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Judith S. Kaye

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# A Double Blessing: Our State and Federal Constitutions

Judith S. Kaye\*

When I was invited some months ago to participate in *Pace Law Review's* special New York issue, I responded enthusiastically, believing that I have the perfect subject for a special New York issue: the New York State Constitution. First, I have long felt that insufficient attention is paid to State charters; second, recent prominent decisions, in New York and elsewhere, have brought them to the forefront; and third, I had, on September 17, 2009 (the 222nd anniversary of the signing of the Constitution of the United States), addressed the SUNY Institute for Constitutional Studies on New York State's Constitution. Fortunately, the *Pace Law Review's* editors were equally enthusiastic about my proposed subject, and what follows is a revised version of those remarks.

We are, after all, blessed in our federal system of government with not one but two separate constitutions: the Federal Constitution and, in every single state, also a State Constitution.

Indeed, our Federal Constitution was actually preceded by, and drew upon, eighteen State Constitutions as well as the Articles of Confederation. The very first New York State Constitution—the handiwork of none other than John Jay, Robert Livingston, and Gouverneur Morris—was already in its double digits on September 17, 1787, having been adopted on April 20, 1777, in Kingston.

Our State Constitution, moreover, has particular relevance today given recent suggestions that it is time in New York for a convention to draw up a brand new constitution. That idea has been floated by several prominent New Yorkers, gaining traction with events in Albany over the past several years.<sup>1</sup> So you

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\* Formerly Chief Judge of the State of New York; now Of Counsel to Skadden, Arps, Slate, Meagher & Flom in New York City.

1. Nicholas Confessore, *As Voter Disgust With Albany Rises, So Do Calls for a New Constitution*, N.Y. TIMES, Aug. 24, 2009, at A17.

can regard this article as your preparation for answering the following important question, which ultimately will be yours to answer: “Shall there be a convention to revise the constitution and amend the same?”<sup>2</sup> You be the judge.

### I. Constitutions in Theory

The very word “constitution,” of course, means the basic structure of a thing. The English regarded themselves as having a constitution long before the Colonials began drawing up constitutions for themselves on paper, and yet the English constitution has never been written down in a single document. That the English can speak of their “constitution” helps to underscore exactly what a constitution means. A community’s constitution is its basic make-up, the source, delineation and delimitation of rights and powers within that society, the collective assessment of the rules of the game under which the process of decision-making and exercise of power within that community will—and will not—proceed. As the very basis of a living community, a constitution is necessarily a thing of that particular community.

The critical difference between British and American constitutionalism is not that American constitutions are written. Rather, it is that the British constitution was founded upon a concept of parliamentary supremacy. Under British constitutional theory, sovereign power resided in Parliament.<sup>3</sup> Our nation, by contrast, was rooted in a concept that sovereignty resides in the People. Thus it is possible that our lawmakers can at times enact laws that fall outside the basic law established by the People. Where the People are sovereign, their conception of their constitution exists apart from—above—legislative

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2. See N.Y. CONST. art. XIX, § 2 (procedures for future constitutional conventions). There have been nine constitutional conventions in New York history: 1777, 1801, 1821, 1846, 1867, 1894, 1915, 1938, and 1967.

3. The power of judicial review in the United States contrasts with England’s doctrine of Parliamentary Supremacy. See generally Theodore F. T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30 (1926-1927). I note the creation of the Supreme Court of the United Kingdom as of October 1, 2009, replacing the House of Lords, as the highest court in the United Kingdom and for the first time separating the Judiciary from the Executive and Legislative branches of government. See generally Lord Mance, *Constitutional Reforms, The Supreme Court and the Law Lords*, 25 CIV. JUST. Q. 155 (2006).

enactments.

The day-to-day function of a constitution, however, goes further. It is a fact of human nature, and of the democratic process, that our actions—both as individuals and as a community—sometimes conflict with our most basic values. What we set out to embody in our constitution are those values we wish never to sacrifice to more transient choices, however compelling they might seem at the moment.

Our constitutional values can of course be reformulated, but amendments are accomplished only through extraordinary political processes—the approval of two successive legislatures followed by a popular referendum in the case of the New York State Constitution,<sup>4</sup> and the approval of two-thirds of both Houses of Congress and three-fourths of the states in the case of the federal charter.<sup>5</sup>

This is not abstraction but rather a reflection of the most abiding reality of both our past and our present. We speak of the constitutional shield provided the People against government, but in a democracy threats to our values often have wide popular support. The Constitution throughout history has been called upon to protect long-venerated values that are momentarily abandoned or neglected by the majority.

It is a function of a constitution and constitutional law, then, to preserve a community's most basic values in the face of its transient choices. And it is a function of the courts, that independent third branch of government, to ascertain and identify these most basic values, to flag them when they are at risk, and to preserve constitutional boundaries on majority rule.

All of this speaks with particular force, and has special relevance, to the subject of State Constitutions, by definition the expression of the most basic values of the people of a particular state.<sup>6</sup> Just as our individual states vary widely, so do their Constitutions, their history and how those documents are interpreted today.

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4. N.Y. CONST. art. XIX, § 1.

5. U.S. CONST. art. V.

6. The modern chapter on state constitutional law opened in 1977, with the publication of Justice William J. Brennan Jr.'s seminal article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). The article inspired an avalanche of judicial decisions and scholarly writings on the subject.

That we have had, from our nation's beginnings, two Constitutions, and parallel state and federal court systems to safeguard them, is a double blessing. Of that there can be no doubt. But as we know, multiple blessings sometimes can also be a challenge. In that the state and federal charters are in many respects alike, the sometimes vexing question is how on a day-to-day basis we best manage, coordinate, and administer our double blessing so as to maximize the benefits and minimize the problems. When does the Federal Constitution govern, and when does the State Constitution govern? Where the provisions of each charter differ significantly, that question is easy to answer; not so where they are virtually the same.

As a general proposition, it is today clear that state courts have the last word on interpreting their own State Constitutions, while the United States Supreme Court has last word on interpreting the Federal Constitution.<sup>7</sup> Thus, in practical application, the Federal Constitution, ultimately construed by the United States Supreme Court, provides a floor of rights applicable all across the nation. State courts may not go below the floor of federal constitutional rights as defined by the United States Supreme Court, but they may, as a matter of state constitutional law, recognize greater rights—in effect establishing a ceiling within the state that rises above the federal constitutional floor.

In a famous opinion decided decades ago, United States Supreme Court Justice Louis Brandeis described the states generally as “laboratories”<sup>8</sup> for democracy, a fitting description for how individual states under their own individual state Constitutions implement the guarantees of their separate charters. One prominent recent example is the decision of the Supreme Judicial Court of Massachusetts recognizing same sex marriage as a matter of equal protection under the words, history and traditions of its own State Constitution.<sup>9</sup> What a remarkable coincidence that on the very birthday of the United States Constitution—September 17—the Indiana intermediate appellate court, ruling independently under the Indiana State Constitution, struck down a state statute requiring voters to present

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7. *Michigan v. Long*, 463 U.S. 1032 (1983).

8. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

9. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

government-issued identification when casting their ballots, departing from the United States Supreme Court conclusion that such laws are constitutional.<sup>10</sup>

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. The right to counsel is a good illustration, where a growing body of state constitutional law decisions ultimately persuaded the Supreme Court to reverse itself and find in favor of the right to counsel in serious criminal cases.<sup>11</sup>

An issue that frequently divides state courts is when to apply their state Constitutions to allow greater rights for parallel provisions of the state and federal charters. And given the common parentage of our state and federal Constitutions, with many similar clauses, that dilemma is not uncommon.

An independent state court interpretation of course does not mean that identical clauses will invariably be read differently, or more broadly, than their Federal counterparts or those of sister states. As I noted, the Supreme Court, in reading the Federal Constitution, must lay out a minimal rule applicable throughout a diverse nation, with due concern for principles of federalism. State courts, even when working with essentially the same constitutional provisions, have a different focus, which is to fashion workable rules for a narrower, more specific range of people and situations. Their solutions thus may at times be identical to the federal solutions, but they are not necessarily so.

Practical considerations support this theory. State courts are generally closer to the public, to the legal institutions and environments within the State, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessments they may make more readily redressable

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10. *League of Women Voters of Indiana v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App. 2009), *vacated*, No. 49S02-1001-CV-50, 2010 Ind. LEXIS 85 (Jan. 25, 2010) (departing from *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008)). See also John Schwartz, *Indiana Court Voids ID Law that U.S. Justices Upheld*, N.Y. TIMES, Sept. 18, 2009, at A14.

11. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

by the People. Moreover, 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.

Against this backdrop, I would like to focus on the New York State Constitution specifically, and offer concrete illustrations of these abstract points.

## II. The New York State Constitution Today

The New York State Constitution today consists of forty-six tightly printed pages covering everything from search and seizure, to structure of government, to suffrage, conservation, and canals.

In New York, we have actually had several successive Constitutions since 1777, and we have had literally hundreds of amendments, from widening ski trails to gender-neutralizing the entire text. We did that in 2001. As I mentioned, amendment requires the vote of two successive legislatures and approval by the people. Some of you undoubtedly recall having voted on a proposed amendment to our State Constitution.<sup>12</sup>

New Yorkers can rightly take pride in our very first Constitution. It included both the enduring structural framework of our State and national government—three discrete branches of government, with a bicameral legislature, an executive branch headed by a popularly elected Governor, and an independent judicial branch. And it included such fundamental values as the guarantees of religious freedom, right to trial by jury, right to counsel, and right to vote. What extraordinary vision those 1777 drafters had! Yet it was hardly a surprise given who they were.

The Constitution under which we operate today, as a matter of interest, was first adopted in the year 1938. (We arrived

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12. Indeed, on November 3, 2009, the voters approved two amendments. First, they approved an amendment to Article XIV, Section 1, to allow the State to convey up to six acres of forest preserve land to National Grid to construct a power line along State Route 56, in exchange for at least ten acres of forest land in St. Lawrence County to be incorporated into the forest preserve. Second, they approved an amendment to Article III, Section 24, allowing the legislature to pass legislation permitting inmates voluntarily to perform work for nonprofit organizations.

on Earth together.) The New York State Constitution actually requires that at least every twenty years the People of the State be asked whether there should be a convention to revise and amend the Constitution.<sup>13</sup> And while the People have been asked this question in successive twenty-year periods (the last time on November 4, 1997), the Constitution of 1938—many times amended—remains our operative charter. Not since 1967 has there even been a convention, and the constitution proposed by the convention of 1967 was defeated at the polls.

Whether there should be a convention to draft a new New York constitution is a question being debated today, with strong arguments on both sides.<sup>14</sup> On the one hand, some fear little benefit given the Albany folk who may well control the process. On the other hand, some fear great risk given the Albany folk who may well control the process. Ultimately, the question will be for the People of the State of New York to decide, and it's not an easy question. For myself, I have moved from a firm "No" a decade ago to a cautious "Maybe" today. This just could be the right time. It surely would be a great opportunity for comprehensive court reform.

Obviously, we could spend a fair amount of time trudging through our hefty State Constitution. While the Federal Constitution, including its twenty-seven amendments, can easily be slipped into your pocket—in fact, I have a copy with me at all times—carrying around our State Constitution would require a fashion revolution. Ours is hardly a document you might read aloud to a loved one on a snowy night, though it is in every respect—but in many more words—as lofty in its principles as its federal counterpart, beginning with a Bill of Rights including the right to trial by jury, religious liberty, free speech and press, due process, and equal protection of the law.

Some of its provisions, in words and substance, mirror the United States Constitution. Others are unique to our state

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13. N.Y. CONST. art. XIX, § 2.

14. Particularly impressive is the comprehensive, 645-page Report of the Task Force on the New York State Constitutional Convention published in 1997 by the Association of the Bar of the City of New York, ultimately recommending a vote *against* a convention. ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT OF THE TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION (1997). Reasons cited include failure to reform the delegate selection process, the lack of popular momentum for reform, and the considerable expense of holding a convention.



charter, like the inclusion in our Bill of Rights of a maximum forty-hour work week<sup>15</sup> and the right to a system of workers' compensation.<sup>16</sup> Last fall, a divided Court of Appeals upheld the Governor's authority to appoint a Lieutenant Governor under the unique provisions of Article IV, Section 6, of our State Constitution.<sup>17</sup> Article XI ("Education")—also nowhere found in the Federal Constitution—requires that "the legislature . . . provide for the maintenance and support of a system of free common schools, where[ ] all the [State's] children . . . may be educated."<sup>18</sup> That gave rise to years of litigation, resulting in a rare direction by the Court of Appeals to the State Legislature to increase funding for New York City public school children.<sup>19</sup>

Article XIV, Section 1 of our Constitution mandates that the State's forest preserve "shall be forever kept as wild forest lands."<sup>20</sup> And just one final example of a provision unique to New York: Article XVII of our Constitution declares that, in the State of New York, the "aid, care and support of the needy are public concerns and shall be provided by the state."<sup>21</sup> Some years ago, the Court of Appeals found in favor of a group of immigrants, lawful New York residents, who had wrongfully been denied medical coverage for potentially life-threatening conditions simply because they were immigrants.<sup>22</sup> Such a denial was inconsistent with the fundamental values expressed in Article XVII of the New York State Constitution—not us, not New Yorkers, the Court concluded.<sup>23</sup>

Plainly, provisions of the New York State Constitution that differ from the Federal Constitution must be safeguarded and protected, and our courts on innumerable occasions have done precisely that, with minimal fuss and fanfare. What tends to

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15. N.Y. CONST. art. I, § 17 ("Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.")

16. *Id.* art. I, § 18.

17. *Skelos v. Paterson*, 915 N.E.2d 1141, 1142 (N.Y. 2009).

18. N.Y. CONST. art. XI, § 1.

19. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995).

20. N.Y. CONST. art. XIV, § 1.

21. *Id.* art. XVII, § 1.

22. *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085 (N.Y. 2001).

23. *Id.* at 1093. *But see* *Khrapunskiy v. Doar*, 909 N.E.2d 70 (N.Y. 2009) (finding that the New York State Constitution did not require that aged, blind or disabled state residents receive the same benefits from the state as they do under federal Social Security programs).

raise blood pressure, however, are instances when the state courts independently construe provisions of our State Constitution that are much like the Federal Constitution, and read them more broadly than the United States Supreme Court.

And here I have chosen just two examples—one civil case, one criminal. The civil case, *Immuno A.G. v. Moor-Jankowski*, is one of my all-time personal favorites, involving freedom of the press.<sup>24</sup> Some years ago, Professor Moor-Jankowski, a medical researcher at New York University School of Medicine and a world-renowned authority on the use of primates in biomedical research, had a brush with the law.<sup>25</sup> His *Journal of Medical Primatology* published a Letter to the Editor challenging a drug company's research methods involving primates. The drug company sued for major damages, charging the good Professor and others with defamation.

The Federal Constitution, in the First Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>26</sup> But New York's Constitution is bolder, more affirmative. It declares, in Article I, Section 8, that "[e]very citizen may freely speak, write and publish . . . sentiments on all subjects."<sup>27</sup>

With the outcome of the *Immuno* legal issue, at that time not 100 percent certain under the United States Constitution, the New York Court of Appeals—citing this State's long history of according generous free speech rights—chose instead to uphold the Professor's right to publish the Letter to the Editor under the State Constitution, establishing our independent constitutional answer rather than awaiting years of uncertainty until the United States Supreme Court spoke the final word on the subject.<sup>28</sup>

My second example is a bit more controversial—a decision of New York's high court months ago, *People v. Weaver*, challenging the admissibility of electronic surveillance evidence under essentially similar state and federal constitutional provi-

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24. *Immuno A.G. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991). See also ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 211-214 (1992).

25. *Immuno*, 567 N.E.2d at 1272.

26. U.S. CONST. amend. I.

27. N.Y. CONST. art. I, § 8.

28. See *Immuno*, 567 N.E.2d at 1270.

sions guaranteeing citizens protection against unreasonable searches.<sup>29</sup> *Weaver* generated not two but three opinions—somewhat unusual for the Court of Appeals—a four-judge majority opinion written by the Chief, and two separate dissents by the remaining three judges.

Chief Judge Lippman's opinion begins with these provocative sentences:

In the early morning hours of December 21, 2005, a State Police Investigator crept underneath defendant's street-parked van and placed a global positioning system (GPS) tracking device inside the bumper. The device remained in place for 65 days, constantly monitoring the position of the van. This nonstop surveillance was conducted without a warrant.<sup>30</sup>

Though it was not clear why defendant had been placed under surveillance, he was ultimately convicted of burglarizing a K-Mart. Over defendant's objection, the GPS data was allowed into evidence, showing that, on the evening of the burglary, defendant's van had crossed the store's parking lot at a speed of six miles per hour. At trial, an accomplice testified to slowly driving through the lot with defendant and another man that evening as they looked for the best place to break into the store. Both the trial court and the intermediate appellate court rejected defendant's constitutional argument. The Court of Appeals however, 4-3, concluded, under the State Constitution, that the warrantless installation and use of a GPS device to monitor an individual's whereabouts constitutes an unreasonable illegal search in violation of Article I, Section 12 of the New York State Constitution. The GPS evidence was suppressed and a new trial ordered.

*Weaver* actually presents the hottest state constitutional conundrum for the courts: parallel state and federal constitutional provisions; a lively debate over whether there is authoritative United States Supreme Court precedent; and an overturned criminal conviction, with potential broad impact on law

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29. *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009).

30. *Id.* at 1195.

enforcement.

During my cherished twenty-five years, three months, nineteen days, and twelve hours as a Court of Appeals Judge, we many times faced a similar conundrum, sometimes when the Supreme Court had not yet spoken to the issue precisely, sometimes when it had,<sup>31</sup> and sometimes when the Supreme Court actually changed its view of the applicable constitutional protection, and our Court had to decide whether New York would or would not follow suit.<sup>32</sup> *Weaver* is a virtual textbook example—the majority claiming that it has followed Supreme Court precedents in arriving at its conclusion, the dissent saying, no way. I could not help thinking back on the lively exchanges around the Court's Conference Table, or the sleepless nights agonizing over whether we had reached the right result and the inevitable spate of criticism that would follow, whichever path we took.

### III. Conclusion

Indeed, we are doubly blessed as Americans, with our Federal Constitution, the bulwark of our democracy, fortified by its blood relatives, our State Constitutions. It was for more than a quarter century my privilege, as a Judge of New York State's high court, to participate in the lively dialogue surrounding preservation of our constitutional values in a rapidly changing world, as it is my continuing privilege, as a citizen, to chime in on these important issues fundamentally shaping our society.

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31. See *People v. Class*, 472 N.E.2d 1009 (N.Y. 1984), *rev'd and remanded*, 475 U.S. 106 (1986), *rev'd*, 494 N.E.2d 444 (1986) (adhering to determination of state constitutional law). See also Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) (supporting a primacy theory of state constitutional decision-making).

32. See, e.g., *People v. Scott*, 593 N.E.2d 1328 (N.Y. 1992); *People v. P.J. Video, Inc.*, 501 N.E.2d 556 (N.Y. 1986).