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My Aching Heart

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It is often said that every happy family is happy in the same way, but every unhappy family is miserable in a way all its own. So it is with state constitutional decisions. The good decisions are good in the same way—thoughtful, well-crafted, thorough, plausible—but the bad ones stink uniquely. This makes it much more feasible to nominate a worst decision than a best one.

But what are the criteria? There are so many ways in which a decision can be lousy. What I would look for in a worst decision is not merely poor judicial craft; anybody can write a lazy, sloppy opinion. No, what I want is pathos, irony—a decision that lifts you up and reveals new vistas . . . only to cruelly dash your naive hopes. What I would look for is a decision in which a state court recognizes its independence and then uses that independence for some dissolute purpose; an opinion that turns to the state constitution with the promise of liberation only to employ the document for purposes of enslavement.

If those are the criteria, my nominee is *People v. Ohrenstein*.[1] In *Ohrenstein*, the minority leader of the New York Senate was prosecuted for theft of state property for using public funds to hire aides whose principal duties consisted of working on the reelection campaigns of Senate Democrats. In a state in which, during the last decade, more members of the legislature have been indicted than defeated for reelection, the significance of this prosecution cannot be overstated. It promised New Yorkers the beginning of a cleansing; perhaps—dared we hope?—the first step toward genuinely responsive, democratic self-rule.

In an opinion of epic blindness, the New York Court of Appeals dismissed virtually all counts. Although the court's holding concerned the proper interpretation of New York's criminal statutes, its opinion was based fundamentally on an interpretation of the state constitution according to which the legislature may insulate its own crimes against the people of the state merely by statutorily

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[1] 565 N.E.2d 493 (N.Y. 1990).

authorizing them. In the court's view there was apparently no pillaging of the public fisc, nor any offense against democratic self-government itself, that the legislature might not exercise its inherent powers to accomplish. The result of this decision is that the only avenue to reform in New York is for the legislature itself to mend its ways. All the rest of us have to do is sit tight and wait for the legislature voluntarily to relinquish the means to perpetuate its own members in power.

At its best, the New Judicial Federalism has shown that judicially enforceable state constitutions really can be effective defenses against the usurpation of governmental power by a self-perpetuating, undemocratic, unresponsive legislature.

Just not in New York.