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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.


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. Hazzard, 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.

Associate Judge on the New York Court of Appeals. She had published a few law review articles and delivered a handful of speeches, but none were of particular moment. 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. 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.”

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. She missed the day-to-day interaction with lawyers in her former law firm and active participation in bar association activities. 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.
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. In private practice, she never had occasion to think about New York’s “double blessing” of having separate state and federal constitutions.

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. 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. 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.
Kaye was swept up by the excitement generated by Brennan’s exhortation for state courts to “step into the breach” and revitalize state constitutions. 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.

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. This historic exhibit was guarded by two New York State Troopers and placed on display in a reception room, only for that evening. 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.”

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. 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.


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


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. Nevertheless, throughout American history, state constitutions have existed and functioned “independently of the federal Constitution.” Kaye thus found that “independent state court adjudications based on state constitutions . . . are hardly revolutionary or illegitimate.” Against this background, she called attention to New York’s long, laboriously detailed and oft-amended State Constitution, 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” are those that confer rights to a free education, aid and support of the needy, and environmental conservation.

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. 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.” 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

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

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?” 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.” She gave this enigmatic provision a novel reading, maintaining that the reference to “rights . . . retained by the people” means that states can establish or alter federal constitutional law. If enough states recognize in their state constitutions a particular value, went the argument, then such value should become part of the federal Constitution. Through this process, in addition to guaranteeing individual rights within their own jurisdictions, state courts can serve as “laboratories” for democracy and “generators of individual rights” for the nation.

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

That was the pure and simple case she made.

Other prominent jurists, like Supreme Court Justice Brennan and Justice Hans A. Linde of Oregon, 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.”

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. 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.”

Kaye published her Cardozo Lecture as a law review article entitled Dual Constitutionalism in Practice and Principle. 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 lectures and publications.

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49 Id.
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)).
54 Kaye, *Dual Constitutionalism*, supra note 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.”

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. 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. In dissents and concurrences, she repeatedly stated her belief that the Court of Appeals should independently interpret the State Constitution and expressed dismay when the court retreated from prior rulings upholding state constitutional protections.

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

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

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]reedom[s] as such 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).
a prolific advocate of independent state-based adjudication, both as a matter of constitutional and common law.”

In 1993, when appointed Chief Judge of the Court of Appeals, she was widely regarded as a brilliant jurist—indeed a judge’s judge—with commentators noting her advocacy of the State Constitution in their general evaluations.

Indeed, Judith Kaye advanced New York’s State Constitution more than anyone in modern New York history. 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.” 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).


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.”).

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.”).

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.”

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, she had published over 200 articles—on a “kaleidoscopic range of topics”—“confront[ing] as educator, scholar and advocate many of the most important issues facing our country.” 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.

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.

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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.


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”).