CHIEF JUDGE KAYE'S DYNAMIC LEGACY

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INTRODUCTION

I never had the privilege of clerking for Chief Judge Kaye, or arguing before her on the bench, or serving on a commission that she had established. But from a distance she became a role model and intellectual mentor.[1] It was not simply that she was the first female to serve as the New York high court's Chief Judge, an achievement that by itself drew attention and respect.[2] Rather, I was pulled into her orbit through my own work: first, as a public interest lawyer, pressing state constitutional arguments in suits involving poverty and inequality, and then as a law professor, questioning whether state courts were obliged to follow federal constitutional interpretive practice. Chief Judge Kaye was central to both projects. As a forceful voice for independent state constitutional adjudication, Kaye's judicial opinions, lectures, and articles created a climate for taking New York's Constitution seriously.[3] Chief Judge Kaye also was committed to

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[1] For a moving account of how Chief Judge Kaye served as both mentor and model to her judicial clerks, see Roberta A. Kaplan, *Tribute to Judith S. Kaye*, 70 ALB. L. REV. 799, 800 (2007).

[2] *See* 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.

[3] *See* Albert M. Rosenblatt, *Honoring Chief Judge Judith S. Kaye*, 70 ALB. L. REV. 821, 821 (2007) (stating that Chief Judge Kaye, "in her academic and judicial writings has

reforming the New York court system to expand access to justice.[4] "I know how hard it will be to effect real change within the court system," Kaye said in a news interview two years after becoming Chief Judge, "where traditions are long, resources short and daily demands enormous."[5] Nevertheless, Kaye accomplished what at the time was considered to be "well-nigh impossible"—the "Herculean task" of reforming the civil jury system.[6] This was not all. Under her watch the New York judiciary established the Center for Court Innovation, created problem-solving courts, provided resources for unrepresented litigants, and constructed and renovated courthouses throughout the state.[7] Committed to the principle that access to justice "not [be] thwarted by lack of money, and surely not by barriers erected by the courts themselves,"[8] Kaye encouraged reforms that made the courts more open, responsive, and dynamic in their ability to do justice. It was no hyperbole for her successor as Chief Judge to praise Kaye as "a visionary third branch leader."[9]

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surely done more to advance our state constitution than anyone else alive"); *see also* Gordon Eddy, *The Development of Independent New York Constitutional Jurisprudence in Chief Judge Kaye's Judicial Opinions: An Empirical Study*, 71 ALB. L. REV. 1137, 1149 (2008) (reporting that "[a]s Chief, Judge Kaye's efforts to advance independent state constitutional jurisprudence in NY have been reflected in nearly one-third of her opinions").

[4] *See* Steven C. Krane, *Judith S. Kaye: The Innovator*, EXPERIENCE, Summer 2007, at 7, 9 (stating that "[f]rom the moment she took the oath, Judge Kaye began to improve the functioning of the court system"). For a discussion of some of the barriers Chief Judge Kaye faced in reforming the court system, see Quintin Johnstone, *New York State Courts: Their Structure, Administration and Reform Possibilities*, 43 N.Y. L. SCH. L. REV. 915 (1999–2000).

[5] Judith S. Kaye, *It Is Time to Reform the Jury System; Effort Involves Change on the Part of Everyone*, N.Y. L.J., Jan. 25, 1995, at S1, S1.

[6] James P. Levine & Steven Zeidman, *The Miracle of Jury Reform in New York*, 88 JUDICATURE, Jan.-Feb. 2005, at 178, 178; *see also* Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York*, 10 J.C.R. & ECON. DEV. 263 (1995).

[7] *See* Benjamin Pomerance, *When Dad Reached Across the Aisle: How Mario Cuomo Created a Bipartisan Court of Appeals*, 77 ALB. L. REV. 185, 249–50 (2013–2014) (stating that "Kaye became a very active judicial administrator during her time as Chief Judge. She modernized New York's court system in both its facilities and its technological prowess, improved conditions for individuals serving on New York State juries, and upgraded the services available to pro se litigants").

[8] JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2002, at 6 (2002), http://www.nycourts.gov/admin/stateofjudiciary/soj2002.pdf.

[9] Jonathan Lippman, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84 N.Y.U. L. REV. 655 (2009).

I

A Twin Legacy: Administrative Reform and State Constitutional Enforcement

In this brief essay I develop a connection between Chief Judge Kaye's approach to the enforcement of the state constitutional right to public schooling and the institutional dynamism that characterizes her administrative legacy—the idea that government structures, including courts, must adapt to meet modern concerns and so preserve public trust.[10] Kaye's steps to modernize the state's judiciary contrasted sharply with the Legislature's concurrent failure to clean its own house. During her judicial career, New York's Legislature had one of the lowest rates of bill enactment in the country; legislative committees rarely met; "empty seat" voting was permitted and indeed was the default voting procedure; and budgets were worked out through the notorious process of "three men in a room," involving closed door sessions of the Governor and legislative leaders.[11] Unattended, the State's fiscal problems multiplied.[12] A list of issues, many of constitutional dimension, illustrated the social costs of electoral-branch dysfunction. Certainly New York's judges were affected by the Legislature's failure to authorize needed salary increases.[13] In my view, however, the hardest hit were children who resided in low-

[10] *Id.* at 656 (discussing the 1994 State of the Judiciary address and its emphasis on the need to restore public trust); *see also* Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L. & Pol'y Rev. 125, 127 (2004) ("I would like to help restore public confidence in the courts, which has frayed in recent years.").

[11] *See* Jeremy M. Creelan & Laura M. Moulton, *The New York State Legislative Process: An Evaluation and Blueprint for Reform*, Brennan Ctr. Just. (July 21, 2004), https://www.brennancenter.org/publication/new-york-state-legislative-process-evaluation-and-blueprint-reform; *see also* Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 533 (Sup. Ct. 2001) ("[A]nnual increases in State education aid are allocated pursuant to an agreement struck by the Governor and the leaders of the State Assembly and the State Senate as part of the overall annual budget negotiations. These negotiations produce a general agreement on the overall amount to be spent on education and how it is to be distributed across the State which is then ratified by the legislature. This phenomenon is commonly referred to as 'three men in a room.'").

[12] *See* Gerald Benjamin, Reform in New York: The Budget, the Legislature and the Governance Process 34 (2003), http://www.cbcny.org/sites/default/files/report_reformnys_11102003.pdf.

[13] The budget crisis over state judicial salaries came to a head in *Maron v. Silver*, 925 N.E.2d 899 (N.Y. 2010), which held that separation of powers was violated by the Legislature's failure to raise state judicial salaries. *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 Penn St. L. Rev. 923, 945 (2011) (discussing *Maron* as an example of the relationship between legislative discretion and judicial power over budgetary matters that affect socioeconomic rights).

wealth districts where the public schools could not provide even minimally adequate educational opportunities.[14]

The gap between judicial competence and legislative incompetence poses a difficult question for the doctrine of separation of powers. Civics 101 tells us that the legislature makes the law and the courts enforce it. Moreover, in enforcing the law, the judiciary is expected to give deference to legislative decisions that involve policymaking and budgetary questions. After all, the legislature is structured to access information quickly, to deal with diverse stakeholders, and to take a holistic approach to governance. Courts, by contrast, depend on self-interested litigants to provide information, they look only to the parties to frame the dispute, and they decide issues on a case-by-case basis. Yet when one branch of government fails to protect rights, how does—how should—that omission affect its partners in governance?

This question came to the fore in a series of school funding appeals that divided the Court of Appeals while Kaye served as Chief Judge.[15] In both her majority and dissenting opinions, Kaye offered a pragmatic yet principled approach to the separation of powers that respected the coordinate branches but did not detract from the court's power and duty to enforce constitutional rights. Chief Judge Kaye openly embraced institutional realism, rejecting the institutional formalism that tends to drive separation-of-powers doctrine. Instead, her approach to inter-branch relations took explicit account of the functional limits of all branches of government, and not only those of the judiciary.[16] Adhering to convention, Chief Judge Kaye started from the presumption that legislative decisions are entitled to deference. But when the elected branches failed to do their job—because of

[14] *See* Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982) (describing educational conditions in New York public schools); *see also* JOEL S. BERKE, POLITICIANS, JUDGES, AND CITY SCHOOLS: REFORMING SCHOOL FINANCE IN NEW YORK 32–35 (1985) (reprinting some of the evidence presented to the Court of Appeals in *Levittown*, which showed that in 1974 and 1975 affluent districts had up to 65% more funding per pupil, almost twenty more classroom teachers on average, and three times more teachers with master's degrees than poorer districts).

[15] Judith S. Kaye, *Interbranch Tangling: Separating Our Constitutional Powers*, JUD. NOTICE, Summer 2013, at 18, 23 [hereinafter Kaye, *Interbranch Tangling*] ("The trio of school funding appeals known as the 'Campaign for Fiscal Equity,' or CFE, drew our trial and appellate courts to an unprecedented degree into determining issues of educational financing, content and resources, hence raising and deciding a host of separation of powers issues.").

[16] For a discussion of the implications of formalism and realism to constitutional interpretation, see Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1909–15 (2001). *See also* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1.

indifference, foot-dragging, or incompetence—she recognized that it would be constitutionally derelict for the court to accord deference that was not deserved. "The Court's duty to protect constitutional rights," she wrote, "is an imperative of the separation of powers, not its enemy."[17] The pragmatic spirit that motivated Kaye's administrative reforms likewise informed her state constitutional jurisprudence—in both, her approach was dynamic, principled, and aimed at "building a better system of justice."[18]

II
Rediscovering State Constitutions and the Right to an Adequate Education

By the time Kaye ascended to the Court of Appeals, the Supreme Court of the United States already had begun its long retrenchment from the enforcement of civil rights and civil liberties.[19] This included the Court's outright resistance to finding in the Federal Constitution any source of so-called positive or affirmative rights, such as a right to public schooling.[20] Although the Court acknowledged the importance of public schooling to a modern democracy, it looked to the states and localities to carry out this function.[21] Significantly, in its 1973 decision, *San Antonio Independent School District v. Rodriguez*,[22] the Court reversed the district court's finding that there was "a fundamental right to education" encompassed within the Fourteenth Amendment.[23] Moreover, other than in situations of de jure racial discrimination,[24] the Court announced that state educational decisions—like other constitutional claims involving the rights of the poor—would be

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17 Hernandez v. Robles, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting).

18 Randall T. Shepard, *Judith Kaye as a Chief Among Chiefs*, 84 N.Y.U. L. Rev. 671, 672 (2009) (applying this description to Kaye's work as an administrative innovator).

19 *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, 1170 (1994) (referring to the Supreme Court's "retrenchment").

20 *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1132–35 (1999) [hereinafter Hershkoff, *Positive Rights*] (discussing the Court's view of the Federal Constitution as a charter of negative rights). For a strong statement of the view that the Federal Constitution ought not to encompass affirmative claims against the government, see Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, *in* American Exceptionalism and Human Rights 90 (Michael Ignatieff ed., 2005). *See also* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857 (2001).

21 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

22 411 U.S. 1 (1973).

23 *Id.* at 18.

24 For a critical appraisal of the relation between school funding litigation and race discrimination, see Christine Kiracofe, *The Natural Relationship Between Desegregation*

subject to only the weakest form of "rationality" review.[25] This hands-off approach produced unfortunate consequences in New York, where the system of school funding created broad disparities in the quality and availability of educational resources. After the *Rodriguez* decision, disadvantaged students were foreclosed from seeking legal protection from the two obvious sources: a federal judiciary, which disclaimed competence to act, and the state legislature, which claimed competence but failed to act.

The conventional wisdom is sometimes true: When one door closes, another one opens. As is well known, Justice William J. Brennan, Jr. saw the Court's retrenchment from rights enforcement as "a clear call to state courts to step into the breach."[26] Justice Brennan urged state judges to "impose higher standards . . . under state law than is required by the Federal Constitution."[27] Encouraged to look to state constitutions as a source of rights and protections, advocates hoping to improve the quality of underresourced public schools began to press claims under state constitution education clauses,[28] including

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and School Funding Litigation, 184 EDUC. L. REP. 1, 2 (2004), which discusses "the natural crossover between desegregation and finance lawsuits."

[25] *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278 (1993) (discussing the application of rationality review to issues that affect the poor); *see also* Bonnie A. Scherer, *Footing the Bill for a Sound Basic Education in New York City: The Implementation of* Campaign for Fiscal Equity v. State, 32 FORDHAM URB. L.J. 901, 904 (2005) ("The United States Supreme Court, in *San Antonio Independent School District v. Rodriguez*, put an end to federal education funding litigation.").

[26] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); *see also* Helen Hershkoff, The Private Life of Public Rights: State Constitutions and the Common Law, Inaugural Lecture of the Herbert M. and Svetlana Wachtell Professorship in Constitutional Law and Civil Liberties (Feb. 3, 2011) (discussing Chief Judge Kaye's tribute to Justice Brennan's call for a renaissance in state constitutional interpretation), *in* 88 N.Y.U. L. REV. ONLINE 1, 3 (2013).

[27] Michigan v. Mosely, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

[28] *See generally* Michael Heise, *State Constitutions, Schooling Funding Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995). Although unusual from the federal perspective, a right to education appears in the majority of modern democratic constitutions outside the United States. *See* Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1053–54 (2014) (eighty percent of 195 national constitutions include an education right). For disclosure, I participated in some of these state lawsuits. *See, e.g.*, Sheff v. O'Neill, No. X07CV890492119S, 2007 WL 123743 (Conn. Super. Ct. Jan. 4, 2007) (challenge to system of public schooling under Connecticut education article) (co-counsel); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995) (challenge to state method of funding public education under Rhode Island education article) (amicus curiae); Campaign for Fiscal Equity, Inc. v. State (*CFE I*), 655 N.E.2d 661 (N.Y. 1995) (challenge to New York's system of public school funding under New York education article) (amicus curiae); Reform Educ. Fin. Inequities Today v. Cuomo, 606 N.Y.S.2d 44 (Sup. Ct. App. Div. 2d Dep't 1993) (challenge to New York's system of public school funding under New York education article) (amicus curiae); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) (challenge under North Dakota Constitution to user fee for school bus transportation) (amicus curiae).

New York's, which commits the state to "the maintenance and support of a system of free common schools."[29] Under Kaye's leadership, the Court of Appeals became one of the most influential state courts to heed Justice Brennan's advice to look to unique state sources of rights and liberties;[30] in the school funding appeals that came before the Court of Appeals,[31] Chief Judge Kaye was critical in devising principled and effective ways to enforce the state constitutional right to education that accounted for the shared role of the different branches. The lawsuit, Campaign for Fiscal Equity (*CFE*), was long and contentious. As Kaye remarked in her 2013 Charles Evans Hughes Lecture:

> Suffice it to say that, in a court long known for the goals of clarity and unanimity, the 1995 CFE appeal generated five extensive writings, replete with authorities, among six judges. The subsequent 2003 and 2006 appeals each produced three significant opinions. Always we were unanimous in our concern for the welfare of New York's schoolchildren but, as individual judges, we assessed the Court's responsibility and power relative to its partners in government very differently.[32]

CFE was not the first case challenging the adequacy of public schooling in New York under the State Constitution. A year before Kaye was appointed to the bench, the Court of Appeals handed down its decision in *Levittown v. Nyquist*.[33] The extensive record in the case—the trial transcript ran for 23,000 pages and included 400 exhibits—documented gross funding and staffing disparities between poor and affluent school districts.[34] The Court of Appeals, while holding the education right to be justiciable, nevertheless found no equality violation or deviation from the requirements of the State Constitution education article. Rather, a public school system that offered an inferior education to schoolchildren based on the location of their public schools was justified, in the majority's view, in light of the state's desire to preserve and promote "local control of education."[35] Judge Fuchsberg, dissenting, stated:

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[29] N.Y. CONST. art. XI, § 1.

[30] Hershkoff, *Positive Rights*, *supra* note 20, at 1140 (referring to the New York Court of Appeals's "historic role as a 'jurisprudential entrepreneur' in developing an independent state law discourse").

[31] *CFE I*, 655 N.E.2d 661 (N.Y. 1995); Campaign for Fiscal Equity v. State (*CFE II*), 801 N.E.2d 326 (N.Y. 2003); Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50 (N.Y. 2006).

[32] Kaye, *Interbranch Tangling*, *supra* note 15, at 23.

[33] Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

[34] *See* Berke, *supra* note 14, at 32–35.

[35] *Levittown*, 439 N.E.2d at 366.

> I believe the sad record of this case demonstrates that in material manner the public school system of New York State, to which falls responsibility for the education of well over three million children, does not rise to the level dictated by a realistic reading of the State constitutional mandate for the "*maintenance* and *support* of a system of free common schools, wherein all the children of this state may be educated."[36]

Judge Fuchsberg criticized the majority's automatic application of federal standards of rationality review to a case involving state constitutional rights, and he questioned the majority's implicit disparagement of the education right as less deserving of judicial support than other rights enumerated in the State Constitution.[37] Further, he drew an explicit connection between funding disparities and racial inequality.[38]

Ten years later, when Kaye became Chief Judge, New York's public schools were still riddled with broad disparities in educational opportunities.[39] In 1991, forty percent of New York City schools had eighty to one hundred percent of their students on free and reduced lunch, compared to 0.4 percent of schools in suburban districts.[40] Expenditures per pupil totaled $5,000 more in the ninetieth percentile of suburban districts than they did in New York City.[41] And student-to-teacher ratios were higher, while teacher salaries were lower in New York City schools when compared to suburban schools.[42] In 1995, the Court of Appeals heard argument in a new lawsuit—Judge Kaye did not participate—now alleging that public schooling in New York was no longer simply unequal district-to-district, but rather was inadequate by any common sense notion of educational quality.[43] Rejecting the State's motion to dismiss, the Court of Appeals remitted

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[36] *Id.* at 370 (Fuchsberg, J., dissenting) (citing N.Y. CONST. art. XI, § 1).

[37] *See* Helen Hershkoff, *Judge Fuchsberg's* Levittown *Dissent: The Evolving Right to an Adequate Education*, 68 ALB. L. REV. 381 (2005).

[38] *Levittown*, 439 N.E.2d at 375 (Fuchsberg, J., dissenting) (stating that it is an "undisputed fact that the existing education aid formulae have an adverse effect, not only on pupils from impoverished families, but also on a large percentage of the nearly 750,000 'minority' students (black, Hispanic, American Indian, Asian and others)").

[39] *See generally* Brief for New York State Ass'n of Small City Sch. Dists. as Amici Curiae Supporting Plaintiffs, Reform Educ. Fin. Inequities Today v. Cuomo, 655 N.E.2d 647 (N.Y. 1995) (No. 2500/91), 1994 WL 16045320.

[40] N.Y. STATE EDUC. DEP'T, NEW YORK, THE STATE OF LEARNING: A REPORT TO THE GOVERNOR AND THE LEGISLATURE ON THE EDUCATIONAL STATUS OF STATE'S SCHOOLS 23 (1993).

[41] *Id.* at 42.

[42] *Id.* at 67.

[43] *CFE I*, 655 N.E.2d 661 (N.Y. 1995).

the matter to the trial court for development of a record to determine whether a violation of the education article in fact existed.[44]

III
Chief Judge Kaye and the Enforcement of the State Education Right

In 2003, the case came back to the Court of Appeals, and the question now was whether the trial court—after hearing the testimony of seventy-two witnesses and examining 4300 exhibits—had properly defined the state constitutional requirement of "a sound basic education" and whether the court, to remedy a violation of that right, was constrained "simply [to] direct the proper parties to eliminate the deficiencies," without setting guidelines or a timetable for compliance.[45] Chief Judge Kaye, writing for the majority, significantly trimmed the trial court's remedy in two respects: the Court of Appeals limited the order to New York City, and it refused to order that the State ensure either "sustained and stable funding" or "that the funding process become as transparent as possible."[46]

In cutting back on the trial court's order, Chief Judge Kaye emphasized that the judiciary had "neither the authority, nor the ability, nor the will, to micromanage education financing."[47] But she made clear that deference to legislative prerogative did not absolve the court of its duty to protect constitutional rights; judicial restraint was not the same as judicial inaction. "By the same token," she stated, "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them."[48] While acknowledging that recent legislative

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[44] *Id.* at 671.

[45] *CFE II*, 801 N.E.2d 326, 345 (N.Y. 2003). The trial court had issued six specific directives to the State:

1. Ascertain the cost of providing a sound basic education statewide. This must be done first.
2. Ensure that every school district has the resources necessary to provide a sound basic education.
3. Take into account variations in local costs, e.g. the higher cost of living in New York City.
4. Provide sustained and stable funding in order to promote long-term planning within the districts.
5. Provide as much transparency as possible so that the public may understand how the State distributes school aid.
6. Ensure a system of accountability to measure whether the reforms produce outcomes that meet the constitutional standard of a sound basic education.

Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 550–51 (Sup. Ct. 2001).

[46] *CFE II*, 801 N.E.2d at 347.

[47] *Id.* at 345.

[48] *Id.*

reforms might bring the State in line with the Court's constitutional standard, the Court of Appeals rejected the State's argument that the passage of the federal No Child Left Behind Act obviated the need for a court order. Nor did the court consider itself limited to a "comply with the constitution" order. Rather, Chief Judge Kaye imposed a three-part mandate on the State: that the State ascertain the cost of providing a sound basic education for New York City, that it ensure that every school in New York City has the resources to provide a sound basic education, and that it provide "a system of accountability to measure whether the reforms actually provide . . . for a sound basic education."[49] Chief Judge Kaye described these mandates as "signposts in the road yet to be traveled," expressing optimism that her approach—which recognized the shared responsibility of the court and elected branches to enforce the state constitutional education right—would encourage political-branch compliance and reduce the need for future litigation.[50]

Unfortunately, Chief Judge Kaye's expectations proved wrong;[51] the mandate of the Court of Appeals failed to catalyze the elected branches into action.[52] Three years later, not only had the State not yet allocated sufficient funding to provide a sound basic education to the children of New York City, but also the Governor and Legislature openly disputed what an adequate education would cost.[53] Another round of litigation resulted. Back before the Court of Appeals, the majority this time deferred to the State's determination of how much funding would be needed to fulfill the constitutional mandate. The grounds for decision were a straightforward application of formal separation-of-powers principles without regard to their functional fit with New York's institutional reality:

> We are the ultimate arbiters of our State Constitution. Yet, in fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government. We have often spoken of this tension between our responsibility to safeguard rights and the necessary deference of the courts to the policies of the Legislature. . . .

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[49] *Id.* at 348.

[50] *Id.* at 350.

[51] *CFE III*, 861 N.E.2d 50, 62 (N.Y. 2006) (Kaye, C.J., concurring in part and dissenting in part) ("Regrettably, our trust was misplaced. Today, more than three years later—and more than 13 years after this litigation began—defendants still have failed to fund the New York City public schools adequately.").

[52] *Cf.* Joanne Scott & Susan P. Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007) (sketching a model of courts as catalysts in governance processes).

[53] *See CFE III*, 861 N.E.2d at 55.

> Deference to the Legislature is especially necessary where it is the State's budget plan that is being questioned.[54]

Chief Judge Kaye dissented. Her opinion is a model expression of the functional approach to separation of powers, fueled by a keen sense of institutional realism and the spirit of social justice that commentators have associated with the New York Court of Appeals.[55] She began by acknowledging the limited role of an appellate court. But she moved quickly to explain that deference to legislative decision-making was not appropriate on the facts presented. "When the Executive and the Legislature have acted together on matters within their particular province, the courts should indeed tread lightly," she wrote. "That, however, is not what happened here. There is no state budget plan for bringing the schools into constitutional compliance; that is precisely the problem."[56] She continued:

> When, as here, the Executive and the Legislature are specifically at odds as to the cost of providing the opportunity for a sound basic education to New York City schoolchildren, the approach of a single branch, rejected by another, cannot legitimately be considered "the State's estimate," and is entitled to no special weight.[57]

While accepting the paradigm of rationality review, Kaye's dissenting opinion insisted that the Legislature attend in a serious way to the realities surrounding claims of constitutional rights. The record showed that the State's proposed budget was "simply a figure . . . 'drawn from a review of research literature,'" and that it did not account for the actual conditions that existed in the plaintiffs' school districts.[58] It was not rational, Kaye said, for the Legislature to devise a budget that ignored the day-to-day reality—grim and inadequate—of the students' public schooling.

Conclusion

Kaye's opinions in *Campaign for Fiscal Equity* have exerted significant influence on state courts tasked with enforcing state constitutional rights that entail policy choices and depend on legislative appropriation for their implementation. Not all courts have followed Kaye's lead in closely assessing legislative decisions, but they consistently have treated Kaye's opinions as principled and sensitive to

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[54] *Id.* at 58 (internal citations omitted).

[55] *See, e.g.*, William E. Nelson, *The Integrity of the Judiciary in Twentieth-Century New York*, 51 Rutgers L. Rev. 1, 41–43 (1998) (discussing social justice and the New York Court of Appeals).

[56] *CFE III*, 861 N.E.2d at 62.

[57] *Id.* (internal citations omitted).

[58] *Id.* at 66.

interbranch concerns.[59] Whether writing for the court or in dissent, Kaye never strayed from the shrewd institutional realism that informed her work as an administrator. She saw the courts as partners with the legislature in the enforcement of rights, and appreciated that each played a distinct role subject to important and traditional boundaries. Moreover, her opinions and extra-judicial writing never succumbed to the nirvana fallacy; she resisted ascribing heroic capability to judges or disparaging elected officials as inept or myopic.[60] Rather, her pragmatic, functional approach kept her clear-eyed about shared institutional limits, but optimistic about possibilities for reform and adaptation. In particular, Kaye questioned whether policymaking was outside the domain of appellate judging; the entire history of the common law demonstrated judicial engagement in the practice.[61] Her theory of deference realistically encompassed this traditional feature of state judicial activity, a factor that generally receives little weight in federal separation-of-powers doctrine.[62] Mindful of the rich experience of state judiciaries relative to the federal, Chief Judge Kaye insisted that the appellate judges of New York not be lulled into a posture of unquestioning restraint when legislators deviated from the formal account of their capacity and commitment. In turn, she trusted that appellate judges would exercise self-restraint in light of custom, consensus, and common sense.

Early in her judicial career, Kaye delivered remarks to the New York County Lawyers' Association on the appropriate role of an appellate judge in a constitutional democracy. At the close, she

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[59] *See, e.g.*, Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 918 (Ct. App. 2016) (Pollak, J., dissenting); King v. State, 818 N.W.2d 1, 90 (Iowa 2012) (Appel, J., dissenting); Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 252–53 (Conn. 2010); Londonderry Sch. Dist. SAU No. 12 v. State, 907 A.2d 988, 998–99 (N.H. 2006) (Duggan, J., concurring specially in part and dissenting in part); Guinn v. Legislature of Nevada, 71 P.3d 1269, 1277 n.9 (Nev. 2003) (Maupin, J., dissenting in part and concurring in part); *see also CFE III*, 861 N.E.2d at 62 (Kaye, C.J., concurring in part and dissenting in part).

[60] *Cf.* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 40 (2006) (criticizing dynamic statutory interpretation as tending "toward a false nirvana based on a romantic appraisal of judicial capacities and a jaundiced appraisal or even neglect of administrative interpretation"); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (explaining that "those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient").

[61] *See* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1528–29 (2010) (discussing Chief Judge Kaye's notion of "a common law infused with constitutional values").

[62] *See* Hershkoff & Loffredo, *supra* note 13, at 936–37 (discussing differences between state and federal doctrine with respect to the legitimacy of positive-rights enforcement).

addressed concerns that the judiciary would arrogate powers belonging to the other branches. In the published version of her talk, Kaye's response voiced the principle that would become and remain her North Star: "[T]he danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them," Kaye said. "It seems to me that a far greater danger exists if they do not."[63] With her full measure, Chief Judge Kaye sought to promote justice for all—an aspiration that was critically advanced by her dynamic approach to courts and law, although an aspiration yet to be fulfilled.[64]

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[63] Judith S. Kaye, *Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1015 (1988).

[64] In 2015, New York established a Permanent Commission on Access to Justice, with the enactment of Part 51.1 of the Rules of the Chief Judge of the Court of Appeals of New York. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 51 (2016). The Permanent Commission carries forward the work of the Task Force to Expand Access to Civil Legal Services in New York established in 2010 by Chief Judge Jonathan Lippman, Kaye's successor, and chaired by Helaine Barnett, former president of the Legal Services Corporation. *See Permanent Commission on Access to Justice*, N.Y. ST. UNIFIED CT. SYS., http://www.nycourts.gov/accesstojusticecommission/index.shtml (last updated Dec. 8, 2016); *see also* Hon. Jonathan Lippman, *Equal Justice at Risk: Confronting the Crisis in Civil Legal Services*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 247, 250 (2012).