

CHIEF JUDGE KAYE AS MODEL

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It is our distinct honor to introduce this issue of the *New York University Law Review*, dedicated to our distinguished alumna, the late Judge Judith S. Kaye. A 1962 graduate of the Law School, Judge Kaye, the child of immigrants from Eastern Europe, had planned on a career in journalism.¹ But here at NYU, she became “captivated” by the law.² One of only ten women in her class,³ she graduated sixth out of nearly three hundred before beginning her career as the only woman in the litigation department at Sullivan & Cromwell.⁴ She would go on to become the first woman to serve on the New York Court of Appeals and later its first female Chief Judge. Ultimately, her tenure on that court spanned a quarter century. She was a true trailblazer, combining profound intelligence with deep humanity. We at NYU Law are fiercely proud to call her our graduate.

The contributions to this volume give some sense of the breadth and depth of Judge Kaye’s contributions to the law. She was a prolific jurist and scholar, writing some 522 majority and over 100 concurrences and dissents during her time on the bench,⁵ in addition to a great many articles and essays on “a kaleidoscopic range of topics.”⁶ She reformed New York’s jury system; pioneered a more accessible state judiciary; ensured that the state’s justice system addressed the needs of families and children; created community courts specializing in nonviolent drug offenses; and staked out clear and influential positions on important issues like marriage equality and the death penalty.

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¹ Judith S. Kaye, *Reflections on Opportunity in Life and Law*, 81 BROOK. L. REV. 1383, 1384 (2016).

² *Id.*

³ *Id.*

⁴ See Richard L. Revesz, *Chief Judge Judith S. Kaye: Proud to Call Her One of Our Own*, 84 N.Y.U. L. REV. 665, 665 (2009).

⁵ See Albert M. Rosenblatt, *Judith Kaye: Beyond Scholarship, to the World of Style and Mirth*, 92 N.Y.U. L. REV. 93 (2017).

⁶ Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 ALB. L. REV. 1977, 1983 (2012).

Among this truly impressive list of accomplishments, one that stands out is Judge Kaye's effort to bring attention to—and educate legal practitioners and scholars on—the importance of state constitutions and the key role of state high courts in interpreting them. In 1987, Judge Kaye published *Dual Constitutionalism in Practice and Principle*.⁷ She wrote it as a response to an earlier call by Justice William Brennan, urging state courts to “step into the breach” and to rely upon state constitutions as sources of individual rights either not found in the federal Constitution or not protected satisfactorily (in state judges' evaluation) by federal courts.⁸ In *Dual Constitutionalism*, Judge Kaye set out a vision of “dual federalism” in which state courts are empowered—encouraged, even—to interpret their own constitutions, independent of federal court interpretations of the analogous federal document. She used New York as a case study, stating that its constitution's “high detail and [the] accessibility of the amendment process” imbue it with “a distinctive New York character.”⁹

It is straightforward, Judge Kaye argued, to say that state judges must engage in “principled independent analysis” of state constitutional provisions addressing matters not covered by the federal Constitution (such as New York's conferral of a constitutional right of equal access to education),¹⁰ and of state constitutional provisions that are materially different from corresponding federal provisions.¹¹ But Judge Kaye insisted that the same holds even in cases where a state constitutional provision is textually similar to a federal constitutional provision.¹² Many state constitutions (including New York's) were written to pursue goals similar to some of those animating the federal Constitution, and the principal framers of the federal document also had a hand in drafting various state charters as well. These similarities, Judge Kaye observed, “naturally engender common texts.”¹³ But to treat such commonality as a basis for automatically interpreting a state provision as meaning nothing more (or less) than its federal

⁷ Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987) [hereinafter Kaye, *Dual Constitutionalism*].

⁸ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); see also Judith S. Kaye, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 14, 16 (1997) [hereinafter Kaye, *In Memoriam*] (describing Justice Brennan's article as “a call to state courts . . . to take up their role as guardians of individual liberties”).

⁹ Kaye, *Dual Constitutionalism*, *supra* note 7, at 409.

¹⁰ N.Y. CONST. art. XI, § 1. Professor Helen Hershkoff's contribution to this issue discusses that right. See Helen Hershkoff, *Chief Judge Kaye's Dynamic Legacy*, 92 N.Y.U. L. REV. 32 (2017).

¹¹ Kaye, *Dual Constitutionalism*, *supra* note 7, at 412.

¹² *Id.*

¹³ *Id.*

counterpart would be to ignore the “significant” point that, “as a political act, two separate constitutions were adopted, neither expressly superseding the other. . . . As a juridical act, therefore, constitutional analysis by state courts cannot stop with a mechanical matching of texts; significant protections of a state constitution are otherwise relegated to redundancy.”¹⁴

Like Justice Brennan, Judge Kaye defended dual constitutionalism because of its capacity to “provide[] a double source of protection for the rights of our citizens.”¹⁵ Always the realist, Judge Kaye recognized that, to have any real impact, state court decisions lifting the “constitutional ceiling of rights above the Supreme Court-defined constitutional floor,” must “raise[] and fully explicate[]” the differences between the protections located in the federal and state constitutions, respectively.¹⁶ She took up this responsibility in countless opinions, and in the inaugural Brennan Lecture on State Courts and Social Justice at NYU Law, which she delivered in 1995.¹⁷

The dual constitutionalism that Judge Kaye championed is not without its critics. State constitutions may have come into being as a result of political acts entirely separate from (and sometimes prior to) the ratification of the federal Constitution, but some commentators insist that “the striking similarity of most contemporary state constitutions to one another and to the Federal Constitution” should not be ignored.¹⁸ Otherwise, state courts may be at risk of “mak[ing] dubious claims about the social and ideological distinctiveness of their state polities,” without recognizing the obvious similarities between and among them.¹⁹

Still others have questioned the capacity of state courts, whose members are popularly elected in many states, to serve as robust pro-

¹⁴ *Id.*

¹⁵ Kaye, *In Memoriam*, *supra* note 8, at 16–17 (quoting Justice Brennan).

¹⁶ Judith S. Kaye, *The Brennan Lecture: A Bit of History*, 17 GREEN BAG 2d 133, 133–34 (2014).

¹⁷ 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, 11–18 (1995). As then-Dean Richard L. Revesz wrote in his introduction to the *Law Review*'s 2009 tribute to Judge Kaye, her Brennan Lecture “received a standing ovation from an audience that included justices from more than thirty-five of the country’s state supreme courts, as well as about a dozen of Justice Brennan’s former law clerks.” Revesz, *supra* note 4, at 666 (2009).

¹⁸ James A. Gardner & Jim Rossi, *Foreword: The New Frontier of State Constitutional Law*, 46 WM. & MARY L. REV. 1231, 1233 (2005).

¹⁹ *Id.*; see also James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (identifying and analyzing an ostensible lack of a coherent discourse of state court-made constitutional law); NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS (James A. Gardner & Jim Rossi eds., Oxford Univ. Press 2010).

tectors of individual rights against majoritarian incursions.²⁰ And as a matter of actual record, these critics can point to an “often disappointing reality” that state courts largely have not proven all that interested in developing “an independent jurisprudence of rights.”²¹ Instead, many state courts “continue to look primarily to federal constitutional law and the Supreme Court for guidance” on how to interpret state constitutional provisions whose text closely parallels the federal Constitution.²² According to some, this practice is unsurprising once one takes into account “the much broader context of the federalism of intergovernmental relations, a system of long-term, often shifting power relationships created and structured by the U.S. Constitution.”²³

Ultimately, these criticisms do not undermine Judge Kaye’s dual constitutionalist project. Of course, a complete conception of state-federal interaction requires looking well beyond how state courts have interpreted their constitutions. Yet those interpretive practices are still worth our attention. Moreover, even if state courts have generally not lived up to Judge Kaye’s and Justice Brennan’s aspirations, that shortcoming does not make those aspirations fanciful. Judge Kaye’s own work on the New York Court of Appeals shows what is possible. Indeed, as Professor Helen Hershkoff memorably observed, New York has been a “jurisprudential entrepreneur” in developing an independent state law discourse.²⁴ In her scholarly writing, Judge Kaye helped to elaborate the theoretical basis for a principled, independent state constitutional jurisprudence; in her judicial writing, she demonstrated its possibility. Together, these two dimensions of her work leave both a challenge for future judges to take up and a model for how to do it. It is a record worth emulating as well as celebrating.

²⁰ Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1414–15 (1999); cf. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal judges’ technical competence, attitude toward the work of judging, and insulation from majoritarian forces make them better situated than state counterparts to adjudicate constitutional claims).

²¹ Schapiro, *supra* note 20, at 1414–15.

²² NEW FRONTIERS OF STATE CONSTITUTIONAL LAW, *supra* note 19, at 1233–34.

²³ James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 358 (2016).

²⁴ Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1140 (1999).