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Henry M. Greenberg

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The Making of a Judge's Judge

JUDITH S. KAYE'S 1987 CARDOZO LECTURE

Henry M. Greenberg[†]

On the evening of February 26, 1987, Judge Judith S. Kaye delivered the Forty-First Benjamin N. Cardozo Lecture in the Great Hall of the Association of the Bar of the City of New York.¹ The audience was not large. The media did not cover the event. But Kaye's address was a turning point in her career and a milestone in New York legal history.

The Cardozo Lecture is one of America's most prestigious lecture series devoted to jurisprudence. It has drawn the brightest stars of the legal firmament to the City Bar. Past speakers include U.S. Supreme Court Justices,² Chief Judges of state courts of last resort,³ distinguished academicians,⁴ practitioners,⁵ and other legal luminaries.⁶

It was a great honor for Kaye to be invited to give a Cardozo Lecture, especially so early in her judicial career. She was 48 years old and had served only three years as an

[†] Henry M. Greenberg is a shareholder with Greenberg Traurig, LLP. He attended Judge Kaye's Benjamin N. Cardozo Lecture (Cardozo Lecture) in 1987, along with his future wife, Hope Engel, a brilliant attorney who has worked at the New York Court of Appeals for 30 years. The author served as a law clerk to Judge Kaye from 1988 to 1990.

¹ See Judith S. Kaye, *Dual Constitutionalism in Practice and Principal*, 61 ST. JOHN'S L. REV. 399 (1987) [hereinafter Kaye, *Dual Constitutionalism*], reprinted from 42 REC. ASS'N B. CITY N.Y. 285 (1987). The Association of the Bar of the City of New York is known today as the New York City Bar Association (the City Bar).

² *E.g.*, Ruth Bader Ginsburg (1999), William J. Brennan, Jr. (1987), Earl Warren (1970), John M. Harlan (1958), William O. Douglas (1949), Felix Frankfurter (1947), Robert H. Jackson (1944), and John M. Harlan (1958). See *The Benjamin N. Cardozo Lectures*, NEW YORK CITY BAR ASSOCIATION, <http://www.nycbar.org/about-us/awards-aamp-special-lectures/the-benjamin-a-cardozo-lectures> [<http://perma.cc/X5NP-LJ9H>] (last visited June 5, 2016).

³ *E.g.*, Walter V. Schaefer (1967), Roger J. Traynor (1966), and Irving Lehman (1941). *Id.*

⁴ *E.g.*, Lee C. Bollinger (2005), Geoffrey C. Hazard, Jr. (1985), Derek C. Bok (1982), and Erwin N. Griswold (1972). *Id.*

⁵ *E.g.*, Frederick A.O. Schwarz, Jr. (1991), Harrison Tweed (1955), and Whitney North Seymour (1968). *Id.*

⁶ The City Bar collected and published Cardozo Lectures, delivered between 1941 and 1995, in THE BENJAMIN N. CARDOZO MEMORIAL LECTURES DELIVERED AT THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1941-1995 (1996).

Associate Judge on the New York Court of Appeals.⁷ She had published a few law review articles and delivered a handful of speeches, but none were of particular moment.⁸ Coming to the court directly from private practice, her first years on the bench were devoted to making the transition from the “fundamentally different roles” of lawyer to judge, advocate to arbiter.⁹ She once joked that “[f]or a long time after my appointment to the Court of Appeals I marked every passing week as a triumph of survival—my own as well as the law of the State of New York.”¹⁰

Her self-deprecating humor notwithstanding, Kaye quickly mastered the craft of judging. Even so, she had to adjust to the “thunderous quiet” of her new life as an appellate judge.¹¹ She missed the day-to-day interaction with lawyers in her former law firm and active participation in bar association activities.¹² Her love of the law and insatiable curiosity about it sought an outlet for expression beyond deciding cases. She wanted to be a “judge’s judge” and knew that many of the nation’s greatest jurists contributed to the growth of the law (and enhanced their reputations) through extrajudicial writings and addresses.¹³

⁷ Governor Mario M. Cuomo appointed Kaye an Associate Judge of the New York Court of Appeals in 1983 and Chief Judge in 1993. Steven C. Krane, *Dedication to Judith S. Kaye*, 70 ALB. L. REV. 807, 809-10 (2007).

⁸ Judith S. Kaye, *Foreword to Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URBAN L.J. 1 (1986); Judith S. Kaye, *My “Freshman Years” on the Court of Appeals*, 70 JUDICATURE 166 (1986) [hereinafter Kaye, *My “Freshman Years”*]; Judith S. Kaye, *Dedication, An Open Letter to My Colleague and Friend on the Occasion of His Seventieth Birthday*, 53 FORDHAM L. REV. 147 (1984).

⁹ Kaye, *My “Freshman Years,”* *supra* note 8, at 166.

¹⁰ Judith S. Kaye, *A Five-Year Retrospective*, Address at New York State Family Court Judges Conference 10 (Sept. 24, 1988).

¹¹ Kaye, *My “Freshman Years,”* *supra* note 8, at 166.

¹² *Id.*

¹³ Perhaps the best example of such a jurist is the man after whom the Cardozo Lecture was named, Benjamin N. Cardozo, Kaye’s illustrious predecessor as Chief Judge of the New York Court of Appeals. As it happens, Kaye idolized Cardozo—indeed, she personally identified with him—and was a scholar of his life and works. See Judith S. Kaye, *Cardozo: A Law Classic*, 112 HARV. L. REV. 1026, 1026-27 (1999) (“I occupy Cardozo’s desk in Albany Chambers and his center chair at the Court’s daily conferences and oral arguments, his spittoon at my feet (confident that neither of us would dream of using it for its intended purpose). My home is a mere five blocks from his, on the Upper West Side of Manhattan. My husband and I are long-time members of the Spanish and Portuguese Synagogue—his congregation—and friends of Cardozo family members.”); see also Judith S. Kaye, *Benjamin N. Cardozo*, in THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 376 (Albert M. Rosenblatt ed., 2007) [hereinafter THE JUDGES OF THE NEW YORK COURT OF APPEALS]. As such, Kaye was well aware that Cardozo delivered lectures published to great acclaim, especially *The Nature of the Judicial Process* (1921), which “erected a framework for understanding how judges go about their work. Thus, in his lifetime he not only changed the law, but also changed the way many thought about the law.” Judith S. Kaye, *Cardozo: A Law Classic*, 112 HARV. L. REV. 1026, 1037-38 (1999). Additionally, Cardozo’s extrajudicial writing “enhanced his standing in the legal profession and continues to do so.” RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 129-30 (1990); see also Andrew L. Kaufman, *Cardozo, Benjamin N.*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 95, 96 (Roger K. Newman ed.,

The Cardozo Lecture gave Kaye an opportunity to prove herself as a legal theorist and scholar. She seized the moment. Her chosen subject—state constitutional law—was largely unfamiliar to the Bench and Bar, as it had been for Kaye just a few years earlier. Before becoming a judge, she was aware of the existence of New York's Constitution and knew that every state has a constitution of its own. But that was all she knew. Like most lawyers trained in American law schools in the 1960s, her orientation was exclusively federal constitutional law.¹⁴ In private practice, she never had occasion to think about New York's "double blessing" of having separate state and federal constitutions.¹⁵

But early in 1984, only months after she was appointed to the Court of Appeals, Kaye attended a conference on state constitutions sponsored by the National Center for State Courts, in Williamsburg, Virginia.¹⁶ The conference was inspired by a 1977 *Harvard Law Review* article authored by William J. Brennan, Jr., an influential Justice of the U.S. Supreme Court, who reminded the profession that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens"—namely, a federal constitutional floor and a state constitutional ceiling.¹⁷ Brennan argued that, for the full realization of fundamental liberties, state courts should look to their own constitutions instead of limiting their decisions to analysis under the U.S. Constitution.¹⁸

2009) ("[C]ardozo's reputation was derived from his opinions and extrajudicial writing and lectures.").

¹⁴ Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 ALB. L. REV. 1977, 1991-92 (2012) [hereinafter Herman, *Portrait of a Judge*].

¹⁵ See Judith S. Kaye, *A Double Blessing: Our State and Federal Constitution*, 20 PACE L. REV. 844, 847 (2010) [hereinafter Kaye, *A Double Blessing*].

¹⁶ Judith S. Kaye, *The Brennan Lecture: A Bit of History*, 17 GREEN BAG 2d 133, 134 (Winter 2014).

¹⁷ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) [hereinafter Brennan, *State Constitutions*]; see also Stewart F. Hancock, Jr., *New York State Constitutional Law—Today Unquestionably Accepted and Applied as a Vital and Essential Part of New York Jurisprudence*, 77 ALB. L. REV. 1331, 1331 (2014) [hereinafter Hancock, *New York State Constitutional Law*] ("[S]tate constitutionalism or the so-called 'new judicial federalism' was given its most widespread recognition and acceptance as a result of a seminal article by Supreme Court Justice William Brennan."); Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES (July 25, 1997), <http://www.nytimes.com/1997/07/25/us/william-brennan-91-dies-gave-court-liberal-vision.html> [<http://perma.cc/5YPK-YEBW>] (noting that Brennan's 1977 article, "State Constitutions and the Protection of Individual Rights," "became one of the most frequently cited law review articles in history").

¹⁸ Brennan, *State Constitutions*, *supra* note 17, at 491.

Kaye was swept up by the excitement generated by Brennan's exhortation for state courts to "step into the breach"¹⁹ and revitalize state constitutions.²⁰ In preparation for the Cardozo Lecture, she steeped herself in the academic literature and case law developments stretching back to the founding of the state and nation.²¹

Kaye pulled out all the stops to make her lecture memorable. She provided the audience with paperback copies of the New York State Constitution. And, she had then-Chief Judge Sol Wachtler arrange for the presence at the lecture of New York's four original state constitutions—1777, 1821, 1846, and 1894—and several original documents involving the State's ratification of the federal Constitution.²² This historic exhibit was guarded by two New York State Troopers and placed on display in a reception room, only for that evening.²³ Kaye felt that the exhibited documents reinforced "in a most tangible and exciting way that we—the citizens, lawyers and judges of today—are the true keepers and guardians of our Constitutions."²⁴

Kaye opened her lecture on a humorous note. She thanked the Chief Judge for making possible the historic exhibit, quipping that her next speech would be on the origins of the law and that he should be prepared to deliver the Ten Commandments.²⁵ Although not yet the accomplished orator she became in later years, Kaye quickly warmed to her subject and displayed a palpable excitement for it.

¹⁹ *Id.* at 503. Brennan wrote that "our liberties cannot survive if the states betray the trust the Court has put in them . . . With federal scrutiny diminished, state courts must respond by increasing their own." *Id.*

²⁰ See 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, 11 (1995) [hereinafter Kaye, *State Courts at the Dawn of a New Century*] ("I still remember the excitement [Brennan's] stirring words [calling on state courts to 'step into the breach'] generated"); Judith S. Kaye, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 14, 16-17 (1997) (describing the impact of Brennan's call for state courts to take up their role as guardians of individual liberties); see also 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, 549 (1986) ("[T]he state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority.").

²¹ See Kaye, *Dual Constitutionalism*, *supra* note 1, at 400-21.

²² *Association Activities*, 42 REC. ASS'N B. CITY N.Y. 271, 271 (1987).

²³ A photo of this historic moment appears on the first page of this issue of the *Brooklyn Law Review*, alongside the introductory remarks by Dean Allard of Brooklyn Law School. See Nicholas Allard, *A Tribute to Judge Kaye*, 81 BROOK. L. REV. 1349 (2016).

²⁴ Kaye, *Dual Constitutionalism*, *supra* note 1, at 288.

²⁵ Twenty-nine years after the lecture, Judge Wachtler fondly recalled Judge Kaye's joke, as well as the steps he took to arrange for the historical exhibit, when he spoke with me on April 13, 2016.

First, she reviewed the historical role of state constitutions, which has advanced and receded over the years.²⁶ Nevertheless, throughout American history, state constitutions have existed and functioned “independently of the federal Constitution.”²⁷ Kaye thus found that “independent state court adjudications based on state constitutions . . . are hardly revolutionary or illegitimate.”²⁸ Against this background, she called attention to New York’s long, laboriously detailed and oft-amended State Constitution,²⁹ containing some provisions that mirror the U.S. Constitution and others unique to the state charter. Examples of provisions with “a distinctive New York character”³⁰ are those that confer rights to a free education,³¹ aid and support of the needy,³² and environmental conservation.³³

No one questions that provisions of the New York State Constitution that differ from the U.S. Constitution should be interpreted as a matter of state law.³⁴ What Kaye focused on, instead, was the hot-button issue of whether New York courts should independently construe provisions of their own State Constitution that have federal analogues and read them to provide greater protections than the federal Constitution, or whether they should read the state provisions to conform to federal precedent. Kaye cited New York’s “long tradition of reading the parallel clauses independently and affording broader protection, where appropriate, under the State Constitution.”³⁵ She then planted her flag as a leader of independent state constitutional adjudication, observing that

there may in particular instances be a principled basis for broader protections within this State because of our history in adopting or applying a clause, or for other reasons. While language differences

²⁶ Kaye, *Dual Constitutionalism*, *supra* note 1, at 400-08, 412-20.

²⁷ *Id.* at 403.

²⁸ *Id.* at 406; *see also* Judith S. Kaye, *Celebrating Our Other Constitution*, 60 N.Y. St. B.J., 8, 73 (1988) (“The lesson to be drawn from history is that the process of state court adjudication under state constitutions cannot be viewed as radical or revolutionary. It is a consequence of the fact that we *have* two constitutions with many similar provisions, both living documents, neither superseding the other . . .”).

²⁹ Kaye, *Dual Constitutionalism*, *supra* note 1, at 408-12.

³⁰ *Id.* at 409.

³¹ *Id.* (citing N.Y. CONST. art. IX, § 1).

³² *Id.* (citing N.Y. CONST. art. XVII, § 1).

³³ *Id.* at 410 (citing N.Y. CONST. art. XIV, § 4).

³⁴ *See id.* at 409 (“I will not linger long on a recitation of the provisions of the State Constitution that have no specific analogue or counterpart in the federal document. No one would question that, though other considerations such as due process or equal protection may also be implicated, these singular provisions must at some point be analyzed as a matter of state law.”); *id.* at 412 (“Where the text of a state constitution deals with matters not enumerated federally there is obviously basis—indeed necessity—for independent interpretation.”).

³⁵ *Id.*

between the two constitutions may determine that there is a need for independent analysis, where our Constitution is at issue, the fact that there is no language difference does not spell the end of state judicial review. It invites inquiry into matters of history, tradition, policy and other special state concerns.³⁶

Kaye argued that “the development of an independent body of state constitutional doctrine not only has deep historical roots but also is theoretically sound.”³⁷ In her view, state constitutional interpretation should be grounded in the unique character and values of an individual state.³⁸ “[I]t is the judiciary’s duty,” she stressed, “to look at what a ‘constitution’ represents in order to determine what it says, and if what a constitution represents is that community’s most basic, overarching values, then it is only right to interpret a state constitution independently of others, even where concepts are expressed in the same words.”³⁹

Kaye identified practical considerations to support her theory. One was that state courts are closer to the people they serve, the legal environment within their states, and the political processes. This proximity informs state court decisionmaking and makes more readily accessible the constitutional amendment process to correct erroneous rulings.⁴⁰ “Moreover,” she said, “building a coherent body of law—one that is not merely reacting to particular Supreme Court decisions, or waiting on the Supreme Court to flesh

³⁶ *Id.* at 420.

³⁷ *Id.* at 425.

³⁸ *See id.* at 409 (“The combination of high detail and accessibility of the amendment process gives our Constitution a distinctive New York character. It is a product and expression of this State.”); *id.* at 423 (noting that “[m]any states today espouse cultural values distinctively their own”).

³⁹ *Id.* A quintessential example of a provision in the State Constitution “grounded in the character” of New York, “reflecting its unique character and values,” is Article I, Section 8. It provides that “[e]very citizen may freely speak, write and publish . . . sentiments on all subjects.” N.Y. CONST. art. I, § 8. Kaye distilled the history and purpose of Article I, Section 8 in *Immuno AG v. Moor-Jankowski*—which held that that provision provides more protection for speech than the First Amendment to the U.S. Constitution—as follows:

This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that “[e]very citizen may freely speak, write and publish . . . sentiments on all subjects.” Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.

Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1277 (N.Y. 1991) (citations omitted).

⁴⁰ Kaye, *Dual Constitutionalism*, *supra* note 1, at 424.

out the contours of a developing right—has the advantage of furthering predictability and stability in our state law.”⁴¹

Having addressed the conditions under which state constitutional rights depend upon the delineation of federal constitutional rights, Kaye turned the tables. She asked: “are there conditions under which federal constitutional rights should depend upon the delineation of state constitutional rights?”⁴² Answering this question in the affirmative, Kaye invoked the Ninth Amendment of the U.S. Constitution, which states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁴³ She gave this enigmatic provision a novel reading,⁴⁴ maintaining that the reference to “rights . . . retained by the people” means that states can establish or alter federal constitutional law.⁴⁵ If enough states recognize in their state constitutions a particular value, went the argument, then such value should become part of the federal Constitution.⁴⁶ Through this process, in addition to guaranteeing individual rights within their own jurisdictions, state courts can serve as “laboratories” for democracy⁴⁷ and “generators of individual rights” for the nation.⁴⁸

Kaye closed her lecture without fanfare or flourish. She tersely summed up by declaring that “state constitutional law

⁴¹ *Id.*

⁴² *Id.* at 425.

⁴³ U.S. CONST. amend. IX.

⁴⁴ Kaye described the Ninth Amendment as “perhaps the one sentence in the federal Constitution that has never been figured out.” Kaye, *Dual Constitutionalism*, *supra* note 1, at 426; *see also* Herman, *Portrait of a Judge*, *supra* note 14, at 1999 (describing Kaye’s reading of the Ninth Amendment as “a unique theory of federal constitutional interpretation” and federalism).

⁴⁵ *See* Kaye, *Dual Constitutionalism*, *supra* note 1, at 428 (“Whatever other rights may have been contemplated by the framers of the ninth amendment, one of these ‘original’ rights was clearly the right to establish, and to alter, the principles of government.”).

⁴⁶ *See id.* at 426 (“In short, rights that come to be recognized as such by enough of the People acting through the states may become federal rights—values of national, constitutional importance.”).

⁴⁷ *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.” (emphasis added)). Kaye elsewhere used Brandeis’s famous metaphor of states as laboratories when advocating for independent state constitutional adjudication. *See, e.g.*, *People v. Scott and Keta*, 593 N.E.2d 1328, 1348 (N.Y. 1990) (Kaye, J., concurring) (“Dual sovereignty has in fact proved itself not a weakness but a strength of our system of government. States, for example, by recognizing greater safeguards as a matter of State law can serve as ‘laboratories’ for national law . . .” (citation omitted)); Kaye, *A Double Blessing*, *supra* note 15, at 848 (“Throughout American history decisions reached in the state court ‘laboratories’ under their own State Constitutions have sparked national debate, at times even persuading the United States Supreme Court to overturn its own decisions interpreting similar provisions of the United States Constitution and recognize greater rights.”).

⁴⁸ Kaye, *Dual Constitutionalism*, *supra* note 1, at 429.

is significant historically; its independent development is sound today, both practically and theoretically; and it represents an avenue for the future delineation of constitutional rights nationally.”⁴⁹ That was the pure and simple case she made.

Other prominent jurists, like Supreme Court Justice Brennan and Justice Hans A. Linde of Oregon,⁵⁰ had expressed similar views. But as Professor Susan N. Herman has aptly noted, Kaye’s Cardozo Lecture “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.”⁵¹ At the time, there was little support for relying on the New York State Constitution to protect individual rights not adequately protected by the Supreme Court under the federal Constitution.⁵² As Kaye explained, the legal profession “had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.”⁵³

Kaye published her Cardozo Lecture as a law review article entitled *Dual Constitutionalism in Practice and Principle*.⁵⁴ The printed version runs 30 pages and is densely footnoted, establishing academic credibility and precedent for state constitutional adjudication. In the years that followed, she elaborated her views in a series of lectures⁵⁵ and publications.⁵⁶

⁴⁹ *Id.*

⁵⁰ See, e.g., Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

⁵¹ Herman, *Portrait of a Judge*, *supra* note 14, at 1993.

⁵² See Hancock, *New York State Constitutional Law*, *supra* note 17, at 1331 (“In 1993, . . . reliance on New York State constitutional law to protect individual rights not adequately protected by the United States Supreme Court was still a recently emerging doctrine.” (citation omitted)).

⁵³ Kaye, *State Courts at the Dawn of a New Century*, *supra* note 20, at 11-12.

⁵⁴ Kaye, *Dual Constitutionalism*, *supra* note 1.

⁵⁵ See, e.g., Kaye, *State Courts at the Dawn of a New Century*, *supra* note 20 (reprinting Kaye’s Brennan lecture delivered at New York University Law School on March 31, 1995).

⁵⁶ See, e.g., Kaye, *A Double Blessing*, *supra* note 15; Judith S. Kaye, *State Constitutional Law and the State High Courts in the 21st Century*, 70 ALB. L. REV. 825 (2007); Hon. Judith S. Kaye, *Foreword to State Courts in Our Federal System: The Contributions of the New York Court of Appeals*, 46 SYRACUSE L. REV. 217 (1995); Kaye, *State Courts at the Dawn of a New Century*, *supra* note 20; Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992); Judith S. Kaye, *Federalism’s Other Tier*, 3 CONSTITUTION 48 (Winter 1991); Judith S. Kaye, *The Supreme Court: State Constitutional Law*, 25 TRIAL MAGAZINE 67 (Dec. 1989) [hereinafter Kaye, *The Supreme Court: State Constitutional Law*]; Judith S. Kaye, *State Constitutional Adjudication Enjoys Clear Historical Foundation*, N.Y.L.J., Apr. 29, 1987; Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49 (1988); Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1

These works reached not only academics, but also practicing lawyers. Kaye often recalled with joy the lawyer who heard her Cardozo Lecture and wrote her to express his delight, "I feel like I'm swimming in a whole new sea of culture."⁵⁷

Soon after giving the Cardozo Lecture, Kaye put to use what she learned preparing it, fighting for acceptance of her views on the Court of Appeals.⁵⁸ She stood out from her colleagues in the 1980s as an advocate for resolving constitutional questions on the basis of the State Constitution in the face of federal precedents.⁵⁹ In dissents and concurrences, she repeatedly stated her belief that the Court of Appeals should independently interpret the State Constitution⁶⁰ and expressed dismay when the court retreated from prior rulings upholding state constitutional protections.⁶¹

The Cardozo Lecture was the intellectual foundation upon which Kaye built a reputation as one of the nation's leading thinkers about state constitutions.⁶² By 1989, she was viewed "as

EMERGING ISSUES ST. CONST. L. 17 (1988); Kaye, *Celebrating Our Other Constitutions*, *supra* note 28.

⁵⁷ Kaye, *The Supreme Court: State Constitutional Law*, *supra* note 55, at 67.

⁵⁸ See Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1169-1205 (1994) [hereinafter Bonventre, *New York's Chief Judge Kaye*] (detailing Judge Kaye's contributions to state constitutionalism through 1994).

⁵⁹ See *id.* at 1166 ("Unlike . . . the court generally, Kaye did not follow the Supreme Court's lead . . . [H]er voting . . . [was] significantly more supportive of rights and liberties than that of the court as a whole.").

⁶⁰ For example, in Kaye's dissent in *People v. Hernandez*, she urged her colleagues not to assume that state law "would proceed in lockstep with Federal Law" and to develop "an authoritative body of State law instead of being held in suspense, case-by-case," by what the U.S. Supreme Court may decide in the future. *People v. Hernandez*, 552 N.E.2d 621, 626 (N.Y. 1990) (Kaye, J., dissenting), *aff'd*, 500 U.S. 352 (1991). Likewise, in Kaye's concurrence in *People v. Scott and Keta*—responding to arguments against giving defendants the protection of the state constitution for rights not covered under the federal Constitution—she directly instructed her colleagues that it is "perfectly respectable and legitimate" for a state court to establish higher constitutional standards locally. *People v. Scott and Keta*, 593 N.E.2d 1328, 1346-48 (N.Y. 1990) (Kaye, J., concurring). It does not show disdain for the Supreme Court, challenge its authority, or insult the Justices, she continued. *Id.* at 1347-48; see also *O'Neil v. Oakgrove Construction, Inc.*, 523 N.E.2d 277, 282 (N.Y. 1988) (Kaye, J., concurring) (agreeing with the court's majority to provide greater protection for freedom of the press than the U.S. Supreme Court, but expressing the view that the "the case is correctly resolved under the State Constitution alone").

⁶¹ See, e.g., *People v. Bing*, 492, 558 N.E.2d 1011, 1023, 1029 (N.Y. 1990) (Kaye, J., concurring in part, dissenting in part) (objecting to the court's "break with its proud tradition" of protecting a defendant's constitutional right to counsel and that the cases before the Court provided inadequate justification for the "overruling of a significant recent precedent, by now fully a part of the law"); *Town of Islip v. Caviglia*, 540 N.E.2d 215, 235-36 (N.Y. 1989) (Kaye, J., dissenting) (objecting to the court's abandonment of the highly protective standard regarding the right to free expression under the state constitution, stating, "[F]reedoms such as these have been previously accorded transcendent value by this court"); *Caruso v. Ward*, 530 N.E.2d 850, 856 (N.Y. 1988) (Kaye, J., dissenting) (objecting to the court's "abrupt about-face" in ignoring recent past precedent and upholding program of suspicionless, random urine testing of special narcotics officers).

⁶² See Ruth Bader Ginsburg, *In Praise of Judith S. Kaye*, 84 N.Y.U. L. REV. 653, 653-54 (2009) ("Taking a cue from Justice Brennan, [Kaye] . . . understood that

a prolific advocate of independent state-based adjudication, both as a matter of constitutional and common law.”⁶³ In 1993, when appointed Chief Judge of the Court of Appeals, she was widely regarded as a brilliant jurist—indeed a judge’s judge⁶⁴—with commentators noting her advocacy of the State Constitution in their general evaluations.⁶⁵

Indeed, Judith Kaye advanced New York’s State Constitution more than anyone in modern New York history.⁶⁶ Due in no small part to her efforts, state constitutional law is no longer seen as an impractical field of study. New York courts now “accept and routinely apply state constitutionalism when necessary to effectively safeguard individual rights and liberties.”⁶⁷ That would likely not be true but for Kaye’s

New York’s constitution and common law had important roles to play in the protection of fundamental human rights. On her watch, the state’s constitution and laws were read to advance due process, freedom of expression, freedom from unreasonable searches and seizures, and genuinely equal opportunity. The U.S. Supreme Court’s sometimes constricted reading of parallel provisions of the Federal Constitution did not overwhelm her judgment.”); Vincent Martin Bonventre, *Editor’s Foreword*, 70 ALB. L. REV. 795, 795 (2007) (describing Kaye as the “leading authority on state constitutional law” and a “thoughtful proponent of independent state adjudication”); Herman, *Portrait of a Judge*, *supra* note 14, at 1991-2002 (providing an insightful analysis of Kaye’s Cardozo Lecture, her vision of federalism and independent state-based adjudication, and her scholarship generally).

⁶³ Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 31, 58 n.198 (1989); *see also* Linda B. Matarese, *Other Voices: The Role of Justices Durham, Kaye and Abrahamson in Shaping the Methodology of the “New Judicial Federalism,”* 2 EMERGING ISSUES ST. CONST. L. 239 (1989).

⁶⁴ *See, e.g.*, Kevin Sack, *Cuomo’s Choice to Head the Court of Appeals: A Judge’s Judge*, N.Y. TIMES (Feb. 23, 1993), <http://www.nytimes.com/1993/02/23/nyregion/woman-in-the-news-cuomo-s-choice-to-head-the-court-of-appeals-a-judge-s-judge.html> [<http://perma.cc/9G5Y-CNNB>] (“The rigor of her intellect and the clarity of her writing have inspired any number of legal experts to rank her among the brightest members of any state court in the country.”); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1141 n.52 (1999) (noting that “[c]ommentators regard Chief Judge Kaye as a skilled and creative jurist”).

⁶⁵ *See, e.g.*, *Cuomo Nominates Judith Kaye for Top New York Judicial Post*, N.Y. TIMES (Feb. 23, 1993), <http://www.nytimes.com/1993/02/23/nyregion/cuomo-nominates-judith-kaye-for-top-new-york-judicial-post.html> [<http://perma.cc/Z4GW-S6GD>] (“Legal scholars said Judge Kaye’s appointment was a victory for the principle she has espoused in a number of recent rulings—that provisions of the State Constitution can be applied when they afford more protection of individual rights than those afforded by the United States Constitution.”); Bonventre, *New York’s Chief Judge Kaye*, *supra* note 58, at 1166 n.16 (“Judge Kaye’s national reputation is in no small part due to her advocacy of independent state-based decision-making and her scholarship in the field.”).

⁶⁶ *See* Albert M. Rosenblatt, *Honoring Chief Judge Judith S. Kaye*, 70 ALB. L. REV. 821, 821 (2007) (Chief Judge Judith S. Kaye . . . in her academic and judicial writings has surely done more to advance our state constitution than anyone else alive.”).

⁶⁷ Hancock, *New York State Constitutional Law*, *supra* note 17, at 1332; *see, e.g.*, *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009) (holding unconstitutional under Article I, § Section § 12 of the New York State Constitution the warrantless installation by police of a global positioning system device that permitted the tracking of a suspect’s vehicle for a great distance for lengthy periods at minimal cost); *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1277-80 (N.Y. 1991).

leadership as the Court of Appeals' "foremost student and proponent of state constitutional adjudication."⁶⁸

Apart from its impact on New York law, the Cardozo Lecture represented the first time that Kaye prepared, delivered, and published a scholarly lecture. The experience was so rewarding that she replicated it again and again. When she retired from the court 21 years later in 2008,⁶⁹ she had published over 200 articles⁷⁰—on a "kaleidoscopic range of topics"⁷¹—"confront[ing] as educator, scholar and advocate many of the most important issues facing our country."⁷² This astounding outpouring of scholarship and commentary is all the more remarkable given the arduous administrative responsibilities she assumed after becoming Chief Judge in 1993.⁷³

Sometimes history is made right before our eyes, and we fail to appreciate it. Doubtless few, if anyone, who saw Kaye's Cardozo Lecture could have foretold its impact on her career and New York law. But history was made on February 26, 1987, at the City Bar. And we are all its beneficiaries.

⁶⁸ Bonventre, *New York's Chief Judge Kaye*, *supra* note 58, at 1166.

⁶⁹ In 2008, Kaye turned 70 and was forced to retire at the end of the year by operation of the State Constitution. N.Y. CONST. art. VI, § 25(b).

⁷⁰ Herman, *Portrait of a Judge*, *supra* note 14, at 1983. For a partial list of Kaye's published articles, see Steven C. Krane, *Judith Smith Kaye*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 13, at 821-24.

⁷¹ Herman, *Portrait of a Judge*, *supra* note 14, at 1983.

⁷² Sandra Day O'Connor, *A Distinguished Path in Public Service*, 84 N.Y.U. L. REV. 662, 663 (2009).

⁷³ See Herman, *Portrait of a Judge*, *supra* note 14, at 1983 ("[W]hen 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."); Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York's Chief Judge, Dies at 77*, N.Y. TIMES (Jan. 7, 2016), http://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html?_r=0 [<http://perma.cc/7AQQ-P3GL>] (quoting Kaye that her two jobs as the head of New York's court system and the Chief Judge of the Court of Appeals "each . . . took 80 percent of my time").