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NY's Court of Appeals in the Era of Trump

New York's highest court must step up.

The reactionary direction in so many areas of national policy and, perhaps most especially, the effect that the two newest appointees to the Supreme Court will have on ***federal*** constitutional and statutory protections, require heightened vigilance by ***state*** high courts.

As the final arbiters of their individual ***state's*** own constitution and laws, ***state*** courts have the ***authority, opportunity, and obligation*** to ***independently*** insure that fundamental civil rights and liberties are enforced, regardless of what the federal high court does under federal law. As has often been true throughout its history, the New York Court of Appeals should take a--if not ***the***--leadership role.

Seventy-five years ago, Chief Judge Irving Lehman made clear the role and responsibility of New York's high court:

> *Parenthetically we may point out that in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, **this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States** limiting the scope of similar guarantees in the Constitution of the United States.*

In that case, *People v. Barber* (1943), the Court of Appeals refused to adopt the Supreme Court's narrow view of free speech and religious liberty and, instead, did not hesitate to protect both as a matter of New York's own constitution law. Significantly, the federal Supreme Court--a mere four months later--followed the Court of Appeals' lead and overruled its prior rights-denying decision. (*Murdock v. Pennsylvania* [1943], overruling *Jones v. Opelika* [1942].)

> *That sort of leadership and*

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Today's NY Court of Appeals

influence by state courts and, in particular, by the New York Court of Appeals is needed today.

Twenty years later, in *People v. Donovan* (1963), involving the self-incrimination privilege and the right to counsel, then-Judge Stanley Fuld reminded the government of the Court of Appeals' independent tradition and function in our federal system of dual sovereignty:

> *[W]e find it **unnecessary to consider** whether or not **the Supreme Court of the United States** would [rule the police conduct to be] a violation of the defendant's rights **under the Federal Constitution**....**[T]o quote from our opinion** in Waterman (9 N Y 2d, at p. 565), [the violation in this case] "contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."*

Indeed, ***New York's*** high court relied solely on ***New York's*** own constitutional protections and precedents in that case and in so many others where, in the words of Chief Judge Charles Breitel, it reaffirmed its commitment to "extend[ing] constitutional protections...under the State Constitution beyond those afforded by the Federal Constitution." *People v. Hobson* (1976).

That sort of willingness to be bold and independent by state courts and, in particular, by the New York Court of Appeals is needed today.

Then, throughout the tenure of Lawrence Cooke, both as Judge and eventually Chief Judge, the Court of Appeals refused to "pay[] mere lip service to the principle of due process" (*People v. Isaacson* [1978]). It led the country in the rigorous enforcement of constitutional protections in both civil and criminal cases as a matter of New York ***state*** law, ***independent*** of the Supreme Court's rulings under corresponding ***federal*** law. (E.g., *People v. Isaacson* [1978], "traditional notions of justice and fair play;" *Sharrock v. Dell Buick* [1978], civil due process requirements of notice and opportunity to be heard; *People v. Skinner* [1980], right to counsel.)

That sort of steadfast guardianship and rigorous enforcement of constitutional principles by state courts and, in particular, by the New York Court of Appeals is needed today.

Not long thereafter, when the Court seemed at risk of losing its moorings, then-Judge Judith Kaye felt compelled to remind some of her colleagues of the propriety and obligation of a state high court to render independent judgment:

> *[A]t some point the decisions we make must come down to judgments as to whether a particular protection is adequate or sufficient, even as to whether constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court....**A state court decision that rejects Supreme Court precedent, and opts for greater safeguards as a matter of state law,***

> *does indeed establish higher constitutional standards locally. [But even] the Supreme Court as well as its individual Justices have reminded state courts not merely of* ***their right but also of their responsibility to interpret their own constitutions****.[R]ejecting Supreme Court precedents [reflects] both* ***the role of the Supreme Court in setting minimal standards*** *that bind courts throughout the nation, and t****he role of the state courts in upholding their own constitutions****. (*People v. Scott*, concurring opinion [1992].)*

Fortunately, and in large measure owing to Judith Kaye's influence and veritable tutoring on judicial federalism, the Court of Appeals exercised its independent judgment and avoided merely following lockstep with whatever the Supreme Court decided under federal law, however questionable.

Understanding and embracing the axiomatic principles of federalism, including the independent role of state courts--as emphatically restated by Judith Kaye--is needed today by state courts and, in particular, by the New York Court of Appeals.

Nevertheless, in the later years of Kaye's tenure as Chief Judge, the Court of Appeals failed to heed those principles and did lose its moorings for a spell. Consequently, during that period the Court produced some very unworthy decisions. Among them was one of the Court of Appeals most regrettable rulings in the modern era, *Hernandez v. Robles* (2006), rejecting the right to marry for same-sex couples.

As Chief Judge Kaye wrote in her passionate dissent, the majority's refusal to recognize marriage equality was an embarrassing break with the Court's tradition of leadership in safeguarding fundamental rights:

> *This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition....*
> *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.*
> *I am confident that* ***future generations will look back on today's decision as an unfortunate misstep.***

And, of course, Chief Judge Kaye was right. The Court's reluctance to safeguard constitutional rights to the fullest ***under New York law*** was, at the very very least, "an unfortunate misstep." Indeed, it has proven to be a quite shameful ruling. It placed the Court among the nation's most backward, callous, and timid tribunals. And it required New York's governor and legislature to protect equal rights because the Court had failed to do so.

That sort of timidity and underenforcement of the most fundamental constitutional mandates of equal treatment and due process, by a state court and by the New York Court of Appeals in particular, must be avoided today.

A few years hence, with Chief Judge Jonathan Lippman at the helm, the Court's national stature as a leader among state high courts rebounded. *(Indeed, several chief justices of state courts around the country actually volunteered that to me during the time.)*

The Court of Appeals once again began boldly to protect basic rights as a matter of ***state*** law, ***independent*** of how the ***federal*** Supreme Court might decide the same issues. So, for example, in *People v Weaver* (2009), the Court declared that the technological surveillance in question was a search requiring probable cause and a warrant. Whether ***federal*** Supreme Court doctrine--as embraced by the dissenters--would have dictated a different result was beside the point.

Writing for the majority, the Chief Judge made clear that a potentially contrary ***federal*** Supreme Court ruling was irrelevant:

> *What we articulate today may or may not ultimately be a separate standard. If it is, we believe* ***the disparity would be justified****.* ***The alternative would be*** *to countenance an enormous unsupervised intrusion by the police agencies of government upon personal privacy and, in this modern age where criminal investigation will increasingly be conducted by sophisticated technological means, the consequent* ***marginalization of the State Constitution and judiciary in matters crucial to safeguarding the privacy of our citizens.***

Notably, three years later in *U.S. v. Jones* (2012), the Supreme Court--despite its narrow, rigidly, and regressively textualistic opinion by Justice Scalia--reached the same result as did the Court of Appeals. Significantly, a majority of the Justices, in separate concurring opinions, actually adopted the very same privacy analysis articulated by Chief Judge Lippman.

The sort of confident fidelity to a state court's independent role in protecting fundamental rights, as reflected in the Court of Appeals' decision in Weaver, is needed today.

The current Court of Appeals--with all its members having been appointed in recent years--is still a young court, with little institutional memory, and is seemingly still finding its way. At the least, it has not yet made its mark. It has yet to establish itself as an heir of the earlier courts, of carrying forth the historic tradition of the Court of Appeals as a force for vigorously protecting constitutional rights and liberties and fundamental fairness, and of doing so entirely independent of what the federal Supreme Court has done or might do.

Other state high courts around the country--the supreme courts of Iowa, Massachusetts, Oregon, Vermont, and Washington being among them--have been in the forefront of producing landmark rulings as a matter of independent state law. The Court of Appeals was conspicuously and uncharacteristically absent from any such list during a recent period. As previously mentioned, however, the Court subsequently regained considerable national stature while Lippman was Chief Judge.

New York Court of Appeals

It still remains to be seen where the Court of Appeals, with Chief Judge Janet DiFiore presiding, will eventually land. It remains to be seen how faithful this current Court will be to the historic tradition of bold, independent vigilance in the protection of constitutional rights and fundamental fairness. Indeed, that tradition has of late been manifesting itself primarily in the dissenting opinions--in the dissents penned by Judges decrying the majority's indifference to some injustice left unredressed.

- Sears_Leah Ward
- Second Amendment
- Section 1983
- Self-incrimination
- Sex Discrimination
- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny
- Strip Searches
- SupCt
- SupCt (2011-12)
- SupCt (2012-13)
- SupCt Highlights (2007-08)
- SupCt Highlights (2008-09)
- SupCt Highlights (2009-10)
- SupCt Highlights (2010-11)
- SupCt Highlights (2013-14)
- SupCt Highlights (2014-15)
- SupCt Highlights (2017-18)
- SupCt Nominations
- SupCt Workload
- SupCt: Crim Law
- SupCt: Discrimination
- Technology
- Ternus_Marsha
- Textualism
- Thomas_Clarence
- Titone_Vito
- Toal_Jean
- Torture
- Traffic Stops

*(See the previous discussion in **Dissents, Disappointments, and Open Questions**, **Part 1** and **Part 2**.)*

In this era of Trump and of the ***federal*** Supreme Court he is remaking, the fundamental role and obligation of ***state*** courts and, in particular, of the New York Court of Appeals could not be more compelling. That role and obligation is to be ever mindful of the ***dual sovereignty of our federal system*** of government, and to stand as a bulwark in the protection of civil rights and liberties and basic justice, ***independent*** of regressive federal law and jurisprudence.

This is no time for timidity or indifference or passive acquiescence to injustice on the altar of some interpretive method. The Court of Appeals must step up.

Labels: Breitel_Charles, Cooke_Lawrence, DiFiore_Janet, Fuld_Stanley, Judicial Federalism, Kaye_Judith, Lehman_Irving, Lippman_Jonathan, NY Court of Appeals, State Constitutional Law, Trump_Donald

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