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PORTRAIT OF A JUDGE: JUDITH S. KAYE, DICHOTOMIES,  
AND STATE CONSTITUTIONAL LAW

*Susan N. Herman\**

I. INTRODUCTION: A CAREER OF THEORY AND PRACTICE

First, let me say how honored and delighted I am to be here to start us out on this afternoon's project, which I would describe as all of us working together to compose a verbal portrait of Chief Judge Judith S. Kaye to go along with the very impressive physical portrait now gracing the back wall of this courtroom. In painting a portrait, we all start with our sketches and our mental snapshots of particular scenes or moments. So before getting to the topic on which I've been asked to speak, Chief Judge Kaye's scholarship, I want to start by sharing with you a few of the snapshots in my mind—my own personal memories and impressions of Chief Judge Kaye over the years—because they are a key part of the background for my piece of the portrait we are creating today.

*A. Judith Kaye and the New York Jury*

The first time that I saw Judith Kaye in action was when I'd been called for jury duty in New York City some years ago. I was sitting among the pool of prospective Brooklyn jurors when a video came on featuring Judith Kaye speaking to all of us there. This was something that had never happened before—that anybody, no less the Chief Judge of New York State, really tried to explain to prospective jurors what they were being asked to do and why it was important, rather than just intoning some Law Day homilies and

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then deluging them with commands and cattle-herding bureaucracy. But there was Chief Judge Kaye up on the screen explaining eloquently and inspiringly why she believed jury duty to be a critical part of our constitutional system. Her remarks signaled that I, along with everyone else in the room, was being taken seriously as an integral part of the justice system and was entitled to respect. In addition, this video (which I'm sure Chief Judge Kaye supervised because no detail went unnoticed) used filmmaking and storytelling arts to communicate with people—in a way that could really capture their imaginations—why they were being asked to give up a part of their personal lives to perform this public function. Instead of just assuming that jury service was a fact of life, the video treated the opinions of the prospective jurors about their jury service as important. And so the video took pains to educate, explain, and persuade so that the prospective jurors would have a basis for deciding for themselves that they were doing something valuable.

I don't know how many of you may have seen this video, and I actually don't know if it's still being shown. But even though I don't recall exactly how long ago I was called to jury duty on that occasion, I vividly recall that in this video—while the voices of Judge Kaye and other experts talked admiringly about the nature and history of our jury system—the viewer was shown a reenactment of an alternative system of justice from our Anglo-American past: trial by ordeal. A woman dressed in appropriate period costume was being led into the water by uniformed purveyors of justice to see if she would sink or float. My fellow Brooklynites hooted at the idea that whether or not the water rejected her could be regarded by anyone as a reasonable basis for deciding whether or not this woman was a witch, a rather questionable charge to begin with. After seeing this video, I was not the only person in the room who then thought: Of course I want to be part of a reasonable and fair system for protecting people against unjust punishment. Even that brief reenactment—inviting viewers to empathize with the woman being subjected to such terrifyingly arbitrary treatment—helped to persuade the viewers that such outmoded forms of trial are no way to make a decision and certainly not a way they would want important decisions about their own lives to be made. That perception made the prospect of disrupting one's own everyday life for jury service sting a little less.

That video, of course, was just one part of Chief Judge Kaye's important campaign—one of her priorities on assuming her position

as Chief Judge—to transform the experience of jury duty for all the people of the State of New York. And as a first glimpse of Judge Kaye, the campaign reveals features of its architect that have become confirmed through later experience: brilliance tempered with humanity and humility, a deep and abiding love and respect for our Constitution and system of justice, devotion to efficiency without neglecting the humanity of the people affected by the system in question, and a view of the arts as a partner of the law.

So this is a good beginning for one of my themes for today, which is to note that any portrait of Chief Judge Kaye has to be multifaceted because Judith Kaye cannot be pigeonholed into a few ‘this is what she’s like’ adjectives. Somehow Chief Judge Kaye manages to bridge what people often regard as dichotomies. Take Aristotle’s dichotomy of the man (or woman) of theoretical wisdom and the man (or woman) of practical wisdom—supposedly two distinct and defining models of how people think.<sup>1</sup> Even in this little video about jury duty, Kaye shows her theoretical wisdom: the intellectual rationalization and eloquent articulation of the importance of the jury trial and its role in the American justice system. At the same time, the transformation of the experience of jurors in New York State worked on a very practical level. In addition to offering inspiration, Chief Judge Kaye was also paying attention to promoting the physical comfort of jurors and prospective jurors, to treating them with dignity, and to figuring out ways to avoid wasting their time. But this was more than just a case of accomplishing two unrelated goals with one set of actions. The theory—that jury service is one way in which the Constitution empowers the People—was integrally tied to these practical innovations. Taking jurors seriously is more than just kindness. It is the result of recognizing that jurors are one-half of our judicial system, and therefore should not be treated as ignorant, surly, temporary servants of judges who show up only because they are compelled to do so, and need to be manhandled into serving their function. By treating jurors with respect, we show them that the constitutional theory that “We, the People” are the true government<sup>2</sup> is actually being put into practice. This attention to both the theory<sup>3</sup> and practice of jury service has been an invaluable

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<sup>1</sup> ARISTOTLE, *NICOMACHEAN ETHICS* bk. IV, at 176–78 (Sarah Brodie, ed. & Christopher Rowe, ed. & trans., Oxford Univ. Press 2002) (c. 384 B.C.E.).

<sup>2</sup> U.S. CONST. pmbl.

<sup>3</sup> Judge Kaye has also contributed to the academic scholarship on jury reform. See Judith S. Kaye, *Why Juries? Looking Back, Looking Ahead*, 1 J. CT. INNOVATION 185, 185–88 (2008)

contribution to the people of New York State and to justice generally.

So that video and that campaign are snapshot number one.

*B. Judith Kaye, Interviewee*

The first time that I actually spoke with Chief Judge Kaye was in anticipation of a program in which we were both involved. The National Association of Women Judges had planned a Saturday night dinner during its annual conference and had decided that the entertainment at the end of the dinner would be something of great significance to all the women judges in the room: an interview with the first woman justice on the United States Supreme Court, Sandra Day O'Connor, and the first woman judge on the New York Court of Appeals, Judith Kaye. I was invited to conduct that after-dinner interview. As my husband quipped, it was my chance to be Oprah.

We had planning calls: I spoke with both Justice O'Connor and Chief Judge Kaye on the telephone. When I spoke with Judith Kaye, the first thing she said to me was, "I see we both went to Barnard and to NYU Law School." Now isn't this typical? As busy as she must have been, she had taken the time to look me up and had done research on me. She told me at one point that she was a bit nervous about what I might ask her during the interview—which she needn't have been, as she handled all of the questions beautifully. Here again, Judith Kaye bridged a dichotomy: between her own superstar stature and a genuine humility that is not always easy for such a public figure to maintain.

The conference at which this dinner was scheduled to take place—and did take place—was held during the first week of October 2001, just a few weeks after 9/11, in New York City. The dinner had originally been scheduled to take place at the elegant Windows on the World restaurant atop the World Trade Center, a restaurant which had suddenly and shockingly ceased to exist.

What was quite remarkable was that so many of those women

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(explaining jury reform in terms of public outreach and courthouse team building); Judith S. Kaye, *Why Every Chief Judge Should See 12 Angry Men*, 82 CHI.-KENT L. REV. 627 (2007) (recognizing the advances in the jury system—including the amenities, diversity, and technology—since the release of the film); Judith S. Kaye & Albert M. Rosenblatt, *Introduction to Special Edition on Juries*, 73 N.Y. ST. B.J. 8 (2001) (identifying New York's efforts at jury reform since 1993); Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1494–96 (1999) (extolling changes to summoning methods and jury sequestration that have made New York courts more juror-friendly).

judges were willing to come to New York anyway, resisting the climate of fear that surrounded New York City at the time, and that the planning committee was able to hastily relocate the dinner to a hotel in midtown. In this highly charged atmosphere, the interview was especially moving and the audience was rapt. Justice O'Connor wryly referred to herself as the FWOTSC (First Woman on the Supreme Court, an acronym for the way in which she was so frequently described) and Judith Kaye shone as the FWOTNYCA (First Woman on the New York Court of Appeals) as well as the FWCJOTNYCA (First Woman Chief Justice of the New York Court of Appeals).

### C. *Judith Kaye and Law and . . .*

The third vignette that I want to share with you occurred in this very courtroom. After the Court of Appeals building had been renovated (a process of which Judge Kaye was justifiably proud because it came out beautifully), Chief Judge Kaye decided to celebrate the new courthouse by holding a lecture series featuring multidisciplinary topics, like law and architecture, instead of just law. I was invited to speak on a law and literature topic: the *People v. Gillette* case<sup>4</sup>—the New York case which was one of the models for Theodore Dreiser's great novel, *An American Tragedy*.<sup>5</sup> Interestingly enough, the person who was paired with me to speak that evening was Francesca Zambello, who had recently directed the Metropolitan Opera production of an opera based on *An American Tragedy*.<sup>6</sup> Chief Judge Kaye clearly delighted in the literature aspect every bit as much as the law, and in managing to include her beloved world of opera within the confines of the courthouse. My husband and I had the great pleasure of having a personalized, guided tour of the newly renovated courthouse by none other than tour guide Judith Kaye.

Here again you can see dichotomies being bridged: there's the champion of the law and there's also the lover, appreciator, and missionary of the arts—literature, opera, architecture; and again Kaye scarcely seems to notice any tension between what a lot of people would regard as very different and even irreconcilable enterprises.

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<sup>4</sup> *People v. Gillette*, 83 N.E. 680 (N.Y. 1908).

<sup>5</sup> THEODORE DREISER, *AN AMERICAN TRAGEDY* (1926).

<sup>6</sup> Susan N. Herman, *Dreiser "American Tragedy" The Law and the Arts*, N.Y. CT. APP. LECTURE SERIES (June 26, 2006), <http://www.nycourts.gov/ctapps/imptwebcasts.htm>.

*D. Judge Kaye and the Two Hats*

I want to tell you about one more encounter I had with Chief Judge Kaye, not counting the numerous times we've bumped into each other at the Metropolitan Opera or as strap-hanging fare-payers in the New York City subway. (Imagine that: the Chief Judge of the State of New York right there in the subway along with everybody else, rather than spending all her travel time in limousines.) The last time I saw Chief Judge Kaye in a professional capacity before today was at a session the New York State Bar Association held in which they invited Chief Judge Kaye to give some valedictory remarks and invited some other people (including her successor, Chief Judge Jonathan Lippman) to talk about her tenure on the New York Court of Appeals. Now at that talk I heard Judge Kaye for the first time make the priceless comment that Judge Lippman quoted this morning about her two jobs. She explained that, somewhat to her surprise as she got down to work, the job of Chief Judge turned out to comprise two distinct jobs. One of those jobs is serving as the Chief Administrative Judge of all of New York, presiding over all the courts of the state. I think Judge Newton is going to be talking about some of the things that Chief Judge Kaye did in that capacity.

The second job, of course, is being Chief Judge of the Court of Appeals itself. This entails acting as a judge—hearing the arguments, deciding the cases, writing the opinions—in addition to worrying, as Chief, about the well-being and the functioning of the New York Court of Appeals.

I'm going to repeat Chief Judge Kaye's memorable line, even though Chief Judge Lippman already mentioned it, because I shamelessly plagiarize this humorous but apt summary all the time. "Each of those jobs," said Kaye, "took up eighty percent of my time." I am sure that all of us who know Judge Kaye would regard that quip as more true than the laws of nature would seem to allow. There are some people who just seem to have more hours in their day than anybody else and Judith Kaye is one of those people. And there again in that double job we see a kind of dichotomy being transcended. In addition to a thirty-eight hour day, it takes tremendous practical skills, administrative skills, and managerial skills to run the courts of New York State, and to be their administrator. And it takes a somewhat different range of skills, including serious intellectual chops, to be a great judge.

## II. JUDITH KAYE, SCHOLAR

I will now turn to the matter of Chief Judge Kaye's scholarship, because other speakers more familiar with the courts from the inside than I am are going to focus on what Chief Judge Kaye did as an administrator of the courts and as a jurist. As a professor, it's left to me to talk about Chief Judge Kaye's writing beyond judicial opinions. The first thing that I want to note is that when you factor in the amount of time that it consumes to be chief judge of all the courts of New York State as Chief Administrative Judge and to have the full workload of a judge on the Court of Appeals, it is nothing less than astonishing that Judge Kaye managed during that same period of time to publish over two hundred articles.<sup>7</sup> If you add another 80 percent for her writing job, by my math we're up to at least 240 percent of an average person's time.

When you look at Chief Judge Kaye's list of articles and the range of things she's written about, you notice a few things right away, in addition to the sheer volume of her productivity. One is that there's a kaleidoscopic range of topics. Judge Kaye has written traditional law review articles in the usual scholarly art form, voluminous footnotes and all, about substantive legal topics. I will focus, in a few minutes, on one of those topics in particular, state constitutional law, where I think her contributions have been quite remarkable. In addition to articles about the law in this area and beyond, the list includes a lot of articles about the administration of courts, about innovation in the courts, and about how to handle particular aspects of court management.<sup>8</sup> There are articles about

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<sup>7</sup> See *Biography of Judith Kaye*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, <http://www.skadden.com/index.cfm?contentID=45&bioID=9178> (last visited May 22, 2012).

<sup>8</sup> See, e.g., Judith S. Kaye, *Pace Law Review Symposium: New York Matrimonial Commission*, 27 PACE L. REV. 549, 549–50 (2007) (encouraging innovation and cultural change in matrimonial litigation); Judith S. Kaye, *Reducing the Human Costs in Family and Criminal Court Cases*, 45 JUDGES' J. 1, 4 (2007) (advocating for a problem-solving approach to matrimonial and criminal adjudication); Judith S. Kaye, *Albany Law Review Symposium: Refinement or Reinvention: The State of Reform in New York: The Courts*, 69 ALB. L. REV. 831, 831–50 (2006) (identifying and describing various levels and methods of court reform); Judith S. Kaye, *Women Chiefs: Shaping the Third Branch*, 36 U. TOL. L. REV. 899, 900–03 (2005) (listing Judge Kaye's initiatives in family law, drug courts, and integrated domestic violence courts); Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 125–51 (2004) (detailing the problem-solving approach New York has taken towards judicial reform); Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 5–12 (1999) (describing the problem-solving approach in domestic violence cases); Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK (Oct. 10, 1999), <http://www.thedaily-beast.com/newsweek/1999/10/10/making-the-case-for-hands-on-courts.html> (explaining the need to shift from traditional to problem-solving approaches); Kaye, *Rethinking Traditional*



the challenges of being a woman as a lawyer and as a judge.<sup>9</sup> And then there are the meta-articles where Judge Kaye, as befits someone who has been a journalist as well as a lawyer and judge,<sup>10</sup> writes about writing—writing about the writing of judicial opinions, in an article called *Judges as Wordsmiths*,<sup>11</sup> and writing about legal scholarship, in an article called *One Judge's View of Academic Writing*.<sup>12</sup> Another thing you can notice if you look at many of these articles, as I've had the pleasure of doing, is that they're all beautifully written. Some of her articles are highly theoretical, some are intensely practical, some are intensely personal. Together, they present a very impressive range of style as well as subject matter.

The area that I want to focus on in my remarks today is state constitutional law, an area where Judge Kaye has done a fair amount of writing both in her judicial opinions and in a number of articles. Perhaps one reason why the state constitution has drawn Judge Kaye's attention is—as she herself noted in one of her articles or I might not have noticed the coincidence—that she and the current version of the New York State Constitution were born in the same year.<sup>13</sup> Now for those of you who don't off the top of your head recall what year that was, I won't mention it except to say that I think the years have been much kinder to Judith Kaye. One of Kaye's recent articles raised the question of whether we need a new

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*Approaches*, *supra* note 3, at 1494–96 (advocating a shift to the problem-solving approach); Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 854–55 (1997) (same).

<sup>9</sup> Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 FORDHAM L. REV. 1941, 1942–44 (2008) (describing the slow advance of female lawyers at big law firms); Judith S. Kaye, *My Story in Six Life Lessons*, 45 JUDGES' J. 31, 32–33 (2006) (recognizing the significant progress made by women in breaking the gender barrier in the legal profession); Kaye, *Women Chiefs: Shaping the Third Branch*, *supra* note 8, at 899–900; Judith S. Kaye, *Moving Mountains: A Comment on the Glass Ceilings and Open Doors Report*, 65 FORDHAM L. REV. 573, 573–75 (1996) (same); Judith S. Kaye, *How to Accomplish Success: The Example of Kate Stoneman*, 57 ALB. L. REV. 961, 961–71 (1994) (applauding the life and accomplishments of the first woman admitted to the New York Bar); Judith S. Kaye, *Welcome Address: Is the Law Male?*, 69 CHI.-KENT L. REV. 301, 301–02 (1993) (discussing the development of feminist legal theory); Judith S. Kaye, *Women in Law: The Law Can Change People*, 66 N.Y.U. L. REV. 1929 (1991) (noting the growth in population of women in the legal profession); Judith S. Kaye, *A Prologue in the Guise of an Epilogue*, 57 FORDHAM L. REV. 995 (1988) (discussing the barriers women continue to face in the legal profession).

<sup>10</sup> Kaye, *My Story in Six Life Lessons*, *supra* note 9, at 32.

<sup>11</sup> Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. ST. B.J. 10 (1997).

<sup>12</sup> Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989).

<sup>13</sup> Judith S. Kaye, *A Double Blessing: Our State and Federal Constitutions*, 30 PACE L. REV. 844, 849–50 (2010).

New York State Constitutional Convention to update the constitution.<sup>14</sup> That our state constitution could stand some thoughtful renovation is probably another explanation for Judith Kaye's attention to it.

Another inspiration for her interest in state constitutional law was undoubtedly a man whose influence I see in a number of Chief Judge Kaye's judicial opinions as well as in her scholarly writing: United States Supreme Court Justice William Brennan.<sup>15</sup> Brennan talked a lot about the nature of our federalism in his judicial opinions and beyond, and his views led him to become a pioneer in the field of state constitutional law.<sup>16</sup> He also offered clear and well-articulated views about the philosophy of judicial interpretation, particularly constitutional interpretation.<sup>17</sup>

I want to talk about one article in particular that I think is a very interesting and innovative piece, reflecting the Brennan influence. But to help you understand the context for that article, I have to put on my academic hat for a few minutes and give you a little bit of background so that you'll be able to place what Chief Judge Kaye is talking about in the article I'm going to describe and understand her contributions in that article.

### III. THE ROLE OF STATE CONSTITUTIONS IN A FEDERALIST SYSTEM

As many of you know, if you studied this in law school or if you have been a consumer or author of opinions by New York state courts, state constitutions preceded the United States Constitution.<sup>18</sup> States like Virginia, Maryland, Massachusetts, and New York had their own constitutions that served as models for the United States Constitution in providing a range of limitations on what the state government could do, and in promising people rights of the kind we now tend to associate with the United States Constitution.<sup>19</sup>

In *Barron v. City of Baltimore*,<sup>20</sup> a case decided during the first

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<sup>14</sup> *Id.* at 850.

<sup>15</sup> Judith S. Kaye, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 14 (1997).

<sup>16</sup> Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES, July 25, 1997, at A1 (noting that Justice Brennan's 1977 *State Constitutions and the Protection of Individual Rights* "became one of the most frequently cited law review articles in history[.]").

<sup>17</sup> See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551-52 (1986).

<sup>18</sup> ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES xiii (2d ed. 2006).

<sup>19</sup> *Id.* at xii-iv.

<sup>20</sup> *Barron v. City of Baltimore*, 32 U.S. 243, 247-48 (1833).

half of the nineteenth century, the great John Marshall, Chief Justice of the United States Supreme Court, wrote a historic opinion about the relationship between the United States Constitution and the states. What he said, which most historians think is basically right, was that the United States Constitution, including the Bill of Rights and most other aspects of that Constitution, was not intended to apply to the states.<sup>21</sup>

Therefore, Marshall said, if a state has done something that you think violates some aspect of the federal Constitution (like the Fifth Amendment's takings clause), you're out of luck.<sup>22</sup> You can't make that claim. What matters is what the applicable state constitution says because that's the only constitution that is applied to state actions.<sup>23</sup> Marshall remarked that each state by its own constitution may limit and restrict its powers as its wisdom suggests.<sup>24</sup> That means that during the eighteenth and most of the nineteenth century, the state constitutions were the only meaningful constraints on state power.<sup>25</sup> The federal government was not very big at the time and so the state constitutions were really the most important sources of law in the country.<sup>26</sup>

That situation changed quite radically during the second half of the nineteenth century. After the Civil War, the Reconstruction Amendments dramatically expanded the authority of the United

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<sup>21</sup> *Id.* at 250 ("These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.").

<sup>22</sup> *See id.*

<sup>23</sup> *See id.*

<sup>24</sup> *Id.* at 247-48 ("In their several constitutions [the states] have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.").

<sup>25</sup> *See* Brennan, *supra* note 17, at 537 (noting that James Madison was a political anomaly in his day for promoting a stronger centralized government at a time when the individual states were considered far likelier guardians of individual liberties).

<sup>26</sup> *Id.* Justice Brennan himself contributed enormously to the burgeoning law and literature on state constitutionalism. Greenhouse, *supra* note 16; Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1550-53 (1985); *see* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) [hereinafter Brennan, *Individual Rights*] (urging state courts to be more attentive to the liberties protected in state constitutions); *see also* Brennan, *supra* note 17; William J. Brennan, Jr., *Foreword: Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11 (1988); William J. Brennan, Jr., *The Law of the Land: The North Carolina Constitution and State Constitutional Law*, 70 N.C. L. REV. 1701 (1992); William J. Brennan, Jr., *Foreword: Symposium on the Arizona Constitution*, 20 ARIZ. ST. L.J. (1988). In 1986, Justice Brennan said that "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our times." G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165 (1998).

States Constitution to apply more extensively to the states.<sup>27</sup> The chief impetus for this expansion of federal constitutional power was to prevent the southern states from continuing to treat as enslaved people who had become free,<sup>28</sup> but the sweeping language of the Fourteenth Amendment, guaranteeing privileges and immunities, due process, and equal protection of the laws, was not confined to this particular goal.<sup>29</sup>

But the nineteenth-century Supreme Court interpreted most of the provisions of the Fourteenth Amendment very narrowly,<sup>30</sup> and so federal constitutional law wasn't that potent for many decades. It wasn't really until Earl Warren was appointed Chief Justice of the United States Supreme Court, and was joined by justices like William Brennan, that the Supreme Court decided that the federal Constitution really should have teeth and really should apply to the states in important ways.<sup>31</sup> The word they used—this is going to bring back flashes of law school, either good or bad—was “incorporation.”<sup>32</sup> The Fourteenth Amendment talks about limitations on the state: no state shall deprive any person of life, liberty, or property without due process of law, no state shall deny any person equal protection of the laws, etc.<sup>33</sup> The Warren Court held that the broad language of the due process clause serves to apply most of the provisions of the Bill of Rights to the states.<sup>34</sup>

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<sup>27</sup> See Brennan, *supra* note 17. The inspiration for these changes arose in part from political lessons taught by the Civil War, which “exposed a serious flaw in the notion that states could be trusted to nurture individual rights.” *Id.*

<sup>28</sup> See *id.*

<sup>29</sup> *Id.* (“[T]he majestic goals of the Fourteenth Amendment were framed in terms of more general application . . .”).

<sup>30</sup> See *The Civil Rights Cases*, 109 U.S. 3, 11–12 (1883) (holding that the Fourteenth Amendment prohibits only state constitutional violations but not state inaction or private action); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1872) (construing the privileges or immunities clause to apply only to the narrow privileges of national citizenship).

<sup>31</sup> See Brennan, *supra* note 17, at 540 (“[T]he [Warren] Court fundamentally reshaped the law of this land.”).

<sup>32</sup> See *id.* at 540–46 (describing the process of incorporation and explaining the incorporation debate).

<sup>33</sup> U.S. CONST. amend. XIV.

<sup>34</sup> See, e.g., *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (applying to the states the double jeopardy clause of the Fifth Amendment); *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968) (applying to the states the Sixth Amendment’s right to trial by jury in criminal cases); *Washington v. Texas*, 388 U.S. 14, 22 (1967) (applying to the states the Sixth Amendment right of compulsory process to obtain witnesses in one’s favor); *Klopper v. North Carolina*, 386 U.S. 213, 226 (1967) (applying to the states the speedy trial clause of the Sixth Amendment); *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (applying to the states the Sixth Amendment right to trial by an impartial jury); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (applying to the states the confrontation clause of the Sixth Amendment); *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (applying to the states the self-incrimination clause of the Fifth Amendment); *Gideon*

Those rights are incorporated. The Warren Court raised the floor, imposing obligations on the states—in the area of criminal justice, racial justice, etc.—that the states were not imposing on themselves. Thus emerged the idea that the Supreme Court is the primary guarantor, in essential ways, of federal rights and that the federal Constitution is the primary guarantor of everyone's rights. Thereafter, if people in a state had a complaint that state actors were depriving them of an incorporated federal constitutional right—preventing them from exercising their religion, preventing them from exercising free speech, subjecting them to police misconduct or to an unfair trial—the Civil Rights Era that grew from the 1950s and '60s onward led people to turn to the federal courts and to expect the federal Constitution to define and protect their rights more expansively than their state would have been inclined to do.<sup>35</sup>

The great Warren Court decisions started with *Brown v. Board of Education*.<sup>36</sup> Where do you go if you don't like the fact that your state has racially segregated schools? You go to federal court and you tell the federal judges to stop the state from violating your rights. Where do you go if you think that evidence obtained in violation of the Fourth Amendment is being used in your trial? You go to federal court because the federal courts apply an exclusionary rule, while New York State at the time did not.<sup>37</sup> So during the Warren Court era, people become accustomed to the Supreme Court raising the floor of constitutional protection. Some said the Court was nationalizing the Bill of Rights.<sup>38</sup> The Supreme Court set the federal Constitution as the lowest common denominator of rights

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v. *Wainwright*, 372 U.S. 335, 339 (1963) (applying to the states the Sixth Amendment's assistance of counsel clause); *Robinson v. California*, 370 U.S. 660, 667 (1962) (applying to the states the cruel and unusual punishment clause of the Eighth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (applying to the states the Fourth Amendment exclusionary rule, and declaring that the Fourth Amendment "is enforceable in the same manner and to like effect as other basic rights secured by the due process clause").

<sup>35</sup> See Brennan, *Individual Rights*, *supra* note 26, at 540.

<sup>36</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

<sup>37</sup> See *People v. DeFore*, 242 N.Y. 13, 22, 26 (1926) (refusing to apply an exclusionary rule in Fourth Amendment cases). The Supreme Court later diverted Fourth Amendment exclusionary rule claims from federal courts by limiting their availability as a basis for habeas corpus petitions. See *Stone v. Powell*, 428 U.S. 465, 481–82 (1976) (restricting habeas corpus petitions when prisoners are given a "full and fair opportunity" to litigate their Fourth Amendment claims at the state level).

<sup>38</sup> See, e.g., Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 933 (1965) (discussing the application of the Bill of Rights to the states through incorporation by the Fourteenth Amendment).

throughout the country.<sup>39</sup> No state was allowed to do less, to be less protective of any incorporated right, than what that federal floor provided.<sup>40</sup>

When you have a dramatic revolution like this, greatly expanding federal authority to limit what the states can do, there inevitably will be backlash. Particularly in the southern states, there was a lot of grumbling about the fact that the federal government was telling the states what to do.<sup>41</sup> Some of these complaints took the form of arguments about states' rights; people started talking about the Tenth Amendment, contending that the states have a right to be autonomous and do what they want, so how can the federal courts be telling the states what to do?<sup>42</sup> The phrase "states' rights," particularly in some southern states, began to seem to observers in the North like code for "we don't like *Brown v. Board of Education* and we want to continue to be racist." The valorization of federalism claims was regarded by some as nothing more than a veneer for opposition to civil rights.<sup>43</sup>

But "states' rights" complaints about the Warren Court did resuscitate a profound question we have been struggling with ever

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<sup>39</sup> See *id.* at 937–38 (discussing how judicial decision-making responsibilities apply to state action by the federal government and the states).

<sup>40</sup> See *id.* at 935–36 (discussing the extent of "absorption" of the Bill of Rights into state law).

<sup>41</sup> See John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the Primacy States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1023 n.18 (1993) (noting the southern states' aversion to incorporation and preference for using state constitutional analysis).

<sup>42</sup> *Id.*

<sup>43</sup> The affiliation of states' rights arguments and racism is reflected at various points in our history. The State of Kansas raised federalism and majoritarian rights arguments in its brief opposing school desegregation in *Brown v. Board of Education*. Brief for Appellant on Reargument at 16, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) ("The people of Kansas, through the normal processes of local government, are demonstrating their willingness and capacity to deal with local race problems in a manner most beneficial to all concerned. Federal interference is neither necessary nor justified."). In an earlier era, the rights of states were asserted to explain opposition to the Thirteenth Amendment's ban on involuntary servitude. See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 49 & n.166 (2004) (quoting a congressional representative who acknowledged that the "race issue" of slavery had become "merged in the higher issue of the right of the states to control their domestic affairs . . . ." (Cong. Globe, 38th Cong., 1st Sess. 2615 (1864) (statement of Rep. Anson Herrick)). And post-Warren Court politicians have resorted to using states' rights positions as a proxy for arguments about policies pertaining to race. See, e.g., David Brooks, Op-Ed., *History and Calumny*, N.Y. TIMES, Nov. 9, 2007, [http://www.nytimes.com/2007/11/09/opinion/09\\_brooks.html](http://www.nytimes.com/2007/11/09/opinion/09_brooks.html) (discussing President Ronald Reagan's stress on state's rights, not civil rights, in his 1980 election campaign); Roger Wilkins, *Smiling Racism: Ronald Reagan's Race Politics*, NATION, Nov. 3, 1984, at 347 (arguing that states' rights campaign slogans gave Reagan "a way to make racism palatable and politically potent again").

since the founding of the republic: what do we mean by federalism? Do we mean we're going to have fifty different kinds of flowers blooming in fifty different gardens, each of which is going to look unique? Do we mean we are going to have a uniform garden with the same flowers throughout? Or do we mean that we're going to have a garden that's carefully designed and orchestrated so it has common themes and motifs, even though there might be different blooms in different parts of the garden?

I'll give you one example of a case where the Supreme Court confronted a real challenge based on a claim of local difference. There's a case from the 1960s called *Duncan v. Louisiana*, in which Gary Duncan complained about the fact that he was tried for a crime in Louisiana and was not afforded a jury trial.<sup>44</sup> Why didn't Louisiana choose to give him a jury trial? Those of you who have been to New Orleans or know anything about Louisiana know that Louisiana was settled by people coming from the French civil law tradition and not only the Anglo-American tradition which vaunted jury trials.<sup>45</sup> Everyone agreed that it is possible to have a fair trial that's not a trial by jury. So Louisiana said, "Our tradition, our culture, our heritage is not the heritage of the Anglo-American jury trial, and we do things differently. We don't choose to spend our money on jury trials. We don't choose to give our citizens that kind of involvement and we think that should be our choice as long as our trials are fair." In *Duncan*, the Supreme Court disagreed: if Louisiana is going to be one state in the union, the Court said, then Gary Duncan should have the same right to a trial by a jury of his peers in Louisiana as he would in any other state.<sup>46</sup> Louisiana cannot choose to differ in this fundamental respect.

So the Warren Court revolution ratcheted up the limitations on the states and required the states to be more uniform and more consistent, promoting the ideal of nationally shared values. Well, the Warren Court isn't with us anymore. I'm sure most of you have noticed that. As the years passed and the pendulum swung, the Supreme Court began carving out more exceptions and finding fewer rights, and in some areas the nation-wide floor was lowered.

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<sup>44</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968).

<sup>45</sup> See Harriet J. Bauman, *French Creoles in Louisiana: An American Tale*, YALE-NEW HAVEN TEACHER'S INST., <http://www.yale.edu/ynhti/curriculum/units/1992/2/92.02.02.x.html> (last visited May 22, 2012) (providing a timeline and outline of the history of Louisiana, which features a dominant French colonial heritage). Accordingly, much of Louisiana's legal ideology derives from French culture rather than English heritage. See *id.*

<sup>46</sup> *Duncan*, 391 U.S. at 149–50.

So at that point, William Brennan, a key figure here, started to write about the state constitutions.<sup>47</sup> The state constitutions had been upstaged during the middle of the twentieth century by the federal Constitution. If you can't go below the federally set floor, it doesn't really matter whether the states would have chosen to do so. They were required to meet the generally more demanding federal standards.

Brennan, along with other scholars and judges like Justice Hans Linde of Oregon, urged renewed attention to the state constitutions.<sup>48</sup> As the federal floor lowered and there were fewer federal requirements for the states to follow, the states had the opportunity to, in Justice Marshall's phrase, do "as their own wisdom would suggest."<sup>49</sup>

As the Warren Court monolith was dismantled bit by bit, the key question became, "What are we going to do in our state now that the Supreme Court is leaving us more choice?"

If you want to read a wonderfully articulate account of the history of the role of the state constitutions that I'm briefly recounting today, I would highly recommend Judith Kaye's 1987 article, *Dual Constitutionalism in Practice and Principle*, based on a speech she gave at the New York City Bar Association.<sup>50</sup> In this article, Chief Judge Kaye does an excellent job of describing the background and history of the role of the state constitutions, which had waxed and waned over time.<sup>51</sup> The article then takes up the idea that Justice Brennan and Justice Linde had been promoting, that it was about time for everyone in the country to wake up and start paying more attention to the importance of state constitutions.<sup>52</sup> This was a

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<sup>47</sup> See sources cited *supra*, notes 17 & 26; Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421–22 (1996); Ann Lousin, *Foreword: Justice Brennan: A Tribute to a Federal Judge Who Believes in State's Rights*, 20 J. MARSHALL L. REV. 1, 1–2 (1986).

<sup>48</sup> See Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 380 (1980) (arguing state bills of rights are the most fundamental, being both "first in time and first in logic"); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179–83 (1984) (urging autonomous Georgia constitutional interpretation with the adoption of Georgia's new bill of rights); Jerome B. Falk, Jr., *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Vern Countryman, *Why a State Bill of Rights*, 45 WASH. L. REV. 454 (1970); Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969).

<sup>49</sup> *Barron v. Mayor of Baltimore*, 32 U.S. 243, 247–48 (1833).

<sup>50</sup> Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987).

<sup>51</sup> See *id.* at 400–08, 412–20.

<sup>52</sup> *Id.* at 417–18.



necessary reminder because most people who were trained as lawyers in this country during the 1960s and even after were focusing exclusively on federal constitutional law.<sup>53</sup> Those of you who've been to law school, when you took constitutional law, did your course cover only federal constitutional law? Did you hear much about the state constitutions? Probably not.

Chief Judge Kaye noted that this was a problem: not many law schools were paying attention to state constitutions and therefore there were a lot of lawyers who were missing bets because they just weren't making available arguments about how the law could or should be configured in particular states. Most everyone had become distracted by the federal constitutional debates and forgot that there was this whole other body of law. I've never mentioned this to Chief Judge Kaye, but she might be interested to know that for years now I have taught a class on state constitutional law, at least one class in my basic constitutional law course. One of the main things I assign the students to read is Chief Judge Kaye's article on *Dual Constitutionalism*, because it does such an excellent job of really setting out so much of what they need to know. I also assign one or two sample state constitutional law opinions and the incredibly prolix index of the New York State Constitution, which goes on for pages and pages, plus the fifteen-section New York Bill of Rights, so that they can compare the federal and state constitutions.

I have a wonderful research assistant who, like a couple of you here today, was in my constitutional law class. While I was preparing to speak to you today, I explained to her what I was going to cover so that she could help me to gather and sort through the mountains of opinions and mountains of articles that Chief Judge Kaye had written. And when I told her that my starting point for my talk would be the article on *Dual Constitutionalism*, she said to me, "Oh, I loved that article! Great! Wonderful! My colleagues will be jealous." And she and I are not the only ones who loved that article.

Now I want to tell you more about what was in that article because, in addition to being a terrific introduction to state constitutional law, this article is another very good example of the

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<sup>53</sup> See Brennan, *supra* note 17, at 548 (protesting that state courts were so focused on interpreting federal constitutional rulings in state cases that they didn't know how to interpret their own state constitutions); Linde, *First Things First: Rediscovering the States' Bills of Rights*, *supra* note 48, at 381 (reminding law schools and educators that "[t]he Federal Bill of Rights did not supersede those of the states").

multifaceted Kaye approach. I think you can see many different aspects of my portrait of this judge as I talk about the portrait embodied in *Dual Constitutionalism*. The author of this article is a historian, a teacher, a writer, a New York patriot, and a true and imaginative scholar. This 1987 article draws attention to the New York State Constitution in particular, noting a number of things about our Constitution that are truly unique.<sup>54</sup> Justice Brennan and Justice Linde had been talking about state constitutions in general, but Chief Judge Kaye was one of the first to apply their points to the New York State Constitution and to urge New Yorkers to practice the art of state constitutional law.

This is another thing that I cover in my constitutional law class: comparisons between the New York State Constitution and the United States Constitution. If you look at the two side by side, there are a number of provisions in the state constitution that simply don't exist in the federal Constitution. There's a right to education in New York.<sup>55</sup> There's a very different definition of equal protection that, unlike the federal Constitution, doesn't entail state action requirements.<sup>56</sup> There are a number of provisions that are wholly unique.<sup>57</sup> The search and seizure provision, guaranteeing freedom from unreasonable search and seizures, is also remarkable. In my criminal procedure class, we compare the search and seizure provision of the New York State Constitution with the Fourth Amendment to the United States Constitution. When you line up those two provisions, you'll notice that the first paragraphs are exactly the same—they both say, "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated," etc.<sup>58</sup> The federal Fourth Amendment only has one paragraph. But there's a second paragraph in the New York State Constitution which says, "The right of the people to be secure against unreasonable interception of [telephonic] and [telegraphic]

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<sup>54</sup> Kaye, *supra* note 50, at 408–09.

<sup>55</sup> N.Y. CONST. art. IX, § 1.

<sup>56</sup> N.Y. CONST. art. I, § 11.

<sup>57</sup> See N.Y. CONST. art. XIV, § 1 (protecting ski trails in Essex County); N.Y. CONST. art. I, § 9 (prohibiting unregulated gambling except parimutuel betting on horse races).

<sup>58</sup> Compare U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), with N.Y. CONST. art. I, § 12 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

communications shall not be violated,” etc.<sup>59</sup> This amendment is dated 1938.<sup>60</sup>

The Supreme Court’s 1928 opinion in *Olmstead v. United States*,<sup>61</sup> holding that the Fourth Amendment doesn’t cover wiretapping of telephones, always stimulates a very interesting discussion about constitutional interpretation and originalism. Does the Fourth Amendment mean exactly what James Madison would have thought it meant? If we know that if we said to James Madison, “Did you intend this language to cover telephone wiretapping?” and he’d say, “Huh?,” is that the end of the story? That was the view of the Supreme Court in the *Olmstead* case in 1928. Because the Fourth Amendment, in the view of the framers, was only intended to cover physical intrusions, you would need to amend the Constitution to have it cover wiretapping of telephones.

In 1938, the framers of the New York State Constitution accepted that invitation. They added a paragraph after their replication of the Fourth Amendment which explicitly says that the privacy of telephone conversations should also be protected.<sup>62</sup> It is perfectly clear that the framers of this amendment to the New York State Constitution rejected the holding of *Olmstead*. They wanted to protect the right of the people of New York to have private conversations in a way that the Supreme Court had decided the Fourth Amendment, at that point in time, did not. This is all very interesting as constitutional theory, but it also gives you some sense of the arguments lawyers would be missing if they were to ignore the state constitution. If, for example, you had a client who had a telephone wiretapped during much of the twentieth century, all that federal constitutional law offered was *Olmstead*. So why wouldn’t you point out to the New York courts that your client had greater rights in New York because of this provision of the New York State Constitution if you knew about the state constitutional provision?<sup>63</sup>

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<sup>59</sup> N.Y. CONST. art. I, § 12 (“The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.”).

<sup>60</sup> *Id.*

<sup>61</sup> *Olmstead v. United States*, 277 U.S. 438, 464–65 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347, 353 (1967).

<sup>62</sup> N.Y. CONST. art. I, § 12.

<sup>63</sup> *See* Kaye, *supra* note 50, at 419 (explaining that New York courts have interpreted the state constitution as more protective of individual rights against searches and seizures than federal standards).

Another important point that Judge Kaye made in this article, and other places as well, is that there's really nothing illegitimate or suspect about interpreting state constitutional provisions as providing greater rights even when they're worded identically to the parallel federal provisions.<sup>64</sup> The point is that a state constitution is a unique document: its text may be different, its history may be different, local conditions may be different, and the values of New York State may be distinctive.<sup>65</sup>

There's a case that is a very good example to me of what is special about New York, a 1992 case that I teach in my criminal procedure class called *People v. Scott*.<sup>66</sup> In this case, Judge Kaye wrote a masterful concurring opinion directly talking to her colleagues to explain her view of state constitutions and the proper interpretation of them.<sup>67</sup> Her concurring opinion was also talking back to a 1924 Supreme Court decision that had construed Fourth Amendment rights quite narrowly. In *Hester v. United States*, the United States Supreme Court had reviewed an incident where government agents had gone not into someone's home, but into their open fields.<sup>68</sup> (Doesn't that sound old-fashioned, a Thomas Hardy vision of a countryside composed of open fields?) The Supreme Court held that, as with the telephone in *Olmstead*, you don't have a reasonable expectation of privacy in your open field.<sup>69</sup> Anybody including any government agent can walk into your open field and see what you're up to, and therefore if a government agent wants to walk into your open field on purpose to see, for example, whether you happen to be growing marijuana in the back forty there, why not? You don't have any Fourth Amendment rights.

When the New York Court of Appeals reviewed a similar incident in 1992, the court looked at the New York State constitutional search and seizure provision, which, as I have described, was clearly intended to be broader than the Fourth Amendment to the United States Constitution. And so, despite the fact that the Supreme Court had found no Fourth Amendment rights in this open field situation, the Court of Appeals found that Scott did have a right

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<sup>64</sup> *Id.* at 400–01; *People v. Scott*, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring).

<sup>65</sup> Kaye, *supra* note 50, at 423–25 (noting that state courts, being closer to the public and their political institutions, are more responsive in cases of constitutional misinterpretation and can develop constitutional law as needed more efficiently than the U.S. Supreme Court).

<sup>66</sup> *Scott*, 593 N.E.2d at 1328.

<sup>67</sup> *Id.* at 1347–48 (Kaye, J., concurring).

<sup>68</sup> *Hester v. United States*, 265 U.S. 57, 58–59 (1924).

<sup>69</sup> *Id.* at 59.

under the parallel *state* constitutional provision. The text is somewhat different here, the history of New York is different, and so the right was interpreted more expansively. Judge Hancock was here this morning, and I'm going to quote him because he wrote a line in his majority opinion in that case that makes me proud to be a New Yorker. The state had argued that there's no reasonable expectation of privacy out in open fields because if you're not doing something criminal, why should you care if anyone's watching what you're doing? Judge Hancock responded, "this presupposes the ideal of a conforming society, a concept which seems foreign to New York's tradition of tolerance of the unconventional or what may appear bizarre or even offensive."<sup>70</sup> Doesn't that make you proud to be a New Yorker? You have a special right to be bizarre, unconventional, and offensive.

The dissent in *Scott* argued that the New York provision should be interpreted as meaning the same thing as the Fourth Amendment.<sup>71</sup> But Judge Kaye in her concurring opinion made the same arguments she had made in her *Dual Constitutionalism* article, eloquently expressing her belief that the state constitution is a different and unique document, with a unique history and context, and so it is the job of the highest court in New York State to interpret that document independently rather than simply following the Supreme Court's federal constitutional case law in lockstep.<sup>72</sup>

So New York can be an enclave. In New York, then, people do have the right to be bizarre and offensive and nobody can just walk into your open fields to see if you're growing marijuana. Government agents are going to have to get a search warrant first. Isn't that reassuring? A number of other states have made similar choices to extend search and seizure protections based on their own unique state constitutions.<sup>73</sup> James Madison once referred to

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<sup>70</sup> *Scott*, 593 N.E.2d at 1337 (citing *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 564 (N.Y. 1986); *Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 494 (N.Y. 1986); *Bellanca v. N.Y.S. Liquor Auth.*, 429 N.E.2d 765, 768 (N.Y. 1981); *People v. Onofre*, 415 N.E.2d 936, 940–41 (N.Y. 1980)).

<sup>71</sup> *Scott*, 593 N.E.2d at 1351 (Bellacosa, J., dissenting).

<sup>72</sup> *Id.* at 1347 (Kaye, J., concurring); see also Kaye, *supra* note 50, at 424 & n.81 (explaining the "interplay" of parallel state and federal constitutional protections).

<sup>73</sup> See Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 418 (2007) (surveying points of state divergence from Supreme Court Fourth Amendment case law); see also Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process Law,"* 77 MISS. L.J. 1, 2 (2007) (discussing whether it is appropriate for states to interpret their state constitutions in a more right-protecting manner than the Supreme Court has interpreted the U.S. Constitution).

federalism as a “double security” for our rights.<sup>74</sup> One article that I especially admire refers to federalism as a “self-correcting constitutional compass.”<sup>75</sup> If the federal courts are interpreting the federal constitution and setting the floor too low, the state constitutions can build on that floor. Then there will be enclaves of freedom and equality around the country. If you live in or travel to New York, you’re going to have more rights against unreasonable searches and seizures. If you live in or travel to Florida, you’re not.<sup>76</sup> State by state.

Judge Kaye referred to what Madison called a “double security” as a “double blessing.”<sup>77</sup> She pointed out that the states, in addition to taking care of what happens within their own state, within their own enclave, can serve as laboratories for new policies and as models for the other states.<sup>78</sup> So if the Supreme Court says that telephone conversations are not protected by the Fourth Amendment at all, the New York Court of Appeals can offer an alternative by explaining why that conclusion is wrong and unnecessary, at least according to the New York State Constitution. Perhaps other states will then be persuaded to provide greater rights to their own residents. And eventually, the Supreme Court might recognize the wisdom of the New York position and federal constitutional law itself could change. In this way, the states can indeed be laboratories. New York State can participate in an active dialogue with all the other states and the federal courts by providing a model of a well-reasoned opinion saying, “This is how it should be. Government agents should not have the right to find out what everyone’s talking about on their telephones or doing in their open fields unless they’ve obtained a warrant.” New York, by its example, might precipitate changes in the law of part or all of the

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<sup>74</sup> THE FEDERALIST No. 51, at 333 (Robert Scigliano ed., Random House 2000) (1788).

<sup>75</sup> Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 731 (1981).

<sup>76</sup> The Florida Constitution, because of a fairly recent backlash amendment, requires state courts to interpret its search and seizure rights in conformity with U.S. Fourth Amendment law. FLA. CONST. art. I, § 12 (“The right . . . against unreasonable searches . . . 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.”).

<sup>77</sup> Kaye, *supra* note 13, at 847; THE FEDERALIST No. 51, *supra* note 74.

<sup>78</sup> Kaye, *supra* note 13, at 847. Others have pointed this out too, including, most notably, Justice Louis Brandeis. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

nation.

One function of legal scholarship is to describe what the law is and what the law has been. Chief Judge Kaye has done this kind of teaching in her scholarship. And one of the highest callings of scholarship is not just to describe what is and has been, but to be visionary about what law *might be*. There's a fascinating part of Chief Judge Kaye's *Dual Constitutionalism* article that I think has not received enough notice. I've never seen this theory articulated in the same way any place else. Chief Judge Kaye adds one more level to the federalist structure I have just described. Not only can New York State be an enclave where we may have greater rights for our residents if that's what the New York Constitution seems to intend; not only can New York serve as a persuasive model in which other states might follow our lead in deciding to grant additional rights to their people; not only can New York judges write persuasive opinions that might lead federal judges to change their own minds. Chief Judge Kaye goes a step further by weaving one of the most enigmatic parts of the federal Constitution into her analysis: the Ninth Amendment.<sup>79</sup> The Ninth Amendment says that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage other rights retained by the people.<sup>80</sup> The basic idea of the Ninth Amendment seems to be that just because there are some rights listed in the Bill of Rights, that does not mean there aren't also other rights.<sup>81</sup> Some people have dismissed the Ninth Amendment as nothing more than a truism: just because we named some rights doesn't mean there might not be other rights too.<sup>82</sup> But people have been in disagreement for a long time about what those other rights might be and about what the Ninth Amendment really means. Some of you may remember from law school the case of *Griswold v. Connecticut*,<sup>83</sup> which found an implied constitutional right to reproductive freedom, in part on the basis of the Ninth Amendment.<sup>84</sup>

Chief Judge Kaye has a different conception of the Ninth

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<sup>79</sup> See Kaye, *supra* note 50, at 426.

<sup>80</sup> U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

<sup>81</sup> Kaye, *supra* note 50, at 427.

<sup>82</sup> *Griswold v. Connecticut*, 381 U.S. 479, 529 (1965) (Black, J., dissenting) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

<sup>83</sup> *Griswold*, 381 U.S. at 479.

<sup>84</sup> *Id.* at 485–86; see also *id.* at 499 (Goldberg, J., concurring) (stating that the right to privacy in a marital relationship is a basic right "within the meaning of the Ninth Amendment").

Amendment. She describes it in this article as creating a right of the People to establish and alter the principles of government.<sup>85</sup> She argues that the Ninth Amendment's reference to the rights "retained by the people" really means that the states can *directly alter* federal constitutional law—that the state courts and the state constitutions are in a two-way direct dialogue with the federal government.<sup>86</sup> Under her theory, if enough states all interpret guarantees against unreasonable searches and seizures as meaning that government agents can't go into your open fields or tap your telephones without a warrant, at some point the fact that so many states have concluded this should filter back directly into federal constitutional interpretation.<sup>87</sup>

This is not only a theory of federalism—that the dialogue goes both ways, that state courts have the power to constrain federal courts, in addition to federal courts telling the states what to do. It's also a unique theory of federal constitutional interpretation. Under Kaye's vision of the Ninth Amendment, a dynamic dual constitutionalism is incorporated into the constitutional text itself. Federal constitutional law of necessity must be flexible and must change in order to take account of what most of the people in most of the states think. So if the Supreme Court interprets the Fourth Amendment as oblivious to certain kinds of privacy, the states can push back and insist that their own views of the importance of privacy transform federal constitutional law itself on that subject.<sup>88</sup> If enough states agree, under Kaye's theory, the Supreme Court would have to listen.

The Supreme Court has not expressly adopted Judith Kaye's interpretation of the Ninth Amendment, and they certainly haven't cited her article. But Judith Kaye says in one of her articles that she thinks the Ninth Amendment's time will come.<sup>89</sup> And what I think is fascinating is that in a way, her prediction has come true. Here's what the Supreme Court has been doing, albeit without mentioning the Ninth Amendment. Recent federal constitutional interpretation has been directly responsive to what's been happening in the states in a number of areas. I'll give you two different examples.

The first example is the Eighth Amendment, which prohibits

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<sup>85</sup> Kaye, *supra* note 50, at 428.

<sup>86</sup> *Id.* at 427–28.

<sup>87</sup> *Id.* at 426.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*



cruel and unusual punishment.<sup>90</sup> What does that prohibition mean? For a long time the Supreme Court has said that to determine what's cruel and unusual, we have to look at what everyone in our society is doing and not doing.<sup>91</sup>

There are three Eighth Amendment opinions within the last decade which all adopt the same very particular state canvassing methodology, and they are all cases about the imposition of the death penalty. As I am sure you know, the Supreme Court has rejected the position that the death penalty is in and of itself cruel and unusual.<sup>92</sup> But the Court has decided three cases which find the death penalty to be cruel and unusual as imposed in particular circumstances: *Atkins v. Virginia*,<sup>93</sup> *Roper v. Simmons*,<sup>94</sup> and *Kennedy v. Louisiana*.<sup>95</sup> In one of those cases, the Supreme Court says it is cruel and unusual to execute people who are mentally retarded, because they are neither deterrable nor blameworthy.<sup>96</sup> How can you execute someone who did not have the capacity to know what he or she was doing? In the second, the Court held that it is cruel and unusual to execute a person for a crime committed as a juvenile because juveniles are not mature enough to appreciate what they are doing.<sup>97</sup> And in the third, the Court found that it is cruel and unusual to execute people for crimes that do not result and were not intended to result in anyone's death.<sup>98</sup>

In each of these cases, the Supreme Court used the same, quite controversial, methodology. Justice Anthony Kennedy, writing two out of three of these opinions, counted noses, looking at what was happening in all of the states.<sup>99</sup> There is a lot of arithmetic in these opinions. How many states do not apply the death penalty to the mentally retarded, or to juveniles, or to non-homicide offenses? In how many states have the legislatures recently changed their minds

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<sup>90</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>91</sup> Specifically, "[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); *see also* *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (stating that the power to punish must be "exercised within the limits of civilized standards").

<sup>92</sup> *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

<sup>93</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>94</sup> *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

<sup>95</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

<sup>96</sup> *Atkins*, 536 U.S. at 321.

<sup>97</sup> *Roper*, 543 U.S. at 578–79.

<sup>98</sup> *Kennedy*, 554 U.S. at 421.

<sup>99</sup> *Id.* at 423; *Roper*, 543 U.S. at 565.

and decided to make the death penalty inapplicable in such circumstances?<sup>100</sup> It used to be the case that X number of states allowed execution of juveniles, but now Y number of states do not allow such executions. Kennedy examines the numbers and the trends. So in the Eighth Amendment area, if you get enough states—either by their legislatures or by their state courts interpreting their own constitutions—concluding that it is cruel to execute people for crimes committed while they were juveniles, those decisions then throw roots into federal constitutional law. That is a direct impact of state decisions on federal constitutional law, not just a matter of federal judges deciding that a particular state court opinion is persuasive and should be followed. And that is essentially the Ninth Amendment vision of Judith Kaye—that state decisions in the aggregate can *directly* transform federal law.

One other example of this two-way, state-federal dialogue is in the case of *Lawrence v. Texas*,<sup>101</sup> where the Court's decision was based on substantive due process.<sup>102</sup> The question there was whether the Texas law that criminalized consensual sodomy was a violation of due process because it unduly infringed on the liberty to decide on one's lifestyle.<sup>103</sup> In the opinion in *Lawrence v. Texas*, Justice Kennedy uses the same methodology as in the Eighth Amendment cases to reach this result. He looks at the number of states criminalizing consensual sodomy, he counts up how many state legislatures have recently changed their minds and decided to decriminalize consensual sodomy, and considers the number of state courts which have found criminalization of consensual sodomy to violate their own state constitutions.<sup>104</sup> He counts, he reviews the numbers and the trends, and he sees which way the wind is blowing. And because so many states have made the decision in their own enclaves, in their own states, to say, "This is not something that the government should be permitted to do, to criminalize people because of their chosen sexual lives," that liberty now has become enshrined as part of federal constitutional law.

#### IV. CHIEF JUDGE KAYE, VINDICATED

So Chief Judge Kaye, one gift I want to give you today is the gift

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<sup>100</sup> See, e.g., *Roper*, 543 U.S. at 564–678.

<sup>101</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>102</sup> *Id.* at 578.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 573, 577–78.

of vindication. I have not seen anybody formally put together your concept of the Ninth Amendment and the dynamic workings of federalism in the Supreme Court cases I've just described. In addition to being a very fine explication of how dual constitutionalism works and could work, your article's vision of dual constitutionalism as a two-way street, as a way for the states, in combination, to have a direct impact on federal constitutional law, was prescient.

Chief Judge Kaye has also written other articles expanding on her ideas about state constitutional law and dual constitutionalism.<sup>105</sup> And I think another very appropriate note here is that when NYU Law School started a lecture series named for Justice William Brennan, Chief Judge Kaye gave the inaugural William Brennan lecture.<sup>106</sup> Quite appropriately, she talked about this tradition of state constitutional law. I think that Justice Brennan would have been delighted with the choice of speaker and of topic.<sup>107</sup>

In addition to her views on state constitutional law, Chief Judge Kaye also has complex and nuanced ideas about when courts should use constitutional interpretation and when they should prefer other available tools, like state common law.<sup>108</sup> There are other New York Court of Appeals opinions that I teach in my criminal procedure class, including a case called *People v. Hollman*, in which the New York Court of Appeals laid out a number of rules for police-citizen encounters that are based not on the state constitution but rather on state common law.<sup>109</sup> And Judith Kaye has written engagingly on these topics as well.<sup>110</sup>

The care with which Judith Kaye set about making nuanced decisions about what type of law to apply in individual cases is also completely consistent with the care she lavished on her judicial opinions and her 200 articles, the care she took in managing the

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<sup>105</sup> See, e.g., Kaye, *supra* note 13; Judith S. Kaye, *State Constitutional Law and the State High Courts in the 21st Century*, 70 ALB. L. REV. 825 (2007); Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2001); Judith S. Kaye, *Foreword: State Courts in Our Federal System: The Contribution of the New York Court of Appeals*, 46 SYRACUSE L. REV. 217 (1996); Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49 (1988).

<sup>106</sup> Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 1-2 (1995).

<sup>107</sup> *Id.*; see also Kaye, *supra* note 15 (honoring Justice William Brennan).

<sup>108</sup> Kaye, *supra* note 106, at 5-11.

<sup>109</sup> *People v. Hollman*, 590 N.E.2d 204, 212 (N.Y. 1992).

<sup>110</sup> See *supra* text accompanying note 105.

courts of New York State, and—this will be the last note I will offer toward my part of the portrait of this judge—the care she takes in selecting her shoes.