⁵ This sys-

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1. GEORGE MOORE, *THE BENDING OF THE BOW*.

2. 1985 N.Y. Laws 300.

3. In 1985, 418 of 568 civil appeals decided were as-of-right and 719 total appeals were decided. See 1986 ANN. REP. OF THE CLERK OF THE CT. TO THE JUDGES OF THE N.Y. ST. CT. OF APPEALS app. 5(A).

4. See, e.g., ROBERT MACCRATE ET AL., *APPELLATE JUSTICE IN NEW YORK* (1982).

5. See GOVERNOR'S MEMORANDUM, reprinted in 1985 N.Y. Laws 2.

tem of discretionary jurisdiction also insures that the Court of Appeals fulfills its role under the state constitution as a "law court," establishing policy on matters of state-wide importance, resolving questions of law, and settling conflicts in decisions among the state's four intermediate appellate courts.⁶ In short, the court, no longer burdened by hundreds of civil appeals perceived as legally insignificant, is free to concentrate on a select group of cases that raise important issues of law and public policy.⁷

This paper, an initial step of a larger project designed to provide a comprehensive consideration of the Court of Appeals, addresses some ramifications of the changes in the court's jurisdiction. Specifically, this paper will study characteristics of the court's decisions, such as rates of affirmance, unanimity and type of decision, i.e., opinion or memorandum. This examination will improve our understanding of the judicial decision-making process and enable us to view the Court of Appeals as an institution with a particular role in the prevailing legal and political structures and processes.

II. Need for Study — New York Court of Appeals

Scholarly attention to the Court of Appeals is conspicuously sparse, which is surprising considering the court's longstanding prominence as a common law court. As long ago as 1913, Learned Hand was willing to leave the United States District Court to serve as Chief Judge of the New York Court of Appeals, although the state's voters decided otherwise. Benjamin Cardozo's tenure on the court provided the basis for his recognition as the epitome of a common law jurist and subsequent appointment to the United States Supreme Court. Merryman's research on the sources of authority used by the California Supreme Court confirms that the New York Court of Appeals' decisions have long been considered influential on a national scale.⁸

6. *Id.*; N.Y. CIV. PRAC. L. & R. 5601 commentary at 197-98 (McKinney Supp. 1991); *id.* 5602 commentary at 206-07.

7. See GOVERNOR'S MEMORANDUM, *supra* note 5; N.Y. CIV. PRAC. L. & R. 5601 commentary at 197-98 (McKinney Supp. 1991); *id.* 5602 commentary at 206-07.

8. See John Henry Merryman, *Toward a Theory of Citations: An Empirical Study*

The paucity of scholarly attention to the Court of Appeals has not been overlooked by commentators. More than ten years ago, Galie noted a lack of scholarly attention to the Court of Appeals' criminal procedure and constitutional law decisions.⁹ More recently, Bonventre commented on the "curious" lack of attention given to the Court of Appeals in his area of concern, state constitutional adjudication.¹⁰ This same lack of scholarly effort applies to the court's role as an institution and its place in the judicial process.

Such scholarly neglect seems especially odd in light of the increased attention state supreme courts have received lately because of their substantive legal rulings and place in the nation's judicial system.¹¹ Indeed, the New York Court of Appeals has been at the forefront of the trend to reinvigorate state constitutional law, and its decisions on social, criminal and commercial matters are closely watched as bellwethers of national trends.¹² Its oversight of a complex judicial system, encompassing the nation's largest urban area and sparsely populated rural regions, is unique among state court administrative systems. Although researchers seem to have finally learned that the United States Supreme Court and other federal courts are not the only actors in the judicial process, they largely have missed the New York Court of Appeals notwithstanding recent efforts by Galie¹³ and Bonventre¹⁴ to reverse the situation. The time is appropriate for comprehensive consideration of the New York Court of Appeals and this paper is the first step in such an undertaking.

of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970, 50 S. CAL. L. REV. 381, 401-403 (1977); John Henry Merryman, *The Authority of Authority; What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 667, 668 (1954).

9. See Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFF. L. REV. 157, 159, 193 (1979).

10. See Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. LAW 31, 31 (1989).

11. See, e.g., CHARLES H. SHELDON, *A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT* (1988); G. ALAN TARR AND MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988); ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1988).

12. See *supra* note 10.

13. Peter J. Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role*, 4 EMERGING ISSUES ST. CONST. LAW 225 (1991).

14. Vincent Martin Bonventre, *Court of Appeals — State Constitutional Law Review*, 1990, 12 PACE L. REV. 1 (1991).

III. Indicators of Judicial Decision-Making

The 1986 jurisdictional change is an excellent point of departure for considering aspects of the Court of Appeals' decision-making process. Reviewing Court of Appeals decisions before and after the jurisdictional amendment provides an opportunity to assess whether civil appeals are treated differently by the court acting with its newly provided discretion in accepting cases for review.

Numerous factors are available to assess how a court goes about its business. Decisional characteristics, such as rates of affirmance, unanimity and type of decision, provide insight into the judicial process. Likewise, jurisdictional factors, such as the presence of a mandatory or discretionary caseload, offer opportunities to look at how a court works. Using these indicators for insight into the Court of Appeals' decision-making process is consistent with the well recognized proposition that the judicial decision-making process encompasses far more than a court's opinion and any resulting substantive legal analysis. It is appropriate, then, to consider some indicators in more detail.

A. *Decisional Characteristics*

From research on the United States Supreme Court and other courts, we have findings that bear on and substantiate the importance of decisional factors as indicators of judicial decision-making. For example, the manner of presentation to the court, whether by oral argument or only on written submissions, and the extent of questioning by judges are thought to affect the decision-making process.¹⁵ As lawyers have long appreciated, assignment of opinion writing can play a role in how judges resolve a case and how an opinion is written.¹⁶ In addition, existence of negotiation among judges for votes on particular cases or for

15. See, e.g., Stephen L. Wasby Et Al., *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. OF SPEECH 410 (1976); Steven A. Peterson et. al., *Patterns in Supreme Court Oral Argument* (1991) (unpublished paper presented at the 1991 Law and Society Association Meeting).

16. See, e.g., Sue Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments*, 74 JUDICATURE 66 (1990); Elliott E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 A. J. POL. SCI. 60 (1979); S. Sidney Ulmer, *The Use of Power in the Supreme Court: The Opinion Assignments of Earl Warren, 1953-1960*, 19 J. PUB. L. 49 (1970).

specific language in decisions now is widely acknowledged.¹⁷

Other matters scrutinized for insight into the judicial decision-making process include voting patterns, affirmance and reversal rates, and manner of publication of decisions. Identification of the rates of affirmances and reversals¹⁸ and the extent of unanimity on particular courts¹⁹ are well established as indicating how the decision-making process proceeds. Practices involving publication of decisions are also used in assessing the decision-making process. We have known for some time that the United States Courts of Appeals decide many cases without published opinion although the precise frequency varies by circuit.²⁰ Disagreement exists as to whether this common practice includes legally and politically significant cases.²¹ All the commentators, however, proceed from the general proposition that published decisions are considered more noteworthy or important than unpublished decisions. It seems safe, then, to postulate that the type of decision is an indicator of the judicial decision-making process.

Another matter considered to illuminate the judicial decision-making process is the extent to which an appellate court uses and refers to the opinion under review. It has been suggested that appellate court references to the lower court's opin-

17. See, e.g., WILLIAM H. REHNQUIST, *THE SUPREME COURT* 302 (1987); BERNARD SCHWARTZ, *SUPREME CHIEF, EARL WARREN AND HIS SUPREME COURT: A JUDICIAL BIOGRAPHY* 89-90 (1983).

18. See, e.g., J. WOODFORD HOWARD JR., *COURTS OF APPEAL IN THE FEDERAL JUDICIAL SYSTEM* 67-71 (1981); Burton Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, 24 L. & SOC. REV. 1 (1990); Jeffery A. Segal & Harold J. Spaeth, *Rehnquist Court Disposition of Lower Court Decisions: Affirmance not Reversal*, 74 JUDICATURE 84 (1990).

19. See, e.g., DORIS MARIE PROVIN, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 102, 154 (1980); Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471 (1977).

20. See, e.g., Daniel N. Hoffman, *Non-publication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); Philip Schuchman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value?"*, 29 EMORY L.J. 195 (1980); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 JUDICATURE 307 (1990).

21. Compare Hoffman, *supra* note 20; Reynolds & Richman, *supra* note 20 and Songer, *supra* note 20 with Schuchman & Gelfand, *supra* note 20.

ion may indicate the impact of the lower court's work on the appellate court's deliberations or satisfy the appellate court's need for legal rationalization for the result reached.²²

B. *Jurisdictional Factors*

Less often considered are the effects of jurisdictional factors on the judicial decision-making process. Casper and Posner's work on the United States Supreme Court's caseload summarizes how jurisdictional changes have affected the Court's workload and output.²³ It seems self evident that the number and type of cases that reach a court's docket necessarily affect the process and outcome. To be sure, then, appellate jurisdiction, whether mandatory or discretionary, affects the decision-making process. Mandatory jurisdiction can be seen to constrain a court, requiring it to decide cases in numbers and on issues it may not believe necessary to the efficient execution of its mandate or operation of the judicial system in which it participates. On the other hand, discretionary jurisdiction provides a court with the ability to use its docket to achieve objectives consistent with its agenda.

Among the few studies dealing with how jurisdictional factors affect appellate court work is an early article by Schubert, who used game theory to suggest that United States Supreme Court Justices' certiorari votes were strategically made to effect substantive outcomes.²⁴ Tanenhaus and his colleagues postulated that United States Supreme Court Justices base their certiorari decisions on cues and signals from lower court decisions and found correlations with such decisional characteristics as the party seeking review and subject matter.²⁵ Ulmer identified connections between a United States Supreme Court Justice's decisions on certiorari and the merits and showed that a Justice's vote on certiorari was a predictor of the Justice's vote on

22. See RICHARD J. RICHARDSON & KENNETH N. VINES, *THE POLITICS OF FEDERAL COURTS* 156-58 (1970).

23. See GERHARD CASPER & RICHARD POSNER, *THE WORKLOAD OF THE SUPREME COURT* 19-25 (1976).

24. See GLENDON SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* 210 (1959).

25. See Joseph Tanenhaus, et. al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, *JUDICIAL DECISION-MAKING* 111 (Glendon Schubert ed., 1963).

the merits.²⁶ Provine found United States Supreme Court Justices' certiorari votes to be a function of each Justice's perception of his and the Court's role. She was able to validate Ulmer's findings but found less substantiation for Tanenhaus' basic propositions concerning cue theory and actually refuted Schubert's theories.²⁷ Howard, in his work on the United States Courts of Appeals, reported that the Supreme Court's certiorari determinations were based more on policy objectives than resolving inter-circuit conflict.²⁸ More recently, Perry has undertaken extensive study of the United States Supreme Court and its certiorari practices to suggest that there is comparatively little bargaining and negotiating in that Court's decision-making process.²⁹

Research on other courts also reveals the use of jurisdictional concerns for indications about the decision-making process. Baum, in a study of the California Supreme Court, echoes Ulmer in finding that the California Justices reach similar conclusions on certiorari and the merits and suggesting that certiorari is favored in order to reverse lower court mistakes.³⁰ In further work on state supreme courts, Flango recently concluded that cue theory provided an insufficient explanation for case selection by the Georgia and Illinois Supreme Courts but that judicial perceptions concerning appellate review correlated to case selection.³¹

The works referred to in this section make evident that jurisdictional considerations and decisional characteristics are useful tools in assessing a court's decision-making process. Drawing on these analytical factors, this paper will compare characteristics of the New York Court of Appeals' decisions during two dis-

26. See S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision "On The Merits"*, 4 POLITY 429 (1972).

27. See PROVINE, *supra* note 19, at 76-82, 107-108, 162-172.

28. See HOWARD, *supra* note 18, at 66-71. See also Richardson & Vines, *supra* note 22, at 161.

29. See H.W. Perry, Jr., *Deciding to Decide in the U.S. Supreme Court: Bargaining, Accommodation, and Roses* (1986)(unpublished paper presented at 1986 American Political Science Association meeting).

30. See Lawrence Baum, *Decisions to Grant and Deny Hearings in the California Supreme Court: Patterns in Court and Individual Behavior*, 16 SANTA CLARA L. REV. 714, 743 (1976).

31. See Victor E. Flango, *Case Selection in the Georgia and Illinois Supreme Courts*, 12 JUST. SVS. J. 384 (1987).

crete time periods, one while the court's civil jurisdiction was largely mandatory and the other when the court operated under a largely discretionary system of jurisdiction. To better appreciate the parameters of this investigation, it is appropriate to describe the system of civil appeals in the New York state judicial system.

IV. Civil Appeals in New York

A. *New York State Court Structure*

In New York, civil lawsuits can be initiated in one of several trial courts, depending on the nature of the controversy and the amount in demand.³² The most routine and minor civil cases begin in the inferior trial courts, which include the Town, Village, City and District Courts outside New York City and the Civil Court in New York City.³³ Civil cases with larger monetary stakes or specific subject matter, such as family disputes, probate matters or claims against the state, are commenced in the superior trial courts.³⁴ These courts include the County, Family and Surrogate's Courts, as well as the Court of Claims and the Supreme Court, which is the trial court of general jurisdiction.³⁵

Civil appeals from the inferior courts outside New York City and its suburbs are brought before the County Court; civil appeals inside New York City and its suburbs are brought before the Appellate Term of the Supreme Court.³⁶ From there, along with initial review of civil cases from the superior trial courts and some administrative agencies, cases go to the Appellate Division of the Supreme Court.³⁷ This court has broad jurisdiction which includes as-of-right appeals from most intermediate orders and final judgments.³⁸

The Appellate Division is comprised of four geographically

32. See generally 1989 REP. OF CHIEF ADMIN. OF THE CTS., ST. OF N.Y. 1-2, 9 [hereinafter 1989 Report]. This general description is derived from the 1989 Report and constitutional and statutory provisions.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. N.Y. CIV. PRAC. L. & R. 5701 *et seq.* (McKinney 1983 & Supp. 1991).

disparate courts, identified by department.³⁹ The First and Second Departments encompass New York City and the metropolitan suburbs; the Third is located in upstate northeastern New York and the southern tier; and the Fourth covers central and western upstate New York.⁴⁰ The First and Second Departments traditionally have had much larger caseloads than the Third and Fourth Departments.⁴¹ Indeed, a task force appointed by the Governor and Chief Judge to consider the Appellate Division caseload unanimously concluded that "a caseload crisis of significant proportions exists in the Second Department."⁴² The Third Department, centered in Albany, the state capital, decides many cases involving the policies and operation of state government. The Fourth Department in the latter years of the 1980's endured a substantial caseload increase, consisting largely of drug cases in the metropolitan areas of Utica, Syracuse, Rochester and Buffalo. The courts vary in size from fifteen justices in the Second Department to nine in the Third Department and usually sit in panels of five, although the Second Department generally sits in panels of four.⁴³

Appeals from the Appellate Division are taken to the Court of Appeals, New York's highest court and final arbiter on matters of state law.⁴⁴ The court has seven judges appointed by the Governor for fourteen-year terms, although prior to 1978 the judges were elected.⁴⁵ As of January 1987, all of the court's seven judges had been appointed by Governor Mario M. Cuomo. Five judges constitute a quorum⁴⁶ and four judges must agree for a decision to be reached.⁴⁷ A constitutional provision allows the court to substitute a Supreme Court justice when a Court of Ap-

39. N.Y. CONST. art. VI, § 4(a) (McKinney 1987).

40. *Id.* §§ 4(a), 6(a).

41. See 1989 Report, *supra* note 32, at 26. In 1988, the First Department had 3,099 dispositions, the Second had 6,931, the Third had 1,386 and the Fourth had 1,809. *Id.*

42. Report of the Appellate Division Task Force, (hereinafter Task Force Report) November 8, 1990, at 1.

43. Task Force Report, *supra* note 42, at 5, 6. Recent efforts to appoint five additional justices to the Second Department to assist in resolving the caseload crisis have been unsuccessful. Gary Spencer, *Appointments of Five Appellate Justices Not Likely Soon*, N.Y.L.J., Oct. 9, 1991, at 1, col. 1.

44. N.Y. CONST. art. VI, § 3 (McKinney 1987).

45. N.Y. CONST. art. VI §2, former § 2 (c) (McKinney 1987).

46. N.Y. CONST. art. VI, § 2(a) (McKinney 1987).

47. *Id.*

peals judge is temporarily absent or unable to act.⁴⁸

Appeals to the Court of Appeals in criminal cases are available only by permission.⁴⁹ Only one application for criminal leave to appeal is available,⁵⁰ which can be made to the Chief Judge of the Court of Appeals who designates one of the seven judges of the court to decide it.⁵¹ Upon denial, reconsideration can be requested and the same judge will review the application.⁵² Alternatively, application can be made to a justice of the Appellate Division that decided the case.⁵³ This alternate procedure is most often invoked where an Appellate Division justice has dissented in the case.⁵⁴

In contrast, civil appeals are available as-of-right and by leave of the Court of Appeals or Appellate Division. Of-right appeals, which are statutorily prescribed, must be heard by the court.⁵⁵ Likewise, the court must hear a case in which the Appellate Division grants leave to appeal.⁵⁶ The technical procedures for seeking leave from the Appellate Division vary slightly among the Departments.⁵⁷ The Court of Appeals considers en banc those applications for leave to appeal; two votes are necessary for leave.⁵⁸ Applications for leave in civil cases, unlike those

48. *Id.*

49. N.Y. CRIM. PROC. LAW § 450.90(2) (McKinney 1983). Appeals as-of-right in capital cases are available, *id.*, at §§ 450.70, 450.80, but there currently are no capital crimes in New York. See *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984).

50. N.Y. COMP. CODES R. & REGS. tit. 22, § 500.10(a) (1989).

51. N.Y. CRIM. PROC. LAW § 460.20 (2)(a), (3)(b) (McKinney 1983); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.10(a) (1989).

52. N.Y. COMP. CODES R. & REGS. tit. 22, § 500.10(b) (1989).

53. N.Y. CRIM. PROC. LAW § 460.20(2)(a) (McKinney 1983). If the appeal is not from the Appellate Division but from a lower court sitting as an intermediate appellate court, application can only be made to a Court of Appeals judge. *Id.* § 460.20 (2)(b).

54. See Stuart M. Cohen, *Criminal Leave Applications to the Court of Appeals*, 62 N.Y. St. B.J. 28, 30 (1990).

55. N.Y. CIV. PRAC. L. & R. 5601 (McKinney 1983 & Supp. 1991). The court retains authority to ensure that an appeal meets the as-of-right requirements and can refuse to hear an appeal as-of-right if it determines that the requirements have not been satisfied. See, e.g., *Matter of Tollman v. State*, 77 N.Y.2d 988, 571 N.Y.S.2d 911, 575 N.E.2d 397 (1991).

56. N.Y. CIV. PRAC. L. & R. 5602(a) (McKinney Supp. 1991).

57. See, e.g., *id.*; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 600.14(b) (1989) (First Department), 670.6(c) (1987) (Second Department), 800.2(a) (1987) (Third Department), 1000.2(a)(1) (1988) (Fourth Department).

58. N.Y. CIV. PRAC. L. & R. 5602(a) (McKinney Supp. 1991). This statutory require-

in criminal cases, can first be sought from the Appellate Division.⁵⁹ If unsuccessful, leave can be sought from the Court of Appeals.⁶⁰ However, if first denied by the Court of Appeals, leave cannot be sought from the Appellate Division.⁶¹

The court disposes of most appeals in three ways — by affirming, modifying or reversing — and issues two types of decisions — opinions and memoranda. Opinions are generally perceived as more important than memoranda. Opinions, with the judicial author identified, generally are more extensive and are prominently located in the front of each volume of the official New York Reports. Memoranda, issued by the court without identification of an author, are summary in format and may explicitly adopt the reasoning of the lower court's decision or that of a dissenter below. With this general design of the state court structure, an explanation of the Court of Appeals' civil jurisdiction before and after the 1986 change is appropriate.

B. *Court of Appeals' Civil Jurisdiction — Before and After*

The New York Constitution provides a foundation for the civil jurisdiction of the Court of Appeals.⁶² Generally, the Court of Appeals receives its civil caseload from the Appellate Division and the civil portion of the court's docket predominates.⁶³ In 1985, 568 of 719 cases were civil, constituting almost 80%,⁶⁴ and in 1989, after the 1986 amendment awarding the court almost total discretion over its civil docket, 192 of 295 cases, 65%, were civil.⁶⁵

Prior to the jurisdictional change, an appeal as-of-right to

ment, effective January 1, 1986, 1985 N.Y. Laws 300, § 2, apparently codified existing practice. See *supra* 5602 commentary at 207.

59. N.Y. CIV. PRAC. L. & R. 5602(a) (McKinney Supp. 1991)

60. *Id.*

61. *Id.*

62. N.Y. CONST. art. VI, § 3 (McKinney 1987).

63. The court's jurisdiction is quite technical and has been subject to extensive interpretation over the years. The leading commentary in this area remains HENRY COHEN & ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* (1951). For purposes of this paper, some of the descriptions of the technical requirements have been simplified somewhat.

64. 1989 ANN. REP. OF THE CLERK OF THE CT. TO THE JUDGES OF THE N.Y. ST. CT. OF APPEALS app. 5(A),(B) [hereinafter 1989 Annual Report].

65. *Id.*

the Court of Appeals in a civil case was available in several categories of cases. The most common category was when the Appellate Division made a final determination in a case initiated in a superior trial court or administrative agency and there was a dissent on a question of law in favor of the appellant, a substantial modification, or a reversal.⁶⁶ Appeals as-of-right also were available when the Appellate Division made a final determination directly involving a state or federal constitutional question⁶⁷ or when a court or administrative agency made a final determination in a case which had been remanded by the Appellate Division for further proceedings, and could not then be appealed to the Court of Appeals because the decision lacked finality.⁶⁸ Cases in these latter categories were less frequent than those formerly described. Appeals as-of-right were also available in other very limited situations,⁶⁹ but rarely occurred.

In all other cases, under the rules prevailing before January 1, 1986, permission, or leave-to-appeal, was required for a civil appeal to the Court of Appeals. Where the Appellate Division made a final determination not appealable as-of-right and the case originated in a superior trial court or administrative agency, leave was available from either the Appellate Division or Court of Appeals.⁷⁰ Leave-to-appeal was available only from the Appellate Division where that court made a non-final determination⁷¹ or where the case originated in an inferior court.⁷² Leave was also available in certain other limited, rarely encountered, circumstances.⁷³

66. N.Y. CIV. PRAC. L. & R. 5601 former (a) (McKinney 1983) (repealed 1985).

67. *Id.* 5601(b)(1).

68. *Id.* 5601(d) (McKinney Supp. 1991).

69. *Id.* 5601(b)(2), (c) (McKinney 1983). Subsection (b)(2) allows a direct appeal to the Court of Appeals where there is a final judgment in a court of original instance and the only issue is the constitutional validity of federal or New York statutes. *Id.* 5601(b)(2). The constitutional issue must be substantial. *Gerzof v. Gulotta*, 40 N.Y.2d 825, 355 N.E.2d 797, 387 N.Y.S.2d 568 (1976). Subsection (c) allows a direct appeal from an order granting a new trial or affirming the grant of a new trial if the appellant stipulates that "upon affirmance, judgment absolute shall be entered against him." See N.Y. CIV. PRAC. L. & R. 5601 commentary at 490-499.

70. *Id.* 5602(a)(1)(i) (McKinney Supp. 1991).

71. *Id.* 5602(b)(1) (McKinney 1983).

72. *Id.* 5602(b)(2).

73. Leave was available from the Appellate Division or Court of Appeals where an appeal was sought from a final judgment of a superior trial court or a final determination

Effective with appeals taken on and after January 1, 1986,⁷⁴ the New York Legislature amended the Court of Appeals' civil jurisdiction to provide that court with a large degree of discretion over its civil docket. No longer is a mandatory appeal available where a single Appellate Division justice dissents or the Appellate Division reverses or modifies. Rather, an appeal as-of-right can be taken where the Appellate Division makes a final determination in a case initiated in a superior trial court or administrative agency and two Appellate Division justices dissent on a question of law in favor of the appellant.⁷⁵ The amendment did not affect the availability of appeals as-of-right in those other circumstances where an appeal as-of-right previously was allowed.⁷⁶

With the jurisdictional changes to mandatory appeals came changes in the rules concerning appeals by permission. Leave-to-appeal now exists in a broader range of civil cases. For example, leave is available from the Appellate Division or Court of Appeals where the Appellate Division makes a final decision not appealable as-of-right (e.g., without two dissents or a substantial constitutional question) if the case originates in a superior trial court or administrative agency. Leave-to-appeal is available only from the Appellate Division where that court makes a non-final determination or where the case arises in an inferior court, as under the former jurisdictional provisions.⁷⁷ The availability of leave in the other rarely encountered circumstances remains the same.⁷⁸

Because the court's criminal jurisdiction has long been es-

of an administrative agency where the final action was necessarily affected by a prior Appellate Division order which was not appealable as-of-right. N.Y. CIV. PRAC. L. & R. 5602 (a)(1)(ii) (McKinney Supp. 1991). The same courts could grant leave from a non-final Appellate Division order in proceedings against public bodies or officers unless the order granted or affirmed the grant of a new trial or hearing in which case only the Court of Appeals could grant leave. *Id.* 5602 (a)(2) (McKinney 1983).

74. 1985 N.Y. Laws 300, § 3.

75. N.Y. CIV. PRAC. L. & R. 5601(a) (McKinney Supp. 1991).

76. See *supra* notes 67-69. N.Y. CIV. PROC. L. & R. 5601(d) (concerning appeals as-of-right of prior non-final Appellate Division orders) has been amended to include cases originating in arbitration. 1986 N.Y. Laws 316, § 1.

77. See *supra* notes 71-72.

78. See *supra* note 73. N.Y. CIV. PRAC. L. & R. 5601(a)(1) (concerning appeals by leave of the Appellate Division or the Court of Appeals) has been amended to include cases originating in arbitration. 1986 N.Y. Laws 316, § 2.

entially discretionary,⁷⁹ the change in the civil docket means that the court has become essentially a certiorari court. That the jurisdictional amendment achieved its desired aim is evident from 1989 statistics showing 73% of the court's civil appellate caseload arising from permission.⁸⁰ It is clear that under the new jurisdictional scheme, civil appeals as-of-right have been sharply curtailed. Having described the basic environment in which the Court of Appeals operates, we now turn to the parameters of this study.

V. Scope of this Study

A. Areas of Inquiry

While it is clear that the jurisdictional amendment provides the Court of Appeals with certiorari-like jurisdiction, it is less clear whether the amendment and resulting changes in caseload composition affect the manner in which civil appeals are treated by the court. Although the jurisdictional changes may have produced more permissive appeals, there may be differences in the rates at which the Court of Appeals and the Appellate Division grant leave. One might also surmise that after the jurisdictional changes, the decisional characteristics of the court's output would change. For example, if the court is more selective in assembling its docket based on a case's perceived importance, one might expect the court to use opinions, as opposed to memoranda, more frequently. Also, consistent with Baum's finding that the California Supreme Court intervenes to reverse its intermediate appellate courts' decisions,⁸¹ one would expect a higher percentage of reversals — since the Court of Appeals now has permissive review of those cases reversed or modified by the Appellate Division — when the latter court exercises its error correction function. As Halpern & Vines expected for United

79. N.Y. CRIM. PROC. LAW § 450.90 (McKinney 1983). See also Cohen, *supra* note 54, at 31.

80. In 1989, 141 of 192 civil appeals were by leave of either the Court of Appeals or the Appellate Division. See 1989 Annual Report, *supra* note 64.

81. See Baum, *supra* note 30, at 743. Baum described this approach as a monitor policy: "[w]here a majority of the justices tentatively disagree with the court of appeals decision in a case . . . the supreme court is strongly inclined to accept [that] case." *Id.*

States Supreme Court certiorari patterns,⁸² there might also be fewer unanimous decisions since important public policy issues, those likely to be found in the cases chosen by the court to decide, breed divisiveness, unlike mandatory appeals involving relatively well settled legal principles.

Other projections can be made. One might see the Court of Appeals explicitly relying on lower court decisions less frequently. Now the cases the court chooses to hear are seen as important enough to demand that the state's highest court speak on the issues raised. With the jurisdictional change removing one-dissent appeals from the court's mandatory review so that the court now must affirmatively place them on its docket, one might see more reversals in these kinds of cases.⁸³ With two-dissent cases receiving mandatory review, we should be sensitive to the possibility of changes in the voting patterns of Appellate Division justices or the treatment by Court of Appeals judges of cases with intra-Appellate Division dispute.

To examine these propositions, this study will focus on the characteristics of the Court of Appeals' decisions in different jurisdictional categories before and after the amendment. Specifically, the following questions will be addressed:

- * whether the composition of the Court of Appeals' civil docket has changed with regard to the number of as-of-right cases, Court of Appeals leave-granted cases and Appellate Division leave-granted cases subsequent to the amendment?;

- * whether the Court of Appeals' rates of affirmance, unanimity, decision type and adoption of reasoning below in Appellate Division two-dissent cases are different now than before the amendment?;

- * whether the Court of Appeals' rates of affirmance, unanimity, decision type and adoption of reasoning below in Appellate Division one-dissent cases are different now than before the amendment?; and

- * whether the Court of Appeals' rates of affirmance, unanimity, decision type and adoption of reasoning below in appeal as-of-right cases, Court of Appeals leave granted cases, and Appellate Division leave granted cases are different, both before and after

82. See Halpern & Vines, *supra* note 19, at 475. The authors concluded: "We were wrong." *Id.*

83. See *supra* note 75.

the amendment.

As is evident from these research questions, this study's focus is confined to Court of Appeals decisions and is not intended to consider questions related to access to the court. Likewise, this study will not analyze differences in the Court of Appeals' treatment of the four Appellate Division courts. Having set forth this study's areas of inquiry, we turn now to the methodology used in conducting this analysis.

B. *Methodology*

To conduct this study, all decisions of the Court of Appeals issued during the 1980-1981, 1981-1982, 1987-1988 and 1988-1989 court terms were examined.⁸⁴ Included for analysis were all cases decided by the court acting pursuant to its civil appellate jurisdiction.⁸⁵ Excluded were two types of cases that diverged from the court's usual processes — election cases, usually heard outside of regularly scheduled terms of court and in an expedited fashion,⁸⁶ and a few cases argued during one court term but decided in the following term.⁸⁷ For each decision, data was recorded on the jurisdictional predicate (e.g., constitutional question, dissent, etc.), disposition (e.g., affirmance, modification or reversal), and decision type (e.g., opinion or memorandum) and vote.⁸⁸ Each case was cross referenced to its decision in the Appellate Division and data from that court's resolution of the case, such as vote, disposition and decision type, were collected.

84. These decisions are reprinted in the official New York Reports, Second Series. Although the court's term technically is the calendar year, I chose to use a term beginning in September, when the court traditionally returns from summer recess, because of the continuity in hearing and deciding cases afforded. The term of the United States Supreme Court provides a comparable example.

85. In addition to its civil appellate jurisdiction, the Court of Appeals has other civil jurisdiction, such as original jurisdiction to review judicial disciplinary rulings and jurisdiction to entertain questions certified from federal courts. See N.Y. CONST. art. VI, §§ 3, 22 (McKinney 1987).

86. There were twenty election cases in the 1980-81 court term, twelve in the 1981-82, two in the 1987-1988 court term and three in the 1988-1989 court term.

87. For example, the study did not include cases argued during the 1986-87 term and decided during the 1987-88 term. There was one case decided in 1981-82 from an earlier term and two in 1987-88.

88. For purposes of this study, the concurrence of individual judges in a disposition, even on different grounds with a separate writing, was treated as an unanimous decision.

Court terms were selected for this study because the intended comparative analysis required time periods before and after the jurisdictional amendment. During each specified time period, before and after the change in jurisdictional rule, the Court of Appeals' membership did not change.⁸⁹ This minimizes the possibility that changes in the court's personnel could explain any changes in court action. Because the court's membership had been stable for more than six months prior to the periods examined, the possibility that a new member's socialization period affected the decisional process was minimized. To control further for variation in membership, those few cases in which Supreme Court justices were substituted for Court of Appeals judges in accordance with a constitutional provision were excluded.⁹⁰

Generally, in civil appeals, about one year elapses from disposition in the Appellate Division to disposition in the Court of Appeals. Accordingly, cases appealed to the Court of Appeals under the post-January 1, 1986 jurisdictional rules were likely to have reached the Court of Appeals and have been decided in 1987. This made the 1987-88 court term an appropriate starting point for the post-jurisdictional-change period. The 1987-88 and 1988-89 court terms were also the most recent ones for which complete data were available in the official reports at the time this study was conducted. These terms were also sufficiently beyond the effective date of the amendment so that the effect of any transitional period between the different jurisdictional schemes was likely to be absent or at least limited. Those few cases decided by the court after the amendment which were governed by the rules in place before the amendment were also

89. During 1980-81 and 1981-82, the seven judges of the Court of Appeals, with the year their service commenced and the method of their selection, were Chief Judge Lawrence H. Cooke (1979, appointed) and Associate Judges Matthew J. Jasen (1968, elected), Dominick L. Gabrielli (1973, elected), Hugh R. Jones (1973, elected), Sol Wachtler (1973, elected), Jacob D. Fuchsberg (1975, elected) and Bernard S. Meyer (1979, appointed). During the 1987-88 and 1988-89 terms, the seven judges, all appointed by Governor Cuomo, see *supra* note 45 and accompanying text, and their year of appointment, were Chief Judge Sol Wachtler (1985) and Associate Judges Richard D. Simons (1983), Judith S. Kaye (1983), Fritz W. Alexander, II (1985), Vito J. Titone (1985), Stewart F. Hancock, Jr. (1986) and Joseph W. Bellacosa (1987).

90. See *supra* note 48. There were 13 cases with substituted judges in 1987-88 and five in 1988-89.

excluded.⁹¹

VI. An Overview of the Court of Appeals' Work — Before and After

We begin the examination of the Court of Appeals' work, before and after the jurisdictional change, with an overview of the data showing the way civil cases decided by the court reached its docket and the decisional characteristics of those cases. After this general review, we can proceed to a more detailed analysis of the data.

Perhaps the most obvious change after the jurisdictional amendment is one already alluded to: a significant reduction in the number of civil appeals decided by the Court of Appeals.⁹² The court's civil caseload dropped by more than half: from 470 and 551 civil appeals during 1980-81 and 1981-82, to 206 and 180 in 1987-88 and 1988-89, respectively.⁹³ With this change came another obvious one, also previously noted — approximately three-quarters of the court's civil caseload now reaches the court by leave rather than as-of-right.⁹⁴ Some three-quarters of the civil docket consisted of as-of-right appeals before the amendment as compared to about one-quarter after the amendment.⁹⁵

The percentage of civil appeals arising by leave of the Appellate Division has more than doubled after the jurisdictional change.⁹⁶ Further, the rate of appeals by leave of the Court of Appeals as a percentage of total appeals by leave has increased markedly, whereas appeals by leave of the Appellate Division as a percentage of total appeals by leave decreased after the change.⁹⁷ The increased role of the Court of Appeals in choosing its civil caseload is evident.

The study shows that the percentage of civil cases with one Appellate Division justice dissenting decided by the Court of Appeals has decreased while the percentage of cases with two

91. There was one case decided in 1987-88 under prior law and two in 1988-89.

92. See Table A.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. See Table B.

Appellate Division justices dissenting has increased.⁹⁸ These changes, along with the increased percentage of cases in which the Appellate Division granted leave-to-appeal after the amendment,⁹⁹ suggest that the Appellate Division justices may be altering their manner of judicial decision-making to compensate for the diminished opportunities for as-of-right review by the Court of Appeals.

During the terms studied the court consistently affirmed about two-thirds of its civil appeals.¹⁰⁰ There is only a slight decrease in the rate of affirmance after the jurisdictional change,¹⁰¹ but not the substantial change that might have been expected from the increased opportunity for reversals and modifications after the court gained control of its docket. Likewise, the court seemed to take a common view of civil cases as there was a consistently high rate of unanimity before and after the amendment.¹⁰²

An obvious change, however, is apparent from the increase in the percentage of cases decided by opinion rather than memorandum after the jurisdictional change.¹⁰³ This result suggests that having control over its civil docket allows the court to concentrate on cases it perceives as significant. This proposition finds support in the court's decreased tendency to rely on the reasoning of the Appellate Division and instead provide its own explanation for its decision.¹⁰⁴ This development presents the possibility that the Court of Appeals has relinquished much of its authority to ensure correct resolution of civil cases to the Appellate Division, which now often operates as the sole appellate tribunal and ultimate arbiter. With these broad observations in mind, it is appropriate to turn to a more detailed assessment of how the court does its work.

98. See Tables C and D.

99. See Table A.

100. See Table E.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (data on court's reliance on the Appellate Division).

VII. Access

A. *By Leave or As-of-Right*

Grouping civil cases by jurisdictional predicate graphically illustrates the extent of the change in the manner by which civil cases reach the Court of Appeals after the jurisdictional amendment.¹⁰⁵ Prior to the amendment, about 80% of the court's civil caseload arose as-of-right, whereas after the amendment the percentage of cases arising as-of-right were 20% in 1987-88 and 28% in 1988-89.¹⁰⁶ The Court of Appeals exercised discretion in assembling its civil docket in the terms after the amendment, as evidenced by the court's granting leave-to-appeal in 64% and 46% of the civil cases heard in the 1987-88 and 1988-89 terms respectively, as compared to only 8% and 11% in the 1980-81 and 1981-82 terms respectively.¹⁰⁷ But the substantial decrease in the civil caseload after the amendment reveals that the court has failed to satisfy the expectations of some commentators, who thought the court would grant leave to worthy cases after the amendment in numbers equal to the now-displaced "as-of-right" cases.¹⁰⁸ For example, in 1981-82, there were 551 total civil appeals; this number decreased to 180 in 1988-89.¹⁰⁹

This suggests that the Court of Appeals has a definite vision of its role after the amendment and is actively working to accomplish its goal. The court's refusal to accept more cases for review after the amendment manifests its intent to make the Appellate Division the court of last resort in most cases, thereby limiting its place to the ultimate arbiter of important cases dealing with significant legal, social or political issues. This role mirrors that of the United States Supreme Court as described by Howard¹¹⁰ and Richardson and Vines.¹¹¹ They argue that the nation's highest court is more of a policy organ than an appellate court, and is content to allow the United States Courts of Appeals to function as the sole appellate courts for most

105. See Table A.

106. *Id.*

107. *Id.*

108. See *supra* note 6.

109. See Table A.

110. See HOWARD, *supra* note 18.

111. See RICHARDSON & VINES, *supra* note 22.

litigants.¹¹²

This hypothesis reveals much about the nature of appellate justice in the New York court system. As the highest court in the state, the Court of Appeals had long been the ultimate arbiter of individual cases, not just important issues. The court's caseload before the amendment, when as-of-right appeals dominated its civil docket, required it to ensure that proper law was applied by trial and lower appellate courts in many legally insignificant cases. This provided a multi-level appeal process, at least where the lower courts had split either through reversal, modification or dissent at an intermediate appellate level. The Court of Appeals' failure to accept more civil cases after the jurisdictional amendment prevents it from performing the review function in most cases. Thus, litigants now are much less likely to receive further judicial review.

The decreased likelihood of review in the Court of Appeals is obvious when one compares that court's decreasing caseload to the Appellate Division's increasing caseload.¹¹³ This development reflects the Court of Appeals' tacit endorsement of a single level of appellate review and the increased importance of the Appellate Division as the ultimate arbiter in most cases.¹¹⁴ This stands in marked contrast to the system before the amendment and mirrors the federal appellate system as illustrated by How-

112. See HOWARD, *supra* note 18, at 76; RICHARDSON & VINES, *supra* note 22, at 161.

113. In 1981 the Court of Appeals decided 706 appeals while the Appellate Division had 9,255 dispositions. See 1982 REP. OF CHIEF ADMIN. OF THE CTS., ST. OF N.Y. at 39, 40. In 1988, the number of appeals decided by the Court of Appeals decreased to 369 while the number of Appellate Division dispositions increased to 13,225. See 1989 Report, *supra* note 32, at 25-26. Caution is urged in comparing the statistics shown because they are of different categories for the different courts. Nonetheless, the contrasting direction of the respective courts' caseloads is apparent.

114. In *People v. Bleakley*, 69 N.Y.2d 490, 508 N.E.2d 672, 515 N.Y.S.2d 761 (1987), the Court of Appeals explained:

Unlike this court which, with few exceptions, passes on only questions of law, intermediate appellate courts are empowered to review questions of law and questions of fact. They do so in both civil cases and criminal cases. Indeed, this unique factual review power is the linchpin of our constitutional and statutory design intended to afford each litigant at least one appellate review of the facts.

Id. at 493-94 (citations omitted).

The court's apparent acceptance, by not taking more civil cases for its review, of a single level of appellate review in almost all civil cases can be seen as further evidenced by the quoted passage.

ard¹¹⁵ and Richardson and Vines.¹¹⁶

However, the extent, or even any effects, of the change may be tempered by another development. In the terms prior to the amendment, the Appellate Division granted leave-to-appeal in cases constituting just over 10% of the Court of Appeals' civil caseload.¹¹⁷ In the terms after the amendment, this rate increased and in the 1988-89 term had reached 26%.¹¹⁸ Several dynamics may be at work. These terms may represent a transition period when the courts were searching to find their proper roles under the new jurisdictional system. Alternatively, the Appellate Division may be consciously granting leave to appeal in proportionately more cases because of increasing caseloads or to compensate for the diminished availability of appeals as-of-right. This latter possibility would explain the increasing percentage of cases in which the Appellate Division granted leave during the terms after the amendment.¹¹⁹

The increase in the percentage of Appellate Division leave-granted cases suggests that the Appellate Division may be granting leave-to-appeal in cases where appeals as-of-right previously existed but are no longer available.¹²⁰ As the Appellate Division observed the Court of Appeals' total caseload and number and percentage of as-of-right appeals dwindle over the years, it may have begun to grant leave-to-appeal more frequently in an effort to maintain the status quo ante. Approximately 50% of the cases in which the Appellate Division granted leave-to-appeal in the terms after the amendment would have been appealable as-of-right before the amendment but not after.¹²¹

Changes in the Appellate Division's decision-making process can affect the Court of Appeals' decision-making process. Although a case reaching the Court of Appeals by leave of the Appellate Division is permissive from the perspective of the litigants and attorneys, it is mandatory for the Court of Appeals.

115. See HOWARD, *supra* note 18, at 76.

116. See RICHARDSON & VINES, *supra* note 22, at 161.

117. See Table A.

118. *Id.*

119. *Id.*

120. Such as where the Appellate Division reversed or modified or a single Appellate Division justice dissented.

121. See Table F.

To this extent, an increase in the percentage of cases in which the Appellate Division grants leave acts to counter the Court of Appeals' discretion in choosing its caseload. This is precisely what occurred between 1987-88 and 1988-89 when the percentage of cases reaching the Court of Appeals by that court's leave decreased while the percentage of Appellate Division leave cases increased.¹²² Moreover, of all appeals heard by leave in the terms after the amendment, the percentage of Court of Appeals leave-granted cases decreased while Appellate Division leave-granted cases increased.¹²³ These facts could evidence a conscious effort by the Court of Appeals to maintain its civil caseload within a specific range. If true, the court's ability to direct or influence development of the law and its status as a policy organ will be affected. Changes by the Appellate Division in response to the jurisdictional amendment warrant careful attention considering their ramifications on the Court of Appeals.

B. *Appellate Division Dissents*

Prior to the jurisdictional amendment, the dissent of one Appellate Division justice in a civil case provided grounds for an appeal as-of-right to the Court of Appeals, whereas after the amendment the dissent of two Appellate Division justices was required.¹²⁴ Based on this change, the presence and type of Appellate Division dissent has had definite implications on the Court of Appeals' work. After the amendment there was a significant reduction in the rate of as-of-right appeals on the court's civil docket.¹²⁵

There has been little change in the rate at which appeals with dissents in the Appellate Division appear on the Court of Appeals' civil docket.¹²⁶ Similarly, the rate of appeals predicated on Appellate Division dissent — that is, with the requisite number of Appellate Division justices dissenting for an appeal

122. See Table A.

123. See Table B.

124. See *supra* notes 66, 75 and accompanying text.

125. See Table A. In 1980-81, 80% of the civil caseload consisted of appeals as-of-right. In 1988-89, only 28% of the civil caseload consisted of appeals as-of-right.

126. See Table G. The rate of cases on the Court of Appeals' civil docket where there was any Appellate Division dissent was within 4 percentage points of 30% during each term before and after the amendment.

as-of-right — on the court's civil docket has remained relatively constant, within four percentage points of 17% for the terms before and after the jurisdictional change.¹²⁷ In the absence of any dramatic change in cases where Appellate Division dissent was present in an appeal reaching the Court of Appeals and where Appellate Division dissent compels the Court of Appeals to take the appeal, the jurisdictional amendment may be seen as having little or no effect.

These similarities may only mask more subtle changes. In the terms after the amendment, when a single dissent no longer provided an appeal as-of-right, the proportion of one dissent cases of the Court of Appeals' caseload decreased by about one-half.¹²⁸ This suggests that a single dissent alone was not perceived as sufficient reason for the Court of Appeals to grant leave. Indeed in 1988-89, of nineteen one-dissent cases decided by the Court of Appeals, only three reached the court by its permission; whereas in 1987-88, thirteen of twenty-three one-dissent cases reached the court in that manner.¹²⁹ The larger number of one dissent cases with leave granted by the Court of Appeals in 1987-88 may be attributable to a transition period as the court was becoming acquainted with the new jurisdictional rules, or to some other aspect of the particular cases involved such as the court's perception of their significance.

After the amendment the rate at which cases with two Appellate Division justices dissenting appeared on the court's civil docket changed. Before the amendment, this rate was 14% and 11% in 1980-81 and 1981-82 respectively; whereas after the amendment the rate rose to 16% in 1987-88 and to 27% in 1988-89.¹³⁰ Moreover, following the amendment, of the appeals with Appellate Division dissent heard by the Court of Appeals, it is considerably more likely that these appeals will have had two Appellate Division justices dissenting.¹³¹ Of the two-dissent

127. *Id.*

128. See Table C. In 1980-81 and 1981-82, 20% and 17% respectively of the appeals were one-dissent cases. In 1987-88 and 1988-89, only 11% of the appeals were one-dissent cases.

129. See Table H.

130. See Table C.

131. See Table D. In 1988-89, 72% of the appeals with Appellate Division dissent had two Appellate Division justices dissenting, as compared to 41% in 1980-81. It should

cases on the Court of Appeals' civil docket during the two terms after the amendment, about 10% in 1987-88 and 25% in 1988-89 were based on Appellate Division leave.¹³²

These data tend to confirm that Appellate Division justices may be adjusting their votes to accommodate for the two dissent rule; a phenomenon possibly explaining increases in the rate of Appellate Division leave-granted cases after the amendment. Although the increased rate of two-dissent cases must be considered against the relatively consistent rate of appeals predicated on Appellate Division dissent, logic suggests that for the rate of appeals predicated on an Appellate Division dissent to have remained constant in light of the jurisdictional amendment, the rate of two-dissent cases would have had to increase. Change in the voting practices of Appellate Division justices remains a plausible explanation for the observed changes.¹³³

Having examined changes in the Court of Appeals' civil caseload after the amendment from the perspective of access, it is now appropriate to consider these projections from the perspective of the court's output-the decisional characteristics of its written decisions.

VIII. Decisional Characteristics

A. *Generally*

In the terms prior to the amendment, the Court of Appeals affirmed about two-thirds of its civil caseload.¹³⁴ In the terms after the amendment, the affirmance rate decreased to just over 60%, and the combined rates of reversal and modification in-

be remembered that merely having two dissents does not guarantee an appeal as-of-right; the dissents must be on the law and the case must have met the finality requirement. Absent these requirements, the case may nonetheless reach the Court of Appeals as-of-right (e.g., constitutional question) or with leave.

132. See Table I.

133. Considering this possibility, it is noteworthy that at least one Appellate Division justice has called for the elimination of appeals as-of-right based on a double dissent at the Appellate Division so as to make the Court of Appeals "a True Certiorari Court." William C. Thompson, *Streamlining the Appellate Process*, N.Y.L.J., March 7, 1991, at 2, col. 3. So long as the Appellate Division retains authority to grant leave-to-appeal in a civil case, elimination of the double dissent rule would provide only illusory relief.

134. See Table E.

creased slightly.¹³⁵ This suggests that the court is slightly more likely to reverse or modify under the current discretionary jurisdictional plan than under the previous mandatory jurisdictional scheme. But considering the dramatic shift from as-of-right appeals to permissive appeals in the terms after the amendment,¹³⁶ it is surprising that there is only a slight decrease in the affirmance rate after the amendment.¹³⁷ This development would support the view that the Court of Appeals is more interested in speaking on particular issues than correcting lower courts.

The court also appears to have achieved consensus in civil cases as its unanimity rate hovered between 82% and 90% over the terms studied.¹³⁸ This high rate of unanimity is even more pronounced if cases with one Court of Appeals judge dissenting are combined with unanimous cases due to the limited dispute generally engendered by these kinds of cases.¹³⁹ These limited-dissent cases constituted 87% and 92% of the total for terms before and after the amendment.¹⁴⁰

These high rates of unanimity provide an interesting point of departure to test findings such as those by Provine, who attributed high rates of unanimity in decisions to grant or deny review to common role perceptions.¹⁴¹ Judges may act in certain ways regardless of their selection method or may be saving their disputes for criminal cases. What is apparent, though, is that the court's consistently high rate of unanimity stands in marked contrast to the findings of Halpern and Vines, who identified a long term trend toward increased divisiveness on the United States Supreme Court following the passage of legislation providing the Court with much discretion over its caseload.¹⁴²

There does seem to be a substantial change in the type of decision utilized by the Court of Appeals after the amendment. In the terms prior to the amendment, the court used opinions

135. *Id.*

136. *See* Table A.

137. *See* Table E.

138. *Id.*

139. *See* Table J.

140. *Id.*

141. *See* PROVINE, *supra* note 19, at 174-75.

142. *See* Halpern & Vines, *supra* note 19, at 483.

for about 25% of its civil cases.¹⁴³ In the terms after the amendment, the use of opinions rose to over 50% in 1987-88 before declining to about 40% in 1988-89.¹⁴⁴ The increased rate of opinions may reflect greater importance attached by the court to those cases it selects to review under the new jurisdictional scheme. This proposition is supported by the decreased rate of opinions in 1988-89,¹⁴⁵ a term when the proportion of Court of Appeals leave-granted cases on the court's docket decreased.¹⁴⁶ The court might have considered as-of-right cases on its civil docket less important and thus less worthy of a opinion. The increased rate of opinions may also reflect an increased amount of time available to the judges to write opinion quality decisions as the total civil caseload decreased. Regardless, it remains evident that the court has begun concentrating its efforts on opinions rather than memoranda.

The possibility that the increase in use of opinions by the Court of Appeals reflects the increased importance it places on its discretionary caseload finds additional support in the decreasing rate at which the court has expressly relied on the reasoning of the Appellate Division.¹⁴⁷ In the terms prior to the amendment, the court decided a case with express reliance on an Appellate Division decision 30% of the time.¹⁴⁸ In 1987-88, this rate dropped to 11% only to rebound to 20% in 1988-89, still well below the rates before the jurisdictional change.¹⁴⁹

The court's failure to rely on the reasoning of a lower court decision could reflect the importance attached by the Court of Appeals to the matters raised in a case. The substantial drop in express reliance on lower courts' decisions in 1987-88¹⁵⁰ might well reflect the fact that the Court of Appeals is exercising its increased discretion in choosing important cases to decide. The

143. See Table E.

144. *Id.*

145. *Id.*

146. See Table A.

147. See Table E. It should be remembered that the Court of Appeals may affirm for the reasons stated in the Appellate Division decision and reverse or modify for the reasons stated in an Appellate Division justice's dissent.

148. *Id.*

149. *Id.*

150. *Id.*

rebound in express reliance observed in 1988-89¹⁵¹ may reflect a phenomenon already touched upon — a decrease in Court of Appeals leave-granted cases with the corresponding increase in Appellate Division leave-granted and as-of-right cases between the 1987-88 and 1988-89 terms.¹⁵² These latter kinds of cases may be viewed by the Court of Appeals as hindering its discretion to hear more important cases. Therefore, the court may feel less constrained to rely on the lower courts' reasoning in these "less important" cases. When we consider decisional characteristics as grouped by jurisdictional predicate, we will be able to consider more precisely some of these possibilities.

B. *Dissent in the Appellate Division*

The possibility exists that a dispute among one set of judges will cause reviewing judges to approach that disputed case in a particular manner. Although one study found no conclusive evidence that intra-circuit dispute prompted reversal by the United States Supreme Court,¹⁵³ another cautiously offers some evidence that intra-court dispute by a state intermediate appellate court may affect the state supreme court's decision-making process.¹⁵⁴ Flango made similar findings.¹⁵⁵ In view of this possibility, and the jurisdictional amendment changing the effect of a single dissent in the Appellate Division, it is appropriate to consider whether the Court of Appeals' treatment of cases with one or two dissents at the Appellate Division has changed after the amendment.

In the terms before and after the amendment, the rate of unanimity in one dissent cases seems to have remained fairly constant, around 90%.¹⁵⁶ But similarities seem to end there. In the terms prior to the amendment, about two-thirds of one-dissent cases were affirmed by the Court of Appeals, whereas in the terms after the amendment, the affirmance rate was less — 30% in 1987-88 and just over 50% in 1988-89.¹⁵⁷ Opin-

151. *Id.*

152. *See* Table A.

153. *See* HOWARD, *supra* note 18, at 67-71.

154. *See* Baum, *supra* note 30, at 725.

155. *See* Flango, *supra* note 31, at 390-92.

156. *See* Table K.

157. *Id.*

ions were used more frequently after the amendment, rising from around 25% of one-dissent cases in the terms before the amendment to over 60% in 1987-88 and about 40% in 1988-89.¹⁵⁸ Also, the court provided its own rationale more frequently in the terms after the amendment.¹⁵⁹ In the terms before the amendment over 30% of one-dissent cases adopted Appellate Division reasoning as compared to less than 30% in the terms after the amendment, although the rate was much lower, in 1987-88 — 17% — as compared with 26% in 1988-89.¹⁶⁰ The changes after the amendment support the earlier suggestion that the court has become more selective, limiting its docket to important cases.

The congruence of lower affirmance rate, higher opinion rate and lower rate of reliance on Appellate Division reasoning in 1987-88 as compared to 1988-89,¹⁶¹ taken together with a higher percentage of cases heard by leave of the Court of Appeals in 1987-88,¹⁶² further supports the view that the court was independently assessing the worthiness of cases for its consideration and was not influenced by the appearance of an Appellate Division dissent as a cue. Otherwise, one might have expected to see more than the 16% of one-dissent cases on the court's docket by its leave in 1988-89.¹⁶³ These data tend to refute the earlier suggestion that a large percentage of one-dissent cases appearing on the court's civil docket by its leave in 1987-88 resulted from transitional effects shortly after the amendment. It seems more likely, with support from several perspectives, that the court began immediately to exercise its discretion in identifying cases it deemed significant.

This assessment is consistent with conclusions suggested by the data derived from cases involving a double dissent at the Appellate Division.¹⁶⁴ Two-dissent cases in 1988-89 became more than twice as frequent as a proportion of cases in the Court of

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.* (despite a similar percentage of one-dissent cases on the civil docket as shown in Table G).

162. *See* Table A.

163. *See* Table H.

164. *See* Table I.

Appeals than was true before the amendment and almost twice as frequent as a proportion of cases in the Court of Appeals than in 1987-88.¹⁶⁵ But the rates of affirmance, use of opinion and reliance on Appellate Division reasoning stayed remarkably similar in the terms after the amendment compared to the rates in the terms before the amendment, although the percentages in these terms are not stable, either before or after the amendment.¹⁶⁶ For example, the court affirmed slightly more than one-half of the two-dissent cases in 1980-81 and 1987-88 and two-thirds in 1981-82 and 1988-89.¹⁶⁷ Similarly, the court used opinions in 34% and 24% of the two-dissent cases in the terms before the amendment and 28% and 31% in the terms after.¹⁶⁸ The court relied on Appellate Division reasoning in 32% and 23% of the two-dissent cases in the terms before the amendment and 22% and 35% in the terms after.¹⁶⁹ A larger shift is apparent only in the rate of unanimity, which increased from 75% and 84% of the two-dissent cases in the terms before the amendment to 88% and 90% in the terms after the amendment.¹⁷⁰

This relative lack of change in the overall pattern of decisional characteristics in two-dissent cases, despite a doubling in the rate of two-dissent cases after the amendment, suggests that the court has not been particularly swayed in its perception of cases by the increased importance attached to two Appellate Division justices dissenting after the amendment. The court's ability to assess and decide cases independently, without being influenced by the nature or extent of Appellate Division dissent, is evident. Again, the data tend to support the view that the Court of Appeals does not depend on cues involving intra-Appellate Division dissent.

C. *Of-Right and By Leave*

The changes in the jurisdictional composition of the Court of Appeals' caseload and some of the decisional characteristics of

165. See Table G.

166. See Table L.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

the court's output suggest that the court is concentrating on cases it perceives as more important. The court may also be constrained in its work by changes in the voting practices of Appellate Division justices. We now turn to the decisional characteristics of the court's output as grouped by jurisdictional predicate to consider in more detail the changes after the amendment.¹⁷¹

As noted earlier, the rate of as-of-right appeals has declined dramatically after the amendment.¹⁷² The rate of affirmance in as-of-right cases, however, has not changed substantially.¹⁷³ In the terms before the amendment, 70% and 75% of the appeals as-of-right were affirmed, but after the change 61% and 70% of this kind of appeal were affirmed.¹⁷⁴ Similarly, the rate of unanimity in as-of-right cases before and after the amendment stayed relatively constant.¹⁷⁵ In the terms before the amendment, 85% and 90% of as-of-right cases were unanimous compared to 85% and 82% of this kind of appeal in the terms after the amendment.¹⁷⁶

More striking is the post-amendment increase in the use of opinions.¹⁷⁷ In the terms before the amendment, some 20% and 19% of as-of-right cases were decided by opinion compared to 46% and 32% afterwards.¹⁷⁸ Reliance on Appellate Division reasoning rose only slightly in 1988-89 compared to before the amendment with the court adopting the reasoning below in 42% of as-of-right appeals in 1988-89 and 35% and 36% in the terms before the amendment.¹⁷⁹ Interestingly, the Court of Appeals relied on Appellate Division reasoning in 1987-88 only 20% of the time.¹⁸⁰ Since 1987-88 was the term when use of opinions in as-of-right cases rose to 46%¹⁸¹ one might suspect that the court was confronted with particularly important as-of-right appeals

171. See Tables M (rates of affirmance), N (rates of unanimity) and O (rates of decision type).

172. See Table A.

173. See Table M.

174. *Id.*

175. See Table N.

176. *Id.*

177. See Table O.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

during this term, which seems consistent with other characteristics of the 1987-88 term discussed earlier.

The proportion of the Court of Appeals' civil caseload composed of Court of Appeals leave-granted cases is much greater after the amendment than before, as was the intent of the amendment.¹⁸² Although this grant of discretion would seem consistent with a decreased affirmance rate, especially in the cases decided by the court pursuant to its leave, the affirmance rate in Court of Appeals leave-granted cases actually increased after the amendment.¹⁸³ Forty-nine percent and 43% of the Court of Appeals leave-granted cases were affirmed in the terms before the amendment, compared with 62% and 59% in the terms after.¹⁸⁴ This result supports the hypothesis that the court is less concerned about policing the Appellate Division and correcting errors than in insuring that its imprint is on important cases. The increased rate of affirmance after the amendment seems most surprising, and is contrary to the findings of Baum,¹⁸⁵ for example, that courts with discretionary jurisdiction review cases with a mind toward reversal. The Court of Appeals does not seem to be acting in the expected manner, preferring instead to concentrate on truly important appeals. The Court of Appeals' limited reliance on Appellate Division reasoning in cases to which the Court of Appeals itself granted leave — only about 10% in the terms after the amendment¹⁸⁶ — supports this theory. The fairly high rate at which the court uses opinions to decide cases in which it granted leave — a rate hovering around 50% — also supports this theory.¹⁸⁷

That the rate of opinions is not even higher may reflect a determination by the Court of Appeals that one of its memorandum rulings is considered sufficient in its leave-granted cases when the only alternative is an Appellate Division decision on the subject. It should be noted that the 50% rate of use of opinions after the amendment is roughly similar to the rate of the

182. See Table A.

183. See Table M.

184. *Id.*

185. See Baum, *supra* note 30.

186. See Table O.

187. *Id.*

court's use of opinions generally.¹⁸⁸ The rate of unanimity in Court of Appeals leave-granted cases was inconsistent but can be seen as higher in the terms after the amendment.¹⁸⁹

As noted earlier, of the cases decided by the Court of Appeals, the Appellate Division granted leave more frequently after the jurisdictional amendment than before.¹⁹⁰ The decisional characteristics of these cases, however, have not changed much after the amendment. The rate of affirmance in Appellate Division leave cases has remained around 60%¹⁹¹ and the rate of unanimity has remained around 80%.¹⁹² In addition, the rate at which opinions were used was slightly higher in 1987-88, when it increased to 59% of the Appellate Division leave-granted cases, as compared to 46% and 43% in the terms before the amendment and 40% in 1988-89.¹⁹³ Similarly, the rate of reliance on Appellate Division reasoning was lower in 1987-88, at 9% of Appellate Division leave-granted cases, compared to 20% and 23% before the amendment and 17% in 1988-89.¹⁹⁴ The rather large difference for the 1987-88 term is consistent with other changes seen during that term and could support the conclusion that 1987-88 was the transition year for the court, or that the court identified more important cases that particular term. This latter explanation may be preferable given the other evidence suggesting that the court is exercising its discretion in identifying important and significant cases for treatment by the Court of Appeals.

The rate of affirmance for appeals arising by Court of Appeals leave has increased after the amendment to levels comparable to, or slightly lower than, the rates of affirmance for appeals arising by the other jurisdictional predicates.¹⁹⁵ This suggests that the Court of Appeals may not be influenced by the manner in which the appeal arose in reaching an outcome. The

188. See Table E.

189. See Table N. In the terms before the amendment, 65% and 87% of these cases were unanimous whereas in the terms after the amendment 91% and 81% were unanimous.

190. See Table A.

191. See Table M.

192. See Table N.

193. See Table O.

194. *Id.*

195. See Table M.

court may not be using the jurisdictional predicate, as it did not use Appellate Division dissent, as a cue. Rather, the court seems more concerned about addressing important issues.

This phenomenon is further reflected in comparisons of other decisional characteristics. For example, the combined rate of opinions in as-of-right and Appellate Division leave-granted cases, (those which are mandatory from the Court of Appeals' perspective), in 1988-89 is 36% as compared to 46% for Court of Appeals leave-granted cases, (those which are truly discretionary for the court).¹⁹⁶ The data reveal that in combined as-of-right and Appellate Division leave-granted cases during 1987-88 and 1988-89, the Court of Appeals relied on Appellate Division reasoning at rates of 15% and 30%, respectively, as compared to lower rates of 10% and 11% for Court of Appeals leave-granted cases during the respective terms.¹⁹⁷ The court seems least likely to offer its own explanation in deciding an appeal in those cases it has no discretion to hear and which it may perceive as less important or worthy of full Court of Appeals treatment.¹⁹⁸ The court's apparent trend to concentrate on cases it perceives as important finds added support from this comparison.

IX. Conclusion

This paper is offered as the initial step in a comprehensive review of the Court of Appeals. It is designed to examine the decision-making processes of the Court of Appeals and the changes in those processes wrought by an alteration to the court's jurisdictional bases. From a broader perspective, the study also sheds light on differences in how an appellate court operates under discretionary and mandatory systems of jurisdiction.

Some courts with discretionary jurisdiction, such as the California Supreme Court, have been identified as interested in accepting cases for review based on an intention to reverse wayward lower courts. Other courts, such as the United States

196. See Table O.

197. *Id.*

198. In 1988-89, reliance on the Appellate Division reasoning in as-of right cases was 42%, as opposed to 11% in Court of Appeals leave-granted cases and 17% in Appellate Division leave-granted cases.

Supreme Court, have been seen to exercise their certiorari powers more for setting policy than correcting error or policing lower courts. The New York Court of Appeals, after receiving a broad grant of discretion over its civil caseload, seems to be more like the United States Supreme Court than the California Supreme Court. From their consistently high rates of affirmance, even for cases the court chooses to hear, to the increased rate of use of opinions, an emphatic decision type, Court of Appeals decisions now exhibit characteristics we can associate with a primary purpose of deciding cases the court perceives as important. This stands in marked contrast to the court's decisional characteristics before the amendment, when it was required to review hundreds of civil appeals involving issues generally recognized as legally, politically or socially insignificant. As an amendment designed to address this situation, the change to a discretionary jurisdiction seems to have accomplished its objective.

This shift in focus, however, has not come without resistance or cost. It appears that the Appellate Division justices may be altering their voting practices so as to satisfy the recently restricted appeal as-of-right requirements and thereby limit the Court of Appeals' discretion in choosing its caseload. Moreover, the Court of Appeals' shift in emphasis away from an error-correction function can be described as dramatically altering the nature of appellate justice in New York. The Appellate Division, previously subject to more scrutiny from the Court of Appeals, now exists as the ultimate arbiter in most cases. That the Court of Appeals has refused to accept more civil cases for review can be seen as a tacit endorsement of this system. This development makes resolution of the existing caseload crisis in the Appellate Division all the more essential.

Other matters remain for consideration. For example, it would be useful to consider whether decisional characteristics identified during 1987-88 and 1988-89 continue during more recent terms. This research would permit assessments of the judicial decision-making process more removed from a period of transition when recent appointees and the new jurisdictional scheme could have had some effect on the outcomes observed. Additional consideration of the manner in which the Court of Appeals and the Appellate Division grant leave-to-appeal also would shed light on some preliminary findings suggested, such

as the possibility that Appellate Division justices have altered their voting patterns in response to the jurisdictional amendment. Comparisons of decisional characteristics in civil and criminal cases also would provide useful insight into the court's work. Analyzing the court's judicial selection process and internal procedures also may illuminate the work of the court. The opportunity to study these aspects of the judicial decision-making process serves to remind us that the Court of Appeals remains an almost untapped resource for examining how courts conduct their business. This article does little more than peek at the tip of the iceberg. There remains more to know. Methodological Note

The jurisdictional predicate presented the most troubling choice in data collection. Each Court of Appeals decision reported in the official New York Reports specifies the case's jurisdictional basis or predicate. The statement of jurisdictional predicate is prepared by the Law Reporting Bureau, an adjunct of the Court of Appeals, in conjunction with and subject to approval by the judge who authored the decision.¹⁹⁹ Especially for cases decided under the pre-1986 jurisdictional rules, it is possible that cases were appealable on more than one ground, e.g., a dissent in and reversal by the Appellate Division, or a dissent in and a substantial constitutional question resolved by the Appellate Division. Since this study was concerned with differences between the broad categories of appeals as-of-right and appeals by permission, a problem arose where multiple predicates falling within the different categories were specified. To maintain data uncluttered by these anomalous cases, these few cases were excluded from the study.²⁰⁰

In addition, numerous cases specified only one jurisdictional predicate but further analysis revealed other appealable grounds available, e.g., an Appellate Division reversal was specified as the jurisdictional predicate but there was also an unspecified Appellate Division dissenter. The Law Reporting Bureau reviews the appellate record and determines the appropriate jurisdictional predicate in preparing the jurisdictional statement for a deci-

199. Telephone Interview with Frederick A. Muller, N.Y. State Reporter (Nov. 29, 1990).

200. There were two cases in 1981-82.

sion, apparently designating the predicate relied on by the court in reaching its decision.²⁰¹ For purposes of this study, despite the possibility of multiple predicates, I have chosen to adopt the jurisdictional predicate reported in the official New York Reports because the Law Reporting Bureau and Court of Appeals' judges work together to specify the jurisdictional predicate of the case. Consideration of the choices made in specifying a jurisdictional predicate is beyond the scope of this study.

A related difficulty concerns multiple appeals in the same case. Cross appeals, for example, can be based on similar or different jurisdictional predicates. Since this study's focus was on the frequency at which various decisional characteristics occur in cases and not with specific appeals, multiple appeals in the same case were disregarded to the extent that they were based on the same jurisdictional category, e.g., as-of-right or by permission. Where multiple appeals in the same case were based on the different jurisdictional categories, the case was excluded.²⁰²

TABLE A

Civil Caseload by Jurisdictional Predicate

	Appeals as of Right	Total Appeals by Leave	Appeals by Court of Appeals Leave	Appeals by Appellate Division Leave	Total Appeals
1980-81	377 (80%)	93 (20%)	37 (8%)	56 (12%)	470 (100%)
1981-82	430 (78%)	121 (22%)	60 (11%)	61 (11%)	551 (100%)
1987-88	41 (20%)	165 (80%)	131 (64%)	34 (17%)	206 (100%)
1988-89	50 (28%)	130 (72%)	83 (46%)	47 (26%)	180 (100%)

NOTE: Percentage shown is of total appeals.

201. See Muller, *supra* note 199.

202. There were seven cases in 1980-81 and three in 1981-82.

TABLE B

Proportion of Appeals by Leave

	Appeals by Court of Appeals Leave	Appeals by Appellate Division Leave	Total Appeals by Leave
1980-81	37 (40%)	56 (60%)	93 (100%)
1981-82	60 (50%)	61 (50%)	121 (100%)
1987-88	131 (79%)	34 (21%)	165 (100%)
1988-89	83 (64%)	47 (36%)	130 (100%)

TABLE C

*Appeals with One and Two
Appellate Division Justices Dissenting*

	Appeals with One Appellate Division Justice Dissenting	Appeals with Two Appellate Division Justices Dissenting	Total Appeals
1980-81	95 (20%)	65 (14%)	470 (100%)
1981-82	96 (17%)	63 (11%)	551 (100%)
1987-88	23 (11%)	32 (16%)	206 (100%)
1988-89	19 (11%)	49 (27%)	180 (100%)

TABLE D

*Proportion of Appeals with One and Two
Appellate Division Justices Dissenting*

	Appeals with One Appellate Division Justice Dissenting	Appeals with Two Appellate Division Justices Dissenting	Total Appeals
1980-81	95 (59%)	65 (41%)	160 (100%)
1981-82	96 (60%)	63 (40%)	159 (100%)
1987-88	23 (42%)	32 (58%)	55 (100%)
1988-89	19 (28%)	49 (72%)	68 (100%)

TABLE E

*Decisional Characteristics of
Civil Appeals*

	1980-81	1981-82	1987-88	1988-89
Affirmance	316 (67%)	383 (70%)	127 (62%)	113 (63%)
Reversal	122 (26%)	133 (24%)	64 (31%)	53 (29%)
Modification	31 (7%)	34 (6%)	13 (6%)	13 (7%)
Dismissal	1 (-%)	1 (-%)	2 (1%)	1 (1%)
Opinion	123 (26%)	132 (24%)	109 (53%)	73 (41%)
Memorandum	347 (74%)	419 (76%)	97 (47%)	107 (59%)
Unanimous	386 (82%)	495 (90%)	181 (88%)	148 (82%)
Nonunanimous	84 (18%)	56 (10%)	25 (12%)	32 (18%)
Reliance on Appellate Division	148 (31%)	171 (31%)	23 (11%)	38 (21%)
Total	470 (100%)	551 (100%)	206 (100%)	180 (100%)

TABLE F

*Appeals by Appellate Division Leave After
Amendment that would have been As of
Right Before the Amendment*

	Appeals that would have been As of Right Before the Amendment	Total Appeals by Appellate Division Leave
1987-88	18 (53%)	34 (100%)
1988-89	18 (38%)	47 (100%)
Total	36 (44%)	81 (100%)

TABLE G

*Appeals with Appellate Division Dissent
and Predicated on Appellate Division Dissent*

	Appeals with Appellate Division Dissent	Appeals Predicated on Appellate Division Dissent*	Total Appeals
1980-81	160 (34%)	86 (18%)	470 (100%)
1981-82	159 (29%)	71 (13%)	551 (100%)
1987-88	55 (27%)	29 (14%)	206 (100%)
1988-89	68 (38%)	36 (20%)	180 (100%)

* In 1980-81 and 1981-82, one Appellate Division Justice dissenting was sufficient for an appeal as of right and to supply the predicate for an appeal. In 1987-88 and 1988-89, two Appellate Division Justices dissenting were required.

TABLE H

*Jurisdictional Bases of Appeals with One
Appellate Division Justice Dissenting After the
Amendment*

	Appeals As of Right	Appeals by Court of Appeals Leave	Appeals by Appellate Division Leave	Total Appeals with One Appellate Division Justice Dissenting
1987-88	1 (4%)	13 (57%)	9 (39%)	23 (100%)
1988-89	1 (5%)	3 (16%)	15 (79%)	19 (100%)

TABLE I

*Jurisdictional Bases of Appeals with
Two Appellate Division Justices
Dissenting After the Amendment*

	Appeals As of Right	Appeals by Court of Appeals Leave	Appeals by Appellate Division Leave	Total Appeals with Two Appellate Division Justices Dissenting
1987-88	29 (91%)	0 (0%)	3 (9%)	32 (100%)
1988-89	36 (73%)	1 (2%)	12 (25%)	49 (100%)

TABLE J

Appeals with Limited Dissent

	Unanimous Appeals	One Dissent Appeals	Total Appeals with Limited Dissent	Total Appeals
1980-81	386	21	407 (87%)	470 (100%)
1981-82	495	12	507 (92%)	551 (100%)
1987-88	181	11	192 (93%)	206 (100%)
1988-89	148	8	156 (87%)	180 (100%)

TABLE K

*Decisional Characteristics of Appeals
with One Appellate Division
Justice Dissenting*

	1980-81	1981-82	1987-88	1988-89
Affirmance	69 (73%)	61 (64%)	7 (30%)	10 (53%)
Reversal	22 (23%)	24 (25%)	15 (65%)	6 (32%)
Modification	3 (3%)	11 (11%)	1 (5%)	3 (16%)
Dismissal	1 (1%)	0 (0%)	0 (0%)	0 (0%)
Unanimous	81 (85%)	87 (91%)	22 (95%)	17 (89%)
Nonunanimous	14 (15%)	9 (9%)	1 (5%)	2 (11%)
Opinion	23 (24%)	26 (27%)	14 (61%)	7 (37%)
Memorandum	72 (76%)	70 (73%)	9 (39%)	12 (63%)
Reliance on Appellate Division	29 (31%)	34 (35%)	4 (17%)	5 (26%)
Total Appeals with One Appellate Division Justice Dissenting	95 (100%)	96 (100%)	23 (100%)	19 (100%)

TABLE L

*Decisional Characteristics of Appeals
with Two Appellate Division
Justices Dissenting*

	1980-81	1981-82	1987-88	1988-89
Affirmance	34 (52%)	42 (67%)	19 (59%)	33 (67%)
Reversal	25 (38%)	15 (24%)	9 (28%)	12 (24%)
Modification	6 (9%)	6 (9%)	3 (9%)	4 (8%)
Dismissal	0 (0%)	0 (0%)	1 (4%)	0 (0%)
Unanimous	49 (75%)	53 (84%)	28 (88%)	44 (90%)
Nonunanimous	16 (25%)	10 (16%)	4 (12%)	5 (10%)
Opinion	22 (34%)	15 (24%)	9 (28%)	15 (31%)
Memorandum	43 (66%)	48 (76%)	23 (72%)	34 (69%)
Reliance on Appellate Division	21 (32%)	15 (24%)	7 (22%)	17 (35%)
Total Appeals with Two Appellate Division Justices Dissenting	65 (100%)	63 (100%)	32 (100%)	49 (100%)

TABLE M
Rates of Affirmance By Jurisdictional Predicate

	1980-81				1981-82				1987-88				1988-89			
	As of Right	Court of Appeals	Appellate Division	As of Right	Court of Appeals	Appellate Division	As of Right	Court of Appeals	Court of Appeals	Appellate Division	As of Right	Court of Appeals	Court of Appeals	Appellate Division	As of Right	Court of Appeals
Affirmance	264 70%	18 49%	34 61%	323 75%	26 43%	34 56%	25 61%	81 62%	21 62%	35 70%	49 59%	29 62%	29 62%	49 59%	29 62%	49 59%
Reversal	93 25%	14 38%	15 27%	85 20%	30 50%	18 30%	11 27%	42 32%	11 32%	12 24%	29 35%	12 26%	29 35%	29 35%	12 26%	29 35%
Modification	19 5%	5 13%	7 12%	21 5%	4 7%	9 15%	4 10%	8 6%	1 3%	3 6%	5 6%	5 11%	5 11%	5 6%	5 11%	5 6%
Dismissal	1	0	0	1	0	0	1	0	1	0	0	1	0	0	1	0
Total	377 100%	37 100%	56 100%	430 100%	60 100%	61 100%	41 100%	131 100%	34 100%	50 100%	83 100%	47 100%	83 100%	83 100%	47 100%	47 100%

TABLE N
Rates of Unanimity By Jurisdictional Predicate

	1980-81				1981-82				1987-88				1988-89			
	As of Right	Court of Appeals	Appellate Division	As of Right	As of Right	Court of Appeals	Appellate Division	As of Right	As of Right	Court of Appeals	Appellate Division	As of Right	As of Right	Court of Appeals	Appellate Division	As of Right
Unanimous	321	24	41	389	52	54	35	119	27	41	67	40	81	67	40	85
	85%	65%	73%	90%	87%	89%	85%	91%	79%	82%	81%	85%	81%	81%	85%	85%
Non- Unanimous	56	13	15	41	8	7	6	12	7	9	16	7	9	16	7	7
	15%	35%	27%	10%	13%	11%	15%	9%	21%	18%	19%	15%	18%	19%	15%	15%
Total	377	37	56	430	60	61	41	131	34	50	83	47	90	83	47	92
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

TABLE O
Rates of Decision Type By Jurisdictional Predicate

	1980-81				1981-82				1987-88				1988-89			
	As of Right		Appellate Division		Court of Appeals		As of Right		Appellate Division		Court of Appeals		Appellate Division		Court of Appeals	
	Leave		Leave		Leave		Leave		Leave		Leave		Leave		Leave	
Opinion	78	19	26	83	23	19	26	19	70	20	16	38	19	40%	19	40%
	20%	51%	46%	19%	38%		43%	46%	53%	59%	32%	46%				
Memorandum	299	18	30	347	37	22	35	22	61	14	34	45	28	60%	28	60%
	80%	49%	54%	81%	62%		57%	54%	47%	41%	68%	54%				
Total	377	37	56	430	60	41	61	41	131	34	50	83	47	100%	47	100%
	100%	100%	100%	100%	100%		100%	100%	100%	100%	100%	100%				
Reliance on Appellate Division	133	4	11	155	2	8	14	8	13	3	21	9	8	17%	8	17%
	35%	11%	20%	36%	3%		23%	20%	10%	9%	42%	11%				