CHIEF JUDGE JUDITH S. KAYE SYMPOSIUM

STATE-FEDERAL JUDICIAL COUNCIL CLE PROGRAM: SYMPOSIUM IN HONOR OF CHIEF JUDGE JUDITH S. KAYE – STATE CONSTITUTIONAL ISSUES

THURGOOD MARSHALL U.S. COURTHOUSE
Wednesday, May 24, 2017, 4:00pm

Moderator: Carrie Cohen, *Morrison & Foerster LLP*

Speakers:
Hon. Jonathan Lippman, *Latham & Watkins LLP; Chief Judge, New York Court of Appeals (Ret.)*
Hon. Victoria A. Graffeo, *Harris Beach PLLC; Assoc. Judge, New York Court of Appeals (Ret.)*
Vincent M. Bonventre, *Justice Robert H. Jackson Distinguished Professor of Law, Albany Law School*

Judge Graffeo: Chief Judge Kaye was a woman who made us proud to be female attorneys and jurists. Judge Kaye was appointed to the Court of Appeals in 1983, about six years after Justice William Brennan's famous lecture on State Courts and Social Justice. In a 1995 article, Judge Kaye recalled how impressed she was with his call to "resuscitate our state constitutions" since she, like most attorneys, had been "federalized" and was not very familiar with the contents of our State Constitution.[1] So, even before she began her tenure as an Associate Judge on the Court, Judge Kaye had begun to contemplate the greater role that the New York Constitution could have in state jurisprudence, particularly in common law cases.

In the criminal realm, she publicly expressed her views about how the State Constitution could be an instrument for greater protections for New Yorkers in her concurrence in the 1992 case of *People v. Scott*[2]

[1] Judith S. Kaye, *Brennan Lecture: State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U.L. REV. 1, 11–12 (1995).
[2] People v. Scott, 593 N.E.2d 1328, 1346 (N.Y. 1992) (Kaye, J. concurring).

and *People v. Keta*.[3] The plurality writings in this case illustrated the philosophical differences of opinion at the Court regarding the relationship between the federal and state constitutions and when the Court of Appeals should deviate from the parameters established by U.S. Supreme Court precedent.[4] The *Scott* case involved a classic real property "law school" fact pattern—it was a "curtilage" case.[5] Although Mr. Scott had posted "no trespassing" signs on his 165-acre property, a deer hunter walked on his land and discovered Scott's marijuana crop.[6] The hunter alerted the State Police and a State trooper accompanied the hunter to the property to check out the cultivation.[7] This was, of course, done without Scott's knowledge or permission.[8] The State Police later obtained a search warrant and confiscated the plants, resulting in Scott's arrest for criminal possession of marijuana.[9]

As part of his defense, Scott filed a suppression motion claiming that the police had illegally entered his property.[10] The trial court denied his suppression request, and the Appellate Division affirmed that ruling.[11] Both courts relied on the U.S. Supreme Court's Fourth Amendment analysis in *Oliver v. U.S.*,[12] in which the Supreme Court articulated the "open fields" doctrine. Applying the rationale in *Oliver*, the lower courts had concluded that Scott was not entitled to an expectation of privacy outside the curtilage of his residence.[13] Since the marijuana plantings were a distance from his home, the courts concluded that no search and seizure violation had occurred under the Fourth Amendment or Article I of the New York State Constitution.[14]

The New York Court of Appeals reversed in an opinion authored by Judge Stewart Hancock.[15] He explained that the Court's previous precedent in *People v. Reynolds*,[16] (another curtilage case that perhaps could have been distinguished on the basis that the property

[3] *Id.* at 1339, 1346.
[4] *See id.* at 1334–35, 1338.
[5] *Id.* at 1330.
[6] *See id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Oliver v. United States, 466 U.S. 170 (1984).
[13] *See Scott*, 593 N.E.2d at 1330.
[14] *Id.*
[15] *Id.* at 1328.
[16] People v. Reynolds, 523 N.E.2d 291 (N.Y. 1988).

owner in that case had not posted "No Trespassing" signs) could be disregarded if the Court determined that the *Oliver* decision did not sufficiently safeguard the constitutional rights of New Yorkers.[17]

This was not the first time the Court of Appeals considered using language in the State Constitution to extend greater protections than those recognized by the U.S. Supreme Court. For instance, *People v. P.J. Video, Inc.*[18] established the standards for the issuance of search warrants in obscenity situations based upon New York common law and state constitutional principles.[19]

Returning to the *Scott* opinion, Judge Kaye decided to write separately despite the fact that she agreed with Judge Hancock's analysis.[20] I believe that she felt compelled to author a concurrence in *Scott* in order to express what she felt were the troublesome implications of the dissent's view regarding when the Court should examine the implications of the State Constitution. She began by observing that "[o]n a Court where more often than not there is consensus, in State constitutional law cases—civil as well as criminal—we have been uncommonly divided."[21] In her usual eloquent and clear writing style, she explained her view that, "[] where we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter of State law. . . ."[22]

Judge Kaye saw distinct advantages to employing the State Constitution because it gave the Court of Appeals the "final say" on an issue since resolving a case on such a basis would, "make plain the State decisional ground so as to avoid unnecessary Supreme Court review."[23] In other words, a New York Court of Appeals decision anchored on state constitutional protections or rights would insulate such a determination from further appellate review by the U.S. Supreme Court.

Judge Kaye also disagreed with the dissent's view that the U.S. Supreme Court had discouraged States from examining their constitutional provisions. She felt that it "shortchanges both the role

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[17] *See Scott*, 593 N.E.2d at 1330.
[18] People v. P.J. Video, Inc., 501 N.E.2d 556 (N.Y. 1986).
[19] *See id.* at 564–65.
[20] *Scott*, 593 N.E.2d at 1346 (Kaye, J. concurring).
[21] *Id.*
[22] *Id.* at 1347.
[23] *Id.*

of the Supreme Court in setting minimal standards that bind courts throughout the Nation, and the role of the State courts in upholding their own Constitutions."[24] Her respect for the importance of dual sovereignty is now well embedded in New York jurisprudence.

During her years as Chief Judge of the New York Court of Appeals, Judith S. Kaye was a staunch proponent of state constitutionalism, and frequently in her presentations before bar associations or law school audiences she would remind attorneys and law students to familiarize themselves with the New York State Constitution in order to use its provisions when crafting legal issues for litigation purposes.

In November 2017, the electorate in New York will be deciding whether to approve a constitutional convention through a ballot proposal. Such a question is presented to voters only every twenty years. Regardless of how you feel about the proposal, the upcoming vote presents an opportunity for the Bar in New York to raise awareness and inform New Yorkers about the many subjects addressed in our lengthy State Constitution. Judge Kaye would encourage all New York lawyers to read our State Constitution and to use it in suitable cases to further your clients' interests. She was, indeed, a visionary in so many ways.

Thank you.

Judge Lippman: Judith Kaye's dissent in *Hernandez v. Robles*[25] in July of 2006 was to say the least prophetic. Just a short seven years later, the U.S. Supreme Court declared the Defense of Marriage Act unconstitutional under the Equal Protection clause of the federal constitution in *United States v. Windsor*.[26] In 2015, the Supreme Court in *Obergefell v. Hodges*[27] declared state laws prohibiting same-sex marriage unconstitutional, thus allowing marriages between gay and lesbian couples across the nation.[28]

At the time of *Hernandez*, Massachusetts was the only state high court to uphold the right of same-sex couples to marry, and more than a dozen states had passed constitutional amendments banning same-sex marriage.[29]

The prevailing opinion in *Hernandez* was authored by Judge Robert S. Smith who argued that the state legislature had behaved

[24] *Id.* at 1348.
[25] Hernandez v. Robles, 855 N.E.2d 1 (2006).
[26] United States v. Windsor, 570 U.S. 744 (2013).
[27] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[28] *Id.* at 2607–08.
[29] *Hernandez*, 855 N.E.2d at 33–34 (Kaye, J. dissenting).

rationally in concluding that children are better off growing up with a mother and a father, and that this was sufficient justification for requiring that a marriage only be between a man and a woman.[30] The court found that the legislature could logically find that same-sex relationships promote stability in marriage, thus serving the welfare of children.[31] A concurrence by Judge Victoria A. Graffeo emphasized that the ultimate decision on the legality of same-sex marriage rests with the state legislature and not with the court.[32]

In analyzing Chief Judge Kaye's dissent, her own words are far more powerful than anything that paraphrasing can achieve. Therefore, I will for the most part let her elegant, yet passionate language speaks for itself. In that vein, she opens her dissent with a powerful recitation of the human beings that are involved in the case:

> Plaintiffs (including petitioners) are 44 same-sex couples who wish to marry. They include a doctor, a police officer, a public school teacher, a nurse, an artist and a state legislator. Ranging in age from under 30 to 68, plaintiffs reflect a diversity of races, religions and ethnicities. They come from upstate and down, from rural, urban and suburban settings. Many have been together in committed relationships for decades, and many are raising children—from toddlers to teenagers. Many are active in their communities, serving on their local school board, for example, or their cooperative apartment building board. In short, plaintiffs represent a cross-section of New Yorkers who want only to live full lives, raise their children, better their communities and be good neighbors.[33]

Judge Kaye made clear that marriage is a fundamental right and that it is not defined by who is entitled to exercise that right.[34] Hence, she found that denying same-sex marriage violated the state's due process clause.[35]

As was true with the ban preventing individuals in interracial relationships from marrying, Chief Judge Kaye explained that the history of excluding individuals from expressing their fundamental rights cannot be the basis for denying them access to those rights

[30] *Id.* at 7.
[31] *Id.*
[32] *Id.* at 22 (Graffeo, J. concurring).
[33] *Id.*
[34] *Id.* at 22–23.
[35] *Id.*

once they challenge their exclusion.[36] Noting that ninety-six percent of Americans were opposed to interracial couples' marriages ten years before *Loving v. Virginia*,[37] struck down the remaining anti-miscegenation statutes in the country,[38] Chief Judge Kaye found many of the same arguments used then were being used to exclude same-sex couples from marriage.[39] Illustrating the significant shift that occurred in access to marriage just a short time ago, she noted that "during the lifetime of every Judge on this Court, interracial marriage was forbidden in at least a third of American jurisdictions."[40] Rejecting as circular the notion that "same-sex couples can be excluded from marriage because 'marriage,' by definition, does not include them,"[41] Judge Kaye concluded that "the long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it."[42]

Judge Kaye also found that the same-sex marriage ban was discriminatory and violated the Equal Protection Clause, even under a rational basis analysis.[43] She argued that there can be no rational basis for excluding same-sex couples from marrying.[44] As to the impact on children, she opined:

> Defendants primarily assert an interest in encouraging procreation within marriage. But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.[45]
>
> Nor does this exclusion rationally further the State's legitimate interest in encouraging heterosexual married couples to procreate. Plainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry, and many same-sex couples do indeed have children.[46]

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[36] *Id.* at 23.
[37] Loving v. Virginia, 388 U.S. 1 (1967).
[38] *Hernandez*, 855 N.E.2d at 24–25 (Kaye, J. dissenting).
[39] *Id.*
[40] *Id.* at 25.
[41] *Id.* at 26.
[42] *Id.*
[43] *Id.* at 30.
[44] *Id.*
[45] *Id.*
[46] *Id.*

> Marriage is about much more than producing children, yet same-sex couples are excluded from the entire spectrum of protections that come with civil marriage—purportedly to encourage other people to procreate. Indeed, the protections that the State gives to couples who do marry—such as the right to own property as a unit or to make medical decisions for each other—are focused largely on the adult relationship, rather than on the couple's possible role as parents. Nor does the plurality even attempt to explain how offering only heterosexuals the right to visit a sick loved one in the hospital, for example, conceivably furthers the State's interest in encouraging opposite-sex couples to have children, or indeed how excluding same-sex couples from each of the specific legal benefits of civil marriage—even apart from the totality of marriage itself—does not independently violate plaintiffs' rights to equal protection of the laws. The breadth of protections that the marriage laws make unavailable to gays and lesbians is "so far removed" from the State's asserted goal of promoting procreation that the justification is, again, "impossible to credit."[47]

Judge Kaye also debunked the idea that it is pervasive that civil marriage has traditionally been between a man and a woman. She stated that:

> To say that discrimination is "traditional" is to say only that the discrimination has existed for a long time. A classification, however, cannot be maintained merely "for its own sake" Instead, the classification (here, the exclusion of gay men and lesbians from civil marriage) must advance a state interest that is separate from the classification itself. Because the "tradition" of excluding gay men and lesbians from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of "history." Indeed, the justification of "tradition" does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional (["it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."]).[48]

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[47] *Id.* at 31–32 (citations omitted).

[48] *Id.* at 33 (citations omitted).

Finally Judge Kaye takes issue with the idea same-sex marriage must ultimately be addressed by the legislature. She made clear that:

> [T]his Court cannot avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic. After all, by the time the Court decided *Loving* in 1967, many states had already repealed their antimiscegenation laws. Despite this trend, however, the Supreme Court did not refrain from fulfilling its constitutional obligation. . . . It is uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation. The Court's duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.[49]

In bold unmistakable terms, Judge Kaye's dissent in *Hernandez* provided the template and the vision for *Windsor* and *Obergefell*. Judge Kaye saw this critically important legal issue through the lens of the very real human beings who were impacted by the same-sex marriage ban—people who were just like everybody else. As she indicated, they represented New Yorkers of all kinds, seeking to live life fully with their families and as members of their communities. They deserved, as all other human beings, to be treated with respect and dignity, and the law would very rapidly evolve to recognize that universal right.

Judge Kaye ended her dissent with a prediction: "I am confident that future generations will look back on today's decision as an unfortunate misstep."[50] Those words were prescient, and it did not take future generations to prove her right!

[49] *Id.* at 34.
[50] *Id.*