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

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Co-sponsors:
New York State Bar Association
Northern District of New York Federal Court Bar Association
Speakers:
Hon. Mae D'Agostino, *United States District Judge, Northern District of New York*
Vincent M. Bonventre, *Justice Robert H. Jackson Distinguished Professor of Law, Albany Law School*

Judge D'Agostino: Professor Bonventre from Albany Law School. I recently told him that I wish I could go to his classes because I heard him speak now at a few seminars, and he is enthralling.

Prof. Bonventre: I guess I'll have to be enthralling, thank you Judge. But I'm very, very pleased to be here especially with these panelists who I admire so much. You know, this is like deja vu all over again because some of us did these presentations three weeks ago down in Manhattan. But, nevertheless, even though I will be repeating myself, I am certainly glad to once again pay tribute to Chief Judge Kaye. Chief Judge Kaye and I actually began in the New York Court of Appeals together in 1983, she as a Judge and I as a Junior Clerk. Several years later, she became Chief Judge of the court and I became a junior professor. Ultimately, she became revered as a national judicial icon, and I became a sometimes resented local commentator on her court.

But we stayed close through all those years, and I recently wrote something that . . . Let me just read it to you. Of course, it's not as magnificent as some of the articles that Hank Greenberg has written about Judith Kaye, but this is my own effort. "Those of us who worked with her and knew her and loved her will remember her warmth and kindness, her wisdom and inspiration, her dignity and

class, her elegance and eloquence, and her unsurpassed decency, and tireless devotion to the public good. We miss her dearly." My purpose is to place Chief Judge Kaye's advocacy of state constitutional adjudication in context, and to give it some contour. Simply speaking, her philosophy with regard to state constitutional adjudication is that state courts, including the New York Court of Appeals, ought to be applying state law whenever possible to decide constitutional questions.

I mean there's nothing particularly peculiar about that. In fact, there really isn't anything either idiosyncratic or radical about her views. Indeed, there were other judges of other state courts around the country who also were advocating prominently for state constitutional law. Whether that was Hans Linde in Oregon, Randall Shepard in Indiana, Stanley Mosk in California, Shirley Abrahamson in Wisconsin, Christine Durham in Utah, and I could go on and on. But the thing about Chief Judge Kaye is that there was just nobody as brilliant as her, nobody as eloquent as her, and of course none of those others sat on the New York Court of Appeals. So nobody had the kind of gravitas that she had.

Now, not only were there others around the country that were advocating for independent state constitutional adjudication, but the fact of the matter is that what she was advocating and what she became a prominent scholar in was very consistent with our federal republic. Indeed, it's just a truism that the United States Supreme Court has no authority to interpret the meaning of state law. It's also a truism that state courts ought to be applying state law in deciding cases. There's certainly no issue when it comes to property law, contract law, tort law. But all of a sudden, at least in recent history, there seems to be an issue with regard to constitutional law.

Also, it's a truism that state courts are entirely unconstrained by what the United States Supreme Court rules as a matter of Federal Constitutional Law, except for those few instances where the United States Supreme Court says that Federal Constitutional Law mandates what the states do or prohibits what the states do. Other than that, state courts are entirely unconstrained. Indeed, the history of Federal Constitutional Law makes plain all those truisms. For most of our history, the United States Supreme Court ruled virtually nothing with regard to civil rights and civil liberties that had any impact on state courts. In fact, it wasn't until 1868, with the ratification of the Fourteenth Amendment, that there was even an argument. Only then might those rights in the Bill of Rights apply to the States, because we know the Bill of Rights itself did not apply

to the states.

Shortly after the ratification of the Fourteenth Amendment, of course, the United States Supreme Court pulled a hat-trick, and decided in the *Slaughter-House Cases*[1] and the Civil Rights Cases that the Fourteenth Amendment didn't change anything with regard to fundamental rights in the Bill of Rights applying to the states. It really was not until 150 years into the Republic when another New Yorker – like Judith Kaye, a former Chief Judge of the Court of Appeals – Benjamin Cardozo, sat on the United States Supreme Court. When he spoke and wrote in *Palko v. Connecticut*[2] in 1937 that actually those fundamental rights that are implicit in a scheme of ordered liberty, those fundamental rights that were essential to a free society, those could be imposed on the states. Other than that, no.

And then, of course, it was in 1952 another New Yorker, Felix Frankfurter . . . Well, he was born in Austria but he spent his impressionable years in New York City. He wrote in *Rochin v. California*[3] that the only thing the United States Supreme Court could prohibit the states from doing were those actions which "shock the conscience." But until those cases, there was virtually nothing that the United States Supreme Court did with regard to civil rights and civil liberties that had any impact on the states.

With regard to the New York Court of Appeal's own history and tradition, what Chief Judge Kaye was advocating was entirely consistent with that. Because from the time the New York Court of Appeals was instituted in 1846, the New York Court of Appeals led the country in independent state-based adjudication. Almost right off the bat in the *Wynehamer*[4] case, the famous case in 1856, the New York Court of Appeals ruled it was radical at the time that due process must mean something more than that the legislature can simply duly enact any law that infringes upon fundamental rights, or that a court can simply apply that legislation to abridge fundamental rights. No, due process meant more than that.

We call that substantive due process. If we like the substance, we love substantive due process. If we don't like the substance, we hate it, right?

In 1885, *In re Jacobs*,[5] another great on the court, Robert Earl,

[1] Slaughter-House Cases, 83 U.S. 36 (1872).
[2] Palko v. Connecticut, 302 U.S. 319 (1937).
[3] Rochin v. California, 342 U.S. 165 (1952).
[4] Wynehamer v. People, 13 N.Y. 378 (1856).
[5] *In re* Jacobs, 98 N.Y. 98 (1885).

announced another radical proposition at the time: that constitutional liberty means a lot more than simply the absence of physical restraint, a lot more than simply the absence of imprisonment. And then Earl went further. In order for legislation to be valid, it had to have some actual relationship to the avowed legitimate purpose of that legislation.

Then, of course, several years hence in the great 1943 case, *People v. Barber*.[6] The United States Supreme Court by this time at least said Free Exercise of Religion was one of those rights that are implicit in the scheme of ordered liberty applicable to the states. And yet the United States Supreme Court really didn't protect Free Exercise of Religion too much. So when an anti-peddling statute came before the Supreme Court, it refused to grant a religious exemption to the Jehovah Witnesses. The next year, the New York Court of Appeals didn't hesitate at all. Speaking through Chief Judge Irving Lehman, it granted a religious exemption. In one of Lehman's paragraphs, he really set forth exactly what Chief Judge Kaye promoted during her tenure on the Court. Lehman wrote: "Parenthetically, we may point out that in determining the scope and effect of the guarantees of fundamental rights of the individual of the Constitution of the State of New York, this court is bound to exercise its independent judgment. And it is not banned by a decision of the Supreme Court of the United States."

That was in 1943. Oh and by the way, four months later, the United States Supreme Court, citing Chief Judge Lehman in *People v. Barber*, reversed itself and granted the Jehovah Witnesses an exemption.

That's the way it used to be. Later, even in the era of Chief Justice Earl Warren, when the United States Supreme Court was in the vanguard of protecting civil rights and civil liberties, that didn't stop the New York Court of Appeals from deciding cases on an independent basis. No, exactly like Chief Judge Kaye would ultimately advocate.

The Court of Appeals, speaking through Chief Judge Desmond, Chief Judge Fuld and others, would decide cases that became landmarks, not only in New York, but that ultimately were adopted by the United States Supreme Court in the Warren era. Actually, relying on and citing specifically by name, Desmond and Fuld.

And, by the way, in those cases, you know what Fuld and Desmond would say? It's unnecessary to consider what the United States

[6] People v. Barber, 289 N.Y. 378 (1943).

Supreme Court would do with regard to these issues.

Even after Earl Warren, even after that era, when the United States Supreme Court began to retrench a bit on civil rights and civil liberties, did the New York Court of Appeals simply just follow what the Supreme Court was doing? No! Speaking through others, such as and most prominently perhaps Chief Judge Lawrence Cooke, the New York Court of Appeals continued. And it continued to be the leading court in the country in independent state constitutional adjudication.

Not surprisingly, at an event at Albany Law School several years ago, when the Judges of the Court of Appeals would choose their favorite judge in Court of Appeals history to speak about, who did Chief Judge Kaye pick? She picked Chief Judge Cooke. And why? As she said, it in large measure because of Chief Judge Cooke's independent state constitutional adjudication. Also, he came from Monticello like she did.

Anyway, by that time the rest of the country seemed to be discovering state constitutional law. It was really interesting: the "reemergence" of state constitutional law, the "rediscovery" of state constitutional law. The "new judicial federalism." But it was not new in New York, and Chief Judge Kaye understood that.

Why was it new to the rest of the country? Chief Judge Kaye knew this as well, and tried to change what was happening in legal education. It became new, it became a "renaissance," it became a "reemergence" because law schools by and large after the '60s started teaching constitutional law and constitutional criminal procedure by almost exclusively focusing on United States Supreme Court decisions.

Prior to that time, if you looked at a constitutional law treatise, when it came to civil rights and civil liberties and due process cases, many if not most of the cases cited were out of the state courts. Because the Supreme Court had been doing very little about civil rights and civil liberties prior to that time. But after the '60s, law schools, and we continue to do that today law schools would just focus on the United States Supreme Court.

But Chief Judge Kaye, speaking through the Conference of Chief Judges and also in other speeches, articles, and her decisions on the Court of Appeals, and yes, in her dissents at the Court of Appeals (she would dissent quite a bit at that time). She would say and argue, "We ought to be deciding these cases on independent state constitutional law."

I just want to end by talking about Chief Judge Kaye's advocacy for

independent state constitutional law at a time when, very curiously, the New York Court of Appeals seemed to be very unsure, very uncertain even about the very legitimacy of independent state constitutional law. No, it was not because Republican Governor Pataki began appointing conservative Republicans to the court. No, it happened before then.

There became a time, to certain members of the Court of Appeals, it seemed as though independent state constitutional adjudication was somehow illegitimate. That the court was supposed to be following the Supreme Court of the United States on constitutional issues. That the Court of Appeals ought not to be exercising independent judgment.

Well, in one of those cases, in which the forces in favor of state constitutional law won, Chief Judge Kaye wrote a concurring opinion. I think it's one of her finest. It's in the case of *People v. Scott*.[7]

She wrote this in that concurring opinion, "However much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether a particular protection is adequate or sufficient."[8] It's hard to find judges nowadays especially if they're before the Senate Judiciary Committee acknowledging that judges actually ought to be rendering judgment, as opposed to simply mechanically applying law to facts. "In those instances where we have gone beyond Supreme Court interpretations of federal constitutional requirements, our objection has been the protection of fundamental rights, consistent with our constitutions, our precedents, and our own best human judgments in applying them."[9]

Judith Kaye was not only an absolutely wonderful, caring, generous human being. Beyond that, she really was a great jurist, and it was really an honor to know her. Thank you very much.

[7] People v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (Kaye, J. concurring).
[8] *Id.* at 1347.
[9] *Id.*