THE IMPACT OF FEMININE LEADERSHIP ON STATE COURTS: A PANEL OF WOMEN CHIEF JUSTICES

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INTRODUCTION

That two women have sat on the U.S. Supreme Court is a telling fact. The presence of women on the nation's highest court attests to the opportunity women have to occupy the judiciary as fully as men. Given the relatively recent acceptance of women lawyers at all,[1] the ascensions of Sandra Day O'Connor and Ruth Bader-Ginsburg are indeed milestones. On the other hand, that there have been only two women ever to sit on the nine-member body—with currently only one remaining—signifies the relatively small degree to which women have permeated the legal system and the great potential women as a group still have to affect the courts.

How has the entry of women into the legal profession and the judiciary impacted the law? Has the presence of women in law merely made the judiciary more representative of society or has it actually changed the course of the law?

On April 7, 2006, Cardozo Women, with the *Cardozo Journal of Law & Gender*, hosted *A Symposium With Women Chiefs* with the aim of examining the effect of women judges on state courts. The panel included four of the nation's most prominent female chiefs of state judiciary: Chief Judge Judith S. Kaye of the New York Court of Appeals, Chief Justice Barbara J. Pariente of the Florida Supreme Court, Chief Justice Deborah T. Poritz of the New Jersey Supreme Court, and Chief Justice Jean Hoefer Toal of the South Carolina Supreme Court.[2]

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[1] *Compare* Bradwell v. Illinois, 83 U.S. 130, 141, 16 Wall. 130 (1873) (J. Bradley, concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits if for many of the occupations of civil life.") *with* Stanton v. Stanton, 421 U.S. 7, 14-15 (1982) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.") (internal citation omitted).

[2] While female chief justices are relatively new occurrence—Chief Justice Susie Sharp of the Supreme Court of North Carolina became the first in 1974—these four are not the only female leaders of state judiciaries. The panelists were quick to note this fact. Others have included Chief Justice Shirley S. Abrahamson of the Supreme Court of Wisconsin, Chief Justice Deborah A. Agosti of the Supreme Court of Nevada, Chief Justice Kathleen A. Blatz of the Supreme Court of Minnesota, Chief Justice Maura D. Corrigan of the Supreme Court of Michigan, Chief Justice Christine M. Durham of the Supreme Court of Utah, Chief Justice Karla M. Gray of the Supreme Court of Montana, Chief Justice Petra Jimenez Maes of the Supreme Court of New Mexico, Chief Justice Margaret H. Marshall of the Supreme Judicial Court of Massachusetts, Chief Justice Kay McFarland of the Supreme Court of

This essay documents much of the panel discussion regarding the four chiefs' views about the impact of women on the courts. It then goes on to assess one possible legacy of women on the courts—the rise of state courts as the forums for civil rights litigation.

I. THE IMPACT OF WOMEN ON STATE JUDICIARIES

A. The Individual Chief Justices' Backgrounds

The panel began with the four chief justices' relating how they ended up pursuing legal careers. Their backgrounds, as well as the points they recall as particularly important, might serve to illuminate their views of the effect of women on the court.

Chief Judge Kaye originally trained as a journalist, but after working as a social reporter, she found the law more interesting. In 1983, Governor Cuomo appointed her to the New York Court of Appeals, and ten years later, he appointed her as Chief Judge. She was the first woman to hold either position.

Chief Justice Toal grew up in segregated South Carolina and saw the impact of *Brown v. Board of Education*.[3] She originally set out to be a college professor, but after having attended a single constitutional law class at the urging of a family friend, she became charmed with law. "The law I saw as a great engine for change," she recounted with inspiration. She joined a firm, recalling that women lawyers became necessary in South Carolina to appeal to newly allowed women jurors. With some sense of bemusement, she remembered that female jurors had appreciated seeing female lawyers but then resented when female lawyers took no active part during the trial. Similarly, Chief Justice Toal's career was to be about more than simple appearances. With some guidance from Ruth Bader-Ginsburg, she later took on civil rights cases. Eventually, she was elected to the South Carolina House of Representatives. In 1988, she became the first woman elected to the South Carolina Supreme Court, and in 2000, she was elected Chief Justice.

Chief Justice Pariente recalled growing up during the Warren court, revering the federal courts as the champions of individual rights. She described herself as having been driven by a competitive desire to prove that she could do as well as men, seemingly regardless of the field she chose. In fact, she originally sought a career in television production, but having felt that it was too difficult a field for women to break into, she ironically chose law instead. After law school, she

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Kansas, Chief Justice Mary Ann G. McMorrow of the Supreme Court of Illinois, Chief Justice Mary J. Mullarkey of the Supreme Court of Colorado, Chief Justice Sarah Parker of the North Carolina Supreme Court, Chief Justice Linda Copple Trout of the Supreme Court of Iowa, Annice M. Wagner, Chief Judge of the D.C. Court of Appeals, Chief Justice Rosemary Barkett of the Supreme Court of Florida, Chief Justice Rhoda Billings of the North Carolina Supreme Court, Chief Justice Dana Fabe of the Supreme Court of Alaska, Chief Justice Ruth V. McGregor of the Supreme Court of Colorado, and Chief Justice Susie Sharp of the North Carolina Supreme Court. *See* State Listing of Selected State and Federal Justice System Officials and Agencies, http://spa.american.edu/justice/resources/statedirectory.pdf.

[3] 347 U.S. 483 (1953).

clerked for a federal judge and later practiced civil litigation at a Florida firm. She was appointed to the Florida Supreme Court in 1997 and to the position of Chief Justice in 2004.

Rather than recounting the steps of her career, Chief Justice Poritz instead focused on the lateness of her career. She did not decide to go to law school until she was thirty-seven years old and had two children. She described her background as exemplifying that one can take time off and still have high goals. After law school, she worked for the New Jersey Attorney General, a position she described as allowing her to work in a good office but also to be near her children. She eventually became the first female Chief Counsel to a New Jersey governor, and in 1996, she was appointed as the first female Chief Justice of the New Jersey Supreme Court.

B. The Legacy of Women Chief Justices

The four chief justices seemed to believe that the presence of women on the judiciary has changed state courts but unsure of how to characterize that change.

Chief Justice Pariente assessed the change based on the Meyers-Briggs test's characterization of women as extroverts. It is possible, she claimed, that female judges are more likely to seek collaborative solutions, to confer with others, and to use networking as a strategy for solving problems. Similarly, Chief Justice Poritz saw the presence of women on the court as effecting a governance by consensus within the courts. In contrast, Chief Judge Kaye looked at the impact of women in terms of the court's cases, asserting that an increase in the number of family law cases might be attributable to the increased presence of women on the court.

All four panelists shared similarities in background. None of them had set out to be lawyers; instead, they set out on alternative career paths but described being later drawn to law because of its potential for change. Three of the four attended law school during the years of the Warren Court and the civil rights movement, which was strongly supported by federal court decisions. Additionally, these women have something in common with most of the women who sit on state supreme courts. They were among the first women to enter what had been a man's world: first law generally and second the judiciary. Perhaps this commonality impacted the character of the courts these women would lead.

II. HAVE STATE COURTS BECOME THE NEW CHAMPIONS OF INDIVIDUAL RIGHTS?

During the time these women ascended to the top of state judiciaries, one notable shift in state courts has been the increased involvement of state courts in the adjudication of civil rights. Might that shift be the legacy of pioneers like these women chiefs?

A. Case Law Supporting the State Court as Civil Rights Forum

Recent state court cases expanding individual rights support the proposition

that state courts are a powerful forum for enforcing civil rights. To some degree, it was state courts that brought to a head a national political battle on gay rights. Most notably, in 2003, the Massachusetts Supreme Judicial Court effectively legalized gay marriage.[4] In an opinion by (Woman) Chief Justice Marshall, the Court found that laws preventing same-sex marriage violate the equal protection clause of Massachusetts' constitution.[5] In 1989, the New York Court of Appeals made what was then an equally radical decision by reading the word "family" in a rent-control statute to include same-sex couples.[6]

State courts have also extended the rights of criminal defendants where the U.S. Supreme Court has specifically chosen not to. For example, in *Harris v. New York*,[7] the Supreme Court held that statements generally inadmissible because of Miranda violations were admissible for impeachment purposes.[8] Both California and Hawaii specifically adopted Justice Brennan's dissent in *Harris*, finding that such statements were inadmissible for any purpose.[9]

It would be too easy to dismiss the notion of state courts as champions of rights by saying that it applied to only a few liberal states. For example, more than ten years before *Lawrence v. Texas*,[10] the Supreme Court of Kentucky held that the state constitution's rights of privacy and equal protection prohibited the Kentucky legislature from criminalizing homosexual sodomy.[11] Moreover, in reversing its prior position,[12] Justice Kennedy's majority opinion cites cases from the supreme courts of Arkansas, Montana, and Tennessee—as well as the Kentucky case—to criticize Texas's argument that criminalization of same-sex sodomy was constitutionally valid because of its "ancient roots."[13]

Aside from the admittedly controversial gay rights movement, state courts have also afforded criminal defendants additional rights via their own state constitutions. For example, in *People v. Sporleder*,[14] the Supreme Court of Colorado held that the Colorado constitution's prohibition on unreasonable search and seizure required the suppression of evidence in the form of telephone pen

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[4] *See* Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

[5] *See id. See also* Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996) (holding that a prohibition on same-sex marriage failed strict scrutiny under Hawaii's constitution). Note that the decision of the Hawaii Supreme Court was effectively overruled by a popular amendment to the state constitution. *See* Baehr v. Miike, 1999 Haw. LEXIS 391 (Haw. 1999).

[6] *See* Braschi v. Stahl Associates Company, 543 N.E.2d 49 (N.Y. 1989).

[7] 401 U.S. 222 (1971).

[8] *See id.*

[9] *See* People v. Disbrow, 545 P.2d 272 (Cal. 1976); State v. Santiago, 492 P.2d 657 (Haw. 1971).

[10] 539 U.S. 558 (2003).

[11] *See* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

[12] In *Lawrence*, the Court purported to reverse Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a statute criminalizing sodomy regardless of genders). *See Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

[13] *See Lawrence*, 539 U.S. at 570-71 (citing Jegley v. Picado, 80 S. W. 3d 332 (Ark. 2002); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996)).

[14] 666 P.2d 135 (Colo. 1983).

registers despite a U.S. Supreme Court case holding that such suppression was unnecessary.[15]

Reading Oregon's constitutional search and seizure provision more broadly than its federal constitutional analogue, the Supreme Court of Oregon found police use of a surveillance beeper unconstitutional because it was such a pervasive form of scrutiny.[16] In reaching its decision, the Oregon Supreme Court looked far deeper than the U.S. Supreme Court's approach, which focuses only on whether the defendant had had a reasonable expectation of privacy in his location on a public street.[17]

Similarly, the Supreme Court of Washington has read the its own search and seizure provision more broadly than the Fourth Amendment, requiring police officers to obtain search warrants before tracking suspects with Global Positioning System (GPS)-based equipment.

B. Barriers to the State Court as Civil Rights Forum

Despite such results, the chief justice panelists did not see state courts as the inevitable forum for enforcing civil rights. To some degree, the chief justices see the increased politicization of the state court benches as limiting the courts' abilities to protect the rights of minorities.

1. States' Historical Involvement with and Withdrawal from Civil Rights

The seeming suddenness of state courts to expand individual rights could prompt a backlash to what some might see as dreaded judicial activism. That is not to say that state courts have no place in adjudicating the scope of civil rights. Federal constitutional treatment of individual rights in many areas is relatively modern invention, before which state courts addressed individual rights. Substantive due process rights in the area of individual liberties began in the mid-1960s,[18] and until the first quarter of the twentieth century, it was state constitutions, and not the federal constitution, that dealt with criminal procedure.[19]

During the years of the Warren Court, the federal judiciary took a more pervasive view of civil rights as state courts underwent a relative decrease in individual rights cases.[20] And even as some now see the U.S. Supreme Court as taking a conservative shift, the chief justice panelists imagine that state courts may have difficulty reverting to their former position as arbiters of civil rights. A

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[15] *See* Smith v. Maryland, 442 U.S. 735 (1977) (allowing evidence based on warrantless telephone pen registers which recorded the numbers that defendant dialed but not any of the conversations).

[16] *See* State v. Campbell, 759 P.2d 1040, 1047 (Or. 1988).

[17] *Compare* United States v. Knott, 460 U.S. 276 (1983) *with* United States v. Karo, 468 U.S. 705 (1984).

[18] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[19] Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEXAS L. REV. 1141, 1144-45 (1985).

[20] *See id.* at 1147-48.

sudden shift to expand minority rights on the basis of state constitutional provisions might be seen as politically unpopular judicial activism.

2. Constitutional Convergence and Divergence

Such a problem is particularly problematic where the state constitutional provision mirrors that of the federal constitution's provision; the problem is exacerbated where state court precedent reads the two provisions equally, thus locking the state's position to that of the U.S. Supreme Court.[21] In other words, there may be well-founded arguments to read even identical provisions of state and federal constitutions differently. The proponent of states as laboratories of democracy,[22] Justice Brennan has written, "decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions in state [constitutional] law."[23] Constitutional avoidance doctrine might further support interpreting state constitutional provisions as different from identical federal constitutional language, as a method of avoiding unnecessary adjudication of federal constitutional issues.[24]

But despite these legal rationales, political realities may prevent a court from reaching such interpretations. Chief Justice Pariente points to a recent constitutional amendment in Florida, requiring the Florida Supreme Court to interpret Florida's search and seizure provision as identical to the U.S. Supreme Court's treatment of the Fourth Amendment.[25]

3. The Power of the Majority

Chief Justice Toal points out what should be an obvious point but which might escape the notice of someone enthusiastic about the seeming power of state courts to adjudicate individual rights. State courts are now litigating more controversial issues, such as abortion, same-sex marriage, tort reform. By definition, the majority position, what one might characterize as the anti-individual-rights position, has much political support. So the questions become, first, how much political power the majority has over the judge, and second, how easily the constitution can be amended.

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[21] *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

[22] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[23] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

[24] Jerome B. Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 286 (1973).

[25] *See* FLA. CONST. ART. I, 12 ("This right [to be free of unreasonable searches and seizures] shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.").

The first issue largely depends on the process used to select and to remove state court judges. Such methods range from direct appointment by the governor to popular election. Moreover, states with popularly elected judges now run the risk of judicial candidates pandering to popular majorities. Consider the U.S. Supreme Court's recent holding that "the Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment."[26] On the second issue, even in states where judges are relatively insulated from political pressure, the ease with which the state constitution is amended will directly affect the state judiciary's ability to protect individual rights.

4. Familiarity with State Constitutions—An Educational Problem

Finally, the political process aside, state courts' protection of individual rights may be limited simply by the knowledge and training of the states' own lawyers. In light of the historic dominance of federal constitutional law, lawyers are frequently ignorant of state constitutional law. In awe, Chief Judge Kaye pointed out that she has come across New York attorneys who are unaware that New York even has its own state constitution. Chief Judge Kaye openly asked for lawyers to argue that New York's constitution should be interpreted differently from the federal constitution—but she emphasized the need for litigants to give solid reasons grounded in law or in history to do so.

EPILOGUE

Whether or not state courts have in fact become the new forums for civil rights, all four panelists appeared to believe that state courts certainly had such potential. Perhaps law schools and state bars should heed her warning and take a renewed interest in state constitutional law. Moreover, whether or not this focus on civil rights within state courts is the product of the increased involvement of women in the courts, the legacy of these women is nevertheless strong. Individually, they defied stereotypes and sought to satisfy their own dreams while striving to improve others' lives. Collectively, they exemplify the power of visionaries' to use the system for good. Regardless of exactly how it manifests itself, that's quite a legacy.

[26] Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2002).