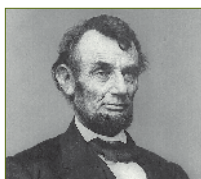

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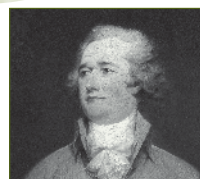
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Dear Members

*J*udicial Notice is moving forward! We have a newly expanded Board of Editors who volunteer their time to solicit and review submissions, work with authors, and develop topics of legal history to explore. The Board of Editors is composed of Henry M. Greenberg, *Editor-in-Chief*, John D. Gordan, III, Albert M. Rosenblatt, and David A. Weinstein. We are also fortunate to have David L. Goodwin, *Assistant Editor*, who edits the articles and footnotes with great care and knowledge. Our own Michael W. Benowitz, my able assistant, coordinates the layout and, most importantly, searches far and wide to find interesting and often little-known images that greatly compliment and enhance the articles. Finally, this periodical would not have the prominence it does without the magnificent layout provided by Teodors Ermansons, part of the NYS Unified Court System Graphics Department, under the direction of Patricia Everson Ryan. For some it takes a village, for us it takes this top-notch team to produce a great publication.

With each new issue I wonder how will we equal or better the last. We have once again proved that we can. This issue features original scholarship from two members of the NYS legal community. It is especially impressive that they produced such fine articles while carrying on busy careers...no ivory tower scholarship for them! David A. Weinstein, a sitting judge on the NYS Court of Claims, looks at *Rutgers v. Waddington*, a pivotal case in the development of American constitutional law on its bedrock of federal legal supremacy enforced by judicial review. Maria T. Vullo, a partner at the firm of Paul Weiss Rifkind Wharton & Garrison LLP, has taken time out of her busy schedule to look back on Margaret Sanger's journey in establishing the family planning clinics movement in America. She does this from the unique perspective of a review of *People v. Sanger* and the legal challenges leading up to that important case.

In November, 2012 the Society presented *Lincoln, the Civil War and Freedom of the Press: New York Divided* as The Stephen R. Kaye Memorial Program. We were privileged to have the eminent Lincoln scholar Harold Holzer deliver a lecture on this topic. His talk was based upon research he was then doing for his forthcoming book *Uncivil Wars: The Press in the Age of Lincoln*. Mr. Holzer has graciously permitted us to reproduce his lecture with footnotes, and we have supplemented this with imagery.

Our own Founder and in-house scholar, Judith S. Kaye. Former Chief Judge of the State of New York, explores the legacy of Charles Evans Hughes in protecting the principles of separation of power and independence of the judiciary in this publication of her talk delivered in April, 2012 at the 49th Charles Evans Hughes Lecture at the New York County Lawyers Association.

Who could ask for anything more!

Marilyn Marcus, Executive Director

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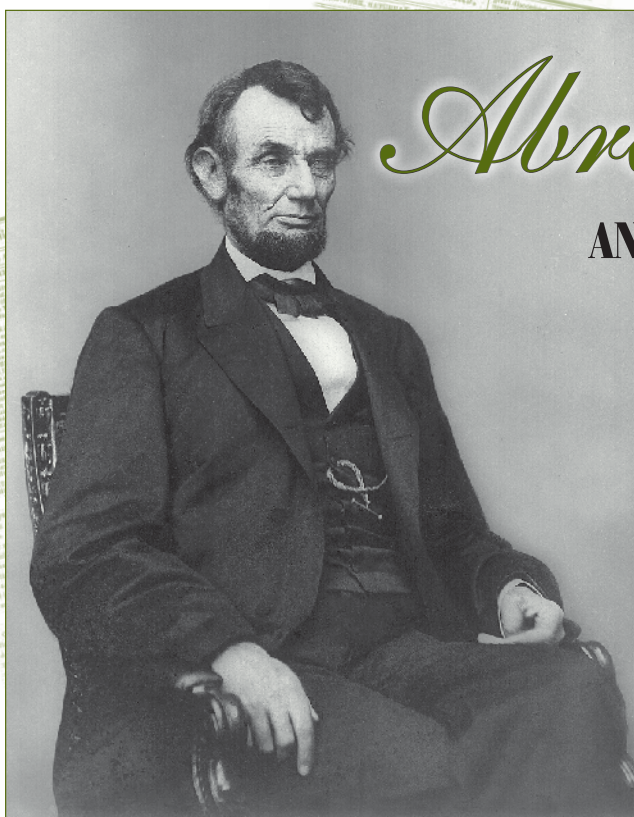
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SUBMISSIONS - **Judicial Notice** accepts article submissions on a continual basis throughout the year. Submissions are reviewed by members of the Board of Editors. Authors are not restricted from submitting to other journals simultaneously. **Judicial Notice** will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.



Abraham Lincoln, February 9, 1864

Library of Congress, Prints & Photographs Division, LC-DIG-ppmsca-19305

Abraham Lincoln

AND FREEDOM OF THE PRESS: A REAPPRAISAL

HAROLD HOLZER

he recalled, “insurgent agents were in the city seeking to *destroy* it without war. . . . Both parties deprecated war; but one of them would *make* war rather than let the nation survive; and the other would *accept* war rather than let it perish. And the war came.”¹

That recollection sheds light on Lincoln’s thinking both before the Civil War—and, on reflection, near the end of it. In his mind, 1861 Washington was crawling with “insurgent agents” committed to destroying constitutional government. His responsibility then, and his justification now, he believed, was that anything he did to thwart treason and preserve the Union was completely justified.

When he gave his first inaugural, the now-familiar Capitol dome was still under construction, encircled by scaffolding. When he gave his second, the dome was complete, and a bronze statue of “Freedom” crowned its summit. During the war, some advisors urged Lincoln to suspend the project; the iron it consumed was urgently needed to manufacture weapons. But Lincoln was said to have insisted that having work on the Capitol go on would show that “the Union shall go on.”² But though “Freedom” was hauled to the summit right on schedule, freedom did not always reign below. The Supreme Court, which in those days met inside the Capitol, did continue to function, even after several Southern Justices resigned. But when Lincoln began exercising unprecedented executive authority to put down the rebellion, deliberations that might have challenged his powers were largely deferred until after the war. When, in 1861, the Chief Justice, acting *ex parte* as a federal circuit judge, challenged Lincoln’s suspension of the

Abraham Lincoln’s second inaugural address—delivered just a few weeks before the Union finally crushed the four-year-long rebellion that cost 620,000 lives—is probably best remembered for its eloquent plea for forgiveness. Concluding the speech he himself considered his best, Lincoln famously called for “malice toward none” and “charity for all.”

Though the entire oration took only ten minutes to deliver, the eloquence with which it ended was so memorable that the thousands who heard it at the Capitol on March 4, 1865, had probably forgotten by that time how it began. In fact, Lincoln had launched the address by recalling his first swearing-in exactly four years earlier—and not without a little malice of his own—at least toward some. “While the inaugural [*sic*] address was being delivered from this place, devoted altogether to *saving* the Union without war,”

Harold Holzer, author, co-author, or editor of 46 books on Lincoln and the Civil War, was awarded the National Humanities Medal in 2008. He serves as Robert Hertog Fellow at the New York Historical Society.

This is the lecture Mr. Holzer presented at the Society’s Stephen R. Kaye Memorial Program on November 30, 2011 at the New York City Bar Association entitled Lincoln, the Civil War and Freedom of the Press. It is based on research for his forthcoming book, *Uncivil Wars: The Press in the Age of Lincoln* (Simon & Schuster).

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writ of habeas corpus in Maryland, the President simply ignored him—after, by some accounts, only reluctantly resisting an inclination to have the chief arrested.

But that's not the story for tonight—though, of course, Lincoln's use of the so-called war power is relevant. So are the constitutional limits against suspending the privilege of the writ of habeas corpus. The fact that the habeas proscription resides in Article I—within the Congressional section, not the presidential one—fuels the ongoing debate over Lincoln's justifications. The clause in Section 9 says, the Writ "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." That was enough for Lincoln—who claimed that "as the provision was plainly made for a dangerous emergency, it cannot be believed that the framers...intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion" itself.³

The subject for this essay is the less ambiguous guarantee enshrined in the First Amendment: "Congress shall make no law...abridging the freedom of speech, or of the press..." It could not be much clearer. But again, Lincoln determined that in a case of rebellion, under the umbrella of war powers, especially while Congress remained in recess, executive authority superseded legislative authority; and contingency trumped even freedom of expression under the Bill of Rights. Lincoln did call Congress back into session—but not for four months! In the meantime he moved against the press on an emergency basis without Congressional and, some have maintained, constitutional authority.

Let us look frankly at the record—first, statistically. During the Civil War, the Lincoln Administration,



*President Lincoln speaking at his first inauguration on March 4, 1861
with the Capitol under construction in the background*
Library of Congress, Prints & Photographs Division, LC-USZ62-48564

and the Union army, directly ordered, or indifferently tolerated, the suppression of an astonishing number of Border State and Northern newspapers. I am in the process now of working on a book about the triumphs and tribulations of the press during the Lincoln era, and this is one area to which I have paid much attention. The preliminary results are not pretty. The episodes I have investigated include: banning

opposition papers from the U.S. mails, interrupting and censoring the flow of telegraphic news, arresting and detaining editors, closing newspaper offices, seizing and destroying type and printing presses, and suspending publication. And all of these actions took place where the Union remained in control, and where the courts continued to function.

In areas loyal to the Confederacy, or teetering between Northern and Southern control, or occupied by the Union army or military governors, we add the following to the litany: failing to prevent mob attacks against newspaper offices, official censorship of battlefield reports, and interference with war correspondence—the banishment of some, the humiliating punishment of others. They called this particular kind of suppression "field censorship."

If anything, historians have not yet called the Lincoln administration to full account; perennially focused on three or four infamous cases, which can easily be viewed as mistakes that were later corrected, most scholars have assessed the curtailment of press liberty as surprisingly infrequent and usually justified, its limited reach more an indication of Lincoln's restraint than his appetite for control. In fact, the effort was actually far more widespread, yet remained surprisingly disorganized and ad hoc, and even more surprisingly was supported not only by most of the loyal Union public, but by many newspaper editors as well.

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The statistics are staggering, amounting to as many as 200 individual events from 1861 to 1865. But before we judge Lincoln guilty at the bar of history, it is worth considering some evidence of the non-legal variety. To understand the conditions under which such apparent outrages were committed and tolerated demands a giant leap of historical imagination, back to the days when the press did not merely cover politics and government, as it does today, but, rather, actively participated in both. During the Lincoln era, newspapers openly represented one political party or the other, and published partisan reports not just on their opinion pages, but on their news pages as well. They were not newspapers exactly, but propaganda sheets, almost never varying from the party line.

Within this culture, violence and suppression against the press was hardly a new phenomenon. In 1837, for example, a mob in Alton, Illinois threw an abolitionist newspaper's printing press into the Mississippi River, and when editor Elijah Lovejoy tried to save his property, killed him. The murder roused fellow Illinoisan Abraham Lincoln, barely 29 years old, to speak out against what he called a growing "mobocratic spirit."

"Let every American...remember," he warned, "that to violate the law, is to...tear the character of his own, and his children's liberty." He proposed that "reverence for the laws," not only be "proclaimed in legislative halls, and enforced in courts of justice," until it becomes the "*political religion*" of the nation.⁴ It did not. While Lincoln was serving his first and only term in Congress ten years later, local authorities captured a ship crowded with sixty fugitive slaves desperately seeking freedom from their Washington owners. In response, a mob attacked not the slave masters, but the local abolition paper *The National Era*, no less than three times.

Over the next decade, political positions on the roiling slavery issue hardened, with newspaper rhetoric intensifying and the press relentlessly attacking both the opposition and each other. By the time Lincoln returned to politics in 1854, most American cities boasted at least two papers, one Republican and one Democratic, each filled with increasingly inflammatory warnings about abolitionist plots on

one extreme, and on the other, Southern schemes to make slavery national and perpetual. In Chicago, for example, the battle raged between the Republican *Tribune* and the Democratic *Times*. Philadelphia had the Democratic *Evening Journal* and the Republican *Inquirer*. And so it went. Albany boasted both the Republican *Evening Journal* and the Democratic *Atlas and Argus*; and New York City, home to dozens of dailies and weeklies, counted several of each.

Lincoln was but one of many politicians who befriended sympathetic editors and regarded opposition ones as enemies. Those who preferred Stephen Douglas during the debates of 1858 he called "villainous reporters."⁵ Democratic papers, he charged two years later, "persistently garbled and misrepresented what I have said."⁶ The opposition editors of a Washington paper he labeled "sick...political fiends." Malice toward none was a long time coming. In fact, during his presidency, Lincoln made this observation about America's reporters: "Party malice, and not public good, possesses them entirely."⁷ He was not alone in these beliefs.

Press loyalties, it should be noted, were not based on shared political philosophy alone. There was also the expectation of reward. Republican papers got Republican advertising, and vice versa. Once elected President, Lincoln cemented the devotion of the party press by rewarding dozens of loyal editors with coveted jobs: post offices, foreign consulates, and port collectorships. In Chicago alone, the publisher of the Republican paper secured a major federal post; while the Democratic paper ultimately got closed down by the army, about which more later. The intertwining of press and politics was not a new phenomenon; it was by then a tradition.

Even more alien to our modern concept of a free press, 19th-century politicians did not merely reward or punish publishers. Politicians often were publishers, and publishers were often politicians. Three members of Lincoln's first Cabinet had been newspaper editors in their day. In New York, Albany publisher Thurlow Weed was also boss of the state Republican party. The *Tribune's* Horace Greeley doubled for a time as a Republican Congressman, and twice tried unsuccessfully to win a U. S. Senate seat. The *New York Times* was founded by the Speaker

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Editorial Staff of the New York Tribune

Left to right, standing: William Henry Fry, Charles A. Dana, Henry J. Raymond

Sitting: George M. Snow, Bayard Taylor, Horace Greeley, George Ripley

Library of Congress, Prints & Photographs Division, LC-USZ62-110282

of the New York State Assembly! If Lincoln became President, the original *New York Daily News* warned in one particularly vile article in 1860, “we shall find negroes among us thicker than blackberries swarming everywhere.”⁸ In sum, the formal intermingling of press and politics was far more prominent than it was, say, in 1971, when—and not until which time—the Supreme Court finally defined the limits of government interference with press freedom during war, in *The Pentagon Papers* case.

But even the warlike press culture of the 1850s and 60s intensified exponentially with secession. In a period fraught with fear and uncertainty, opponents became enemies and criticism became sedition. Soon after his inauguration, Lincoln believed he must save the whole Union even if it meant temporarily sacrificing specific constitutional guarantees. And one of the

first institutions to feel the effect was the press.

Before his inaugural, the President-elect had assured delegates to the Washington peace convention: “We do maintain the freedom of the press—we deem it necessary to a free government.”⁹ But secession changed his thinking, especially after the July 1861 battle that was supposed to end the rebellion in one afternoon instead turned into a shocking Confederate victory that promised to prolong the struggle for years. After the Bull Run disaster, the Lincoln Administration turned its attention not only to a military build-up, but to home-front treason that he, his Cabinet advisors—and to be fair, many other Northerners, editors included—believed had contributed to the Union defeat. To begin with, the Union banned the use of the postal service and commercial intercourse with the rebellious states, and

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assumed control of the nation's growing telegraph system for military use. The new rules applied to the manufacturers of all products, including news.

One of the first test cases involved a Philadelphia publication called *The Christian Observer*, whose tenuous Presbyterian affiliation did not mask its pro-Secession, pro-slavery bias. A month after Bull Run, editor Amasa Converse published what he insisted, unconvincingly, was an authentic letter from an unnamed Virginian charging that Union forces on the march there had been guilty of "gross, brutal, fiendish, demoniac outrages" meant to "ravage the country, pillage the houses and burn them, outrage the women, and shoot down for amusement...even children."¹⁰ On August 22, 1861, federal forces responded by invading the offices of the *Christian Observer*, and meeting less resistance there than troops had encountered at Bull Run, confiscated type and evicted the staff. After trying one unsuccessful appeal to Lincoln, claiming he was but a poor old man who always promoted "harmony," good will," and "the preservation of the Union," editor Converse fled to Richmond—where he soon re-established his paper in friendlier surroundings. Lincoln never replied to the editor's insistence that "freedom of the press I have always believed was one of the great bulwarks of our national safety."¹¹ On the contrary, Lincoln accepted the argument that national safety required anti-government journals like the *Christian Observer* to be shut down.

A week earlier, a federal grand jury in New York's Southern District sent a presentment to the court asking whether "certain newspapers" here, "...in the frequent practice of encouraging the rebels now in arms against the federal government," had overstepped freedom of the press and now deserved "the employment of force to overcome them." The foreman even identified the sinners by name: the *Daily*



Amasa Converse
Editor, *The Christian Observer*
Encyclopedia of the Presbyterian Church in the United
States of America
(Presbyterian Publishing Co.: Philadelphia, 1884), p. 155
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database

News, the *Journal of Commerce*, the *Day-Book*, the *Freeman's Journal*, and the *Brooklyn Eagle*. Official Washington did not wait for the court to rule (in fact the judge never responded).

Deciding that the inquiry had the force of an indictment, the Postmaster General promptly banned all five newspapers from the U. S. mails. When the *News* tried to subvert the order by shipping copies to out-of-town subscribers by railroad, the government assigned agents to board trains and confiscate bundles of papers when they arrived in Philadelphia, Baltimore, and as far away as New England. Facing similar ruin, the *Brooklyn Eagle*

apologized in print and reformed its editorial policy. Unwilling to bow to these constraints, the editor of the *Freeman's Journal* found himself arrested on the orders of the Secretary of State. He was imprisoned for eleven weeks. The Mayor's brother, the *News's* Benjamin Wood, responded with a pot-boiling novel about horrific conditions at the federal military prison Fort Lafayette, but never re-opened his newspaper. Yet these incidents chilled few observers. A grand jury in neighboring New Jersey promptly named five disloyal papers of their own—and marshals obligingly shut them down, too. Mobs attacked pro-secession newspapers in such non-Southern venues as Bridgeport and Dayton. Two days after passage of the Confiscation Act, Union soldiers from New Hampshire attacked a Democratic newspaper in Concord, Maine, and burned its property in the street; much the same occurred in Bangor a few days later.¹²

The War Department soon followed with an order declaring that "the public safety" required the prohibition of "all correspondence and communications verbally, or by writing, printing or telegraphing, respecting the operations of the army, or military movements on land or water" through which "intelligence shall be directly or indirectly given to the enemy." The order placed 154 newspapers on an

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informal but chilling watch list. As early as April, telegraph wires, by then the standard medium for transmitting news, had fallen under military control—a ruling ratified by Congress the following year.

With the government—first Treasury, then State, and ultimately the War Department—in charge of telegraph lines, primarily to prevent the publication of leaked news about troop movements, criticism could be excluded from the wires, as well. Union General George McClellan, always better at organizing than in actually fighting, got correspondents from the *Tribune*, the *Herald*, and nine other papers to agree “refrain from publishing, either as editorial or correspondence...any matter than may furnish aid and comfort to the enemy.” In return, McClellan guaranteed “facilities for obtaining and immediately transmitting all information suitable for publication.”¹³ Neither exactly lived up to its respective bargain

Meanwhile, the government fed the freshly formed New York Associated Press, the forerunner of today’s AP, exclusive stories. But even the AP could be muzzled, almost comically. When its lead correspondent was forbidden from mentioning that wounded soldiers staggering into Washington in December 1862 had come from a major defeat at nearby Fredericksburg, Lawrence Gobright observed: “the rule was, we must not let the enemy know what was taking place, as if the enemy did not already know he had fought a battle!”¹⁴ In the end, government control of the wires proved less onerous than it sounded. Besides, correspondents could still send their stories, however critical, by ordinary mail. And the pressure for scoops usually outweighed the risk of prosecution for disloyalty. By and large, the press remained surprisingly free to cover the war.

If other newspapers felt any bond with their repressed brethren, they seldom expressed solidarity. In fact, the Republican press applauded the first crack-down. Just weeks after vowing that the press would not “regard in silence or obsequiously applaud” the Administration, but would instead act “the school master, exposing and commenting upon every act that does not come up to...the standard which competency demands,”¹⁵ the *Times* judged the *Journal of Commerce* “guilty of exciting a riot in our streets and apologizing for the mob.” No “right of the Press,”

the *Times* concluded, “should shield” it “from the penalty of a crime against society.”¹⁶ Henry Raymond was surprised only that “the Administration has so long forborne to defend itself against the fanatical and insurrectionary crusade of the secession papers published in the loyal states.”¹⁷

In states where no such loyalty reigned—Lincoln got 53% of the vote in New York, but only 2% in Maryland, where Rebel sympathizers cut the telegraph wires to Washington to isolate the capital from incoming troop reinforcements—the press proved far more insurrectionary, and of course more susceptible to repression. Lincoln had previously ordered the arrest of Maryland legislators headed to a secession convention almost certain to vote to take the state into the Confederacy. Rejecting what he called “extreme tenderness of the citizen’s liberty” that would relieve “more of the guilty, than...the innocent,” he suspended the writ of habeas corpus and ordered the military “to arrest, and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety.”¹⁸

This included the press. When the *Baltimore Exchange* editorialized that “the war of the South is a war of the people, supported by the people,” while the “war of the North” was “the war of a party...carried out by political schemers,” military authorities shut down the paper, arrested editor Francis Scott Key Howard—the grandson of the author of the National Anthem!—and threw him into Fort Lafayette prison (his papers include secret resolutions in which Baltimore leaders pledged support for the Confederacy).¹⁹ Marshals suppressed four of the city’s other, equally pro-secession, journals.²⁰ Asked to justify such extreme measures, even in pursuit of the vital goal of keeping Maryland in the Union and Washington safe and accessible, an exasperated Lincoln insisted: “Are all the laws but one to go unexecuted, and the government itself...go to pieces, lest that one be violated?”²¹

Lincoln made that comment on July 4, 1861, in a special session of Congress finally assembled and asked to ratify his executive orders. Accusing the rebels of “insidious debauching of the public mind,” a phrase that reveals how seriously he took disloyal



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press coverage, he explained that he had assumed “the war-power” with “the deepest regret.” He “could but perform this duty,” he said, “or surrender the existence of the government.” To Lincoln, the case came down to this simple question: “Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?”²²

I have dwelled on the examples of free-press subjugation in 1861 not only because they’re less well known than some of the later incidents, but because they set precedents for everything that followed. Had the country—had merely other editors—risen up to condemn newspaper repression, it might have ended aborning. One cannot of course ascribe blame, if blame is deserved, to the victims. While the war raged, an Indianapolis man no doubt spoke for many fathers when he complained of too little censorship, not too much: “The people are getting tired of sending their sons to fight the rebels,” he complained, while editors “more mischievous by far than if armed with muskets, are allowed to furnish aid and comfort to the enemy unmolested.”²³

In early 1862, the House Judiciary Committee began hearings into the question of whether “telegraphic censorship of the press has been established” and, if so, whether it had been used “to restrain wholesome political criticism.” The Committee heard a number of witnesses, and heard testimony from journalists who feared using “severe language” against Lincoln or had been prevented from wiring the truth about the Union loss at Bull Run. The committee concluded that “political, personal, and general” news had indeed been swallowed up in the teeth of telegraphic censorship, and strongly recommended that the telegraph be “left as free from government interference as may be consistent with the necessities of the government in time of war.” That was ambiguous enough to inhibit the full House from recommending a legislative remedy. The censors were left in charge without further oversight.²⁴

By 1862 the Administration added to the list of forbidden coverage anything meant to discourage volunteering, and later, military conscription. But a new wave of violent criticism erupted when Lincoln acted on September 22, 1862—also unconstitutionally, his critics maintained—to free the slaves in the

Confederacy if they did not abandon the rebellion by January 1, 1863. The anti-Lincoln *New York Evening Express* promptly wondered in a scathing editorial: “We do not know what liberty is allowed to free white men to discuss the Proclamation freeing negroes,” adding: “We may be locked up in Fort Lafayette for all this ‘free speech,’ and ‘free discussion,’” but “we lend no sanction to any Negro equality or fraternity schemes of the Amalgamationists or Abolitionists... . President Lincoln is *not* ‘Government,’” the *Express* continued, “only an administrator of the Government... . We owe no loyalty to these Revolutionary and Demoralizing schemes of his Proclamation.”²⁵ The tirade prompted one correspondent to ask the Secretary of State, “how, is rebellion to be crushed while such insulting traitorous papers are allowed to be freely circulated among the people?” Added A. W. Spies: “Tens of thousands in New York now stand ready to enter the printing establishments of several papers and break the heads of the editors, and are only restrained by its unlawfulness and are waiting for our weak and pu[c]kish Govt to do the needful to them[.]”²⁶

Not surprisingly, editors of the Republican papers remained unconcerned by the Administration’s actions. Joseph Medill of the *Chicago Tribune* went so far as to question the very idea of “absolute freedom of the press because in society, speech is always limited by the prevailing conditions... . Until the war is over, we must be content to accept whatever the altered conditions of the times and the country may demand as a requisite of national salvation.”²⁷

In May 1863, the debate over martial law and press freedom came to a head in Dayton, Ohio, where the Union army under General Ambrose Burnside arrested former Congressman Clement L. Vallandigham for speaking out against the draft. Vallandigham, out of office for just two months, was an anti-war Copperhead Democrat who had once been stoned while visiting his state’s troops in Virginia—and by that I don’t mean he was inebriated—but pelted with rocks. Now, Burnside had him imprisoned, tried by military commission. He was found guilty and Lincoln banished him to the Confederacy. Local newspapers that expressed support—like one aptly named the *Columbus Crisis*—paid

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a heavy price. Earlier, a mob tried unsuccessfully to burn down its offices. When editor Samuel Medary proposed running the exiled Vallandigham for governor, a local general in Kansas banned it from the mails. Vallandigham's campaign ended in disaster, but Medary vowed to continue his own campaign for "the liberty of the press" by practicing it "freely." The following year, even though his influence was in decline, Medary was arrested for "conspiracy against the Union." He died before he could face trial.²⁸

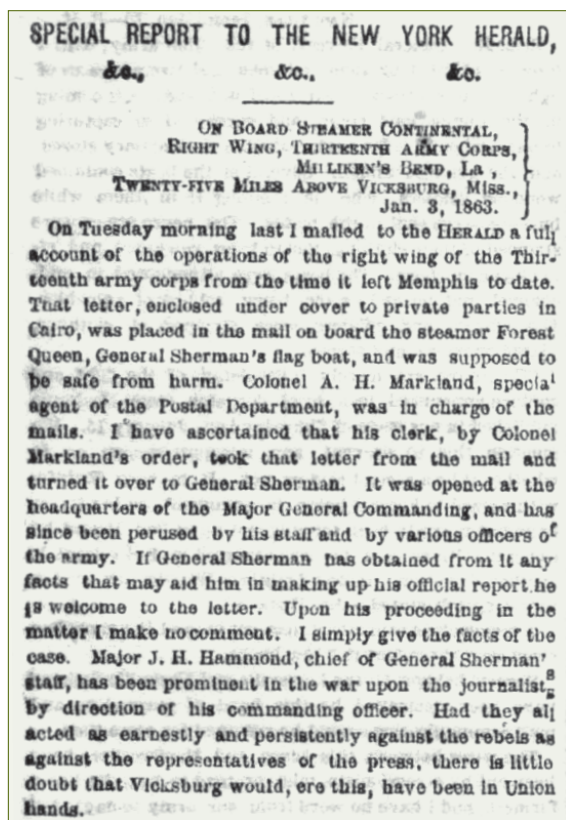
Medary was not the only editor outraged by the Vallandigham case. New York Democrats generally defended "Valiant Val," gathering for a mass meeting in Albany that condemned the President for exceeding his authority. Lincoln replied with a letter cleverly made available first to Republican newspapers; he still knew how to manipulate his party's own editors.

Defending his actions against "insurgents," as he called them, and their "effort to destroy the Union, constitution, and law, all together," he rejected the idea of a passive government "restrained by the same constitution and law, from arresting their progress. Their sympathizers pervaded all departments of the government," he pointed out, "and nearly all communities of the people... [U]nder cover of 'Liberty of speech' 'Liberty

of the press' and 'Habeas corpus' they hoped to keep on foot amongst us a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause in a thousand ways."²⁹ In Lincoln's view, the "courts of justice" were "utterly incompetent" to handle such cases—pointing out rather feebly, it must be admitted, that local juries were more likely "to hang the panel than to hang the traitor"—not a very convincing argument from an old trial lawyer.³⁰ In re-rebuttal, Erastus Corning called the doctrine "a monstrous heresy...subversive of liberty and law, and quite as certainly tending to the establishment of despotism."³¹ But Lincoln replied no further. He let actions speak louder than words.

It surprised no one that the anti-war, anti-Republican *Chicago Times* quickly attacked Burnside over the Vallandigham case. But the general surprised nearly everyone when he sent an order to the Windy City to padlock the paper and arrest its gun-toting editor, Wilbur Storey, "[o]n account of the repeated expression of disloyal and incendiary sentiments."³² This act of suppression Lincoln may have privately relished—the *Times* had been flaying him for years—but publicly he would not defend it. Rather, he intervened to countermand it, convinced, as he put it, that "we should revoke or suspend the order," especially after protestors from both political parties threatened to take to the streets to demonstrate against it. Yet Lincoln had no difficulty defending, or at least turning a blind eye, to Burnside's order prohibiting circulation of the anti-war *New York World* within his military department.³³ Censorship remained so indiscriminate that commanders might seize individual issues of papers that carried disobliging or classified reports.

By this time military censorship and intimidation were commonplace within the Eastern and Western theaters of war. Generals suppressed news, restricted access to embedded journalists, and banished correspondents who talked too much. Some faced courts martial, even execution, even though they were civilians; one editor was made to ride a sawhorse backward wearing a sign identifying him as a traitor. Lincoln did try revoking one decision to expel a reporter from Grant's headquarters, the *New York Herald's* Thomas W. Knox. But unwilling to irritate his most successful general, he added a caveat: "if Gen.



New York Herald, January 18, 1863

Byline: Thomas W. Knox

Courtesy, American Antiquarian Society

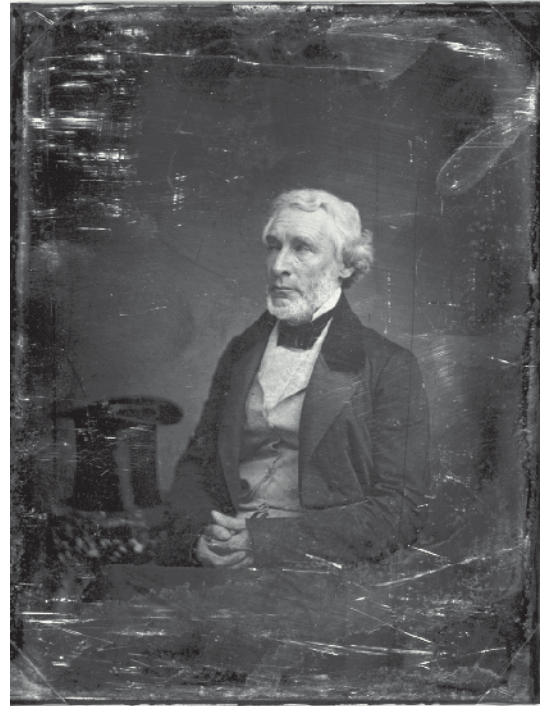
FREEDOM OF THE PRESS

Grant shall give his express consent." Grant did not. Instead he passed the buck down the line to General William T. Sherman, who never met a journalist he didn't hate.

Oblivious to the politics—Lincoln was trying to keep the *Herald's* unpredictable editor, Democrat James Gordon Bennett, inside the pro-war camp—Sherman stubbornly sent the reporter the following message: "Come with a sword or musket in your hand, prepared to share with us our fate in sunshine and storm...and I will welcome you...but come...as the representative of the press, which you yourself say makes so slight a difference between truth and falsehood, and my answer is, Never."³⁴ The ban on Mr. Knox remained in force.

William McKee, a journalist Lincoln derisively labeled a "Democrat editor," had better luck. McKee did nothing more than obtain and publish the President's official letter naming General John Schofield to command the Department of Missouri. Humiliated, Schofield demanded that McKee name his source. When the journalist refused, Schofield ordered him arrested. Lincoln gently reminded his general not that he had violated freedom of the press, but that his severity might upset the locals. "I fear this loses you the middle position I desired you to occupy" in Missouri, the President wrote. "I care very little for the publication of any letters I have written [this from a man who made certain his letters were published and praised in sympathetic newspapers]. Please spare me the trouble this is likely to bring." When Schofield proved initially reluctant, Lincoln conceded that there was "an apparent impropriety," but insisted: "it is still a case where no evil could result, and which I am entirely willing to overlook."³⁵ McKee was freed. As Lincoln had written Schofield in the letter that started the whole business—in a way that reflected his overall policy on martial law in all the volatile Border States: "Let your military measures be strong enough to repel the invader and keep the peace, and not so strong as to unnecessarily harass and persecute the people."³⁶

No incident of Civil War press suppression is more famous than the 1864 case of the *New York World*. In a rare instance in which he took personal possession of a crackdown, Lincoln signed a document, drafted by the Secretary of War, declaring that



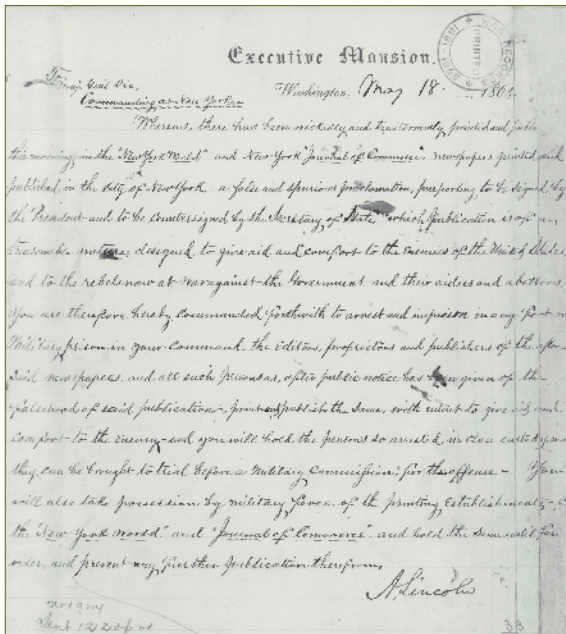
James Gordon Bennett, ca. 1851-1852
Editor, the New York Herald

Library of Congress, Prints & Photographs Division, LC-USZC4-4150

the paper had "wickedly and traitorously printed a false and spurious proclamation...of a treasonable nature, designed to give aid and comfort to the enemies of the United States." In retaliation, he ordered General John A. Dix to "arrest and imprison in any fort or military prison...the editors, proprietors, and publishers" and to bring them "to trial before a military commission, for their offense... You will also take possession, by military force, of the printing establishments," the order continued, "...and prevent any further publication therefrom."³⁷

According to the *World*, which mounted a spirited defense, a messenger had arrived in the office of all the big city papers late one May night bearing an official-looking presidential document calling for 400,000 new volunteers to put down the rebellion. Most editors on duty around town sensed that it looked suspicious: why would the President ask for such a sacrifice, announce it in the middle of the night, only hours before printing deadlines, and particularly in a city bedeviled by massive draft riots the previous summer? But two—the anti-Administration *New York World* and *Journal of Commerce*—claimed they fell for the hoax and innocently rushed the bogus message into print.

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Telegram from President Lincoln to General Dix,
May 18, 1864
The National Archives

Executive Mansion
Washington, May 18, 1864

To Maj. Genl. Dix,
Commanding at New York.

Whereas, there has been wickedly and traitorously printed and published this morning, in the "New York World" and New York "Journal of Commerce," newspapers printed and published in the City of New York, - a false and spurious proclamation, purporting to be signed by the President and to be countersigned by the Secretary of State, which publication is of a treasonable nature, designed to give aid and comfort to the enemies of the United States, and to the rebels now at war against the Government and their aides and abettors. You are therefore hereby commanded forthwith to arrest and imprison in any fort or military prison in your command, the editors, proprietors and publishers of the afore said newspapers, and all such persons as, after public notice has been given of the falsehood of said publication, print and publish the same, with intent to give aid and comfort to the enemy. - and you will hold the persons so arrested in close custody until they can be brought to trial before a military commission for this offense. - You will also take possession by military force of the printing establishments of the "New York World" and "Journal of Commerce," and hold the same until further order, and prevent any further publication therefrom,

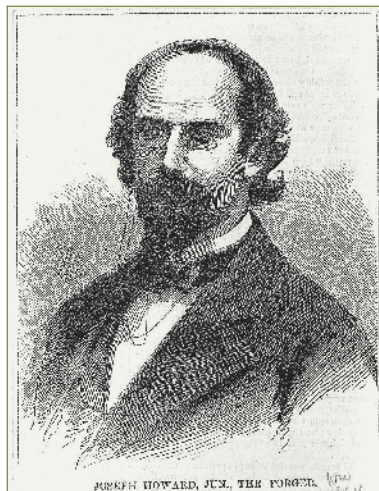
A. Lincoln

The Administration chose to believe the *World* had manufactured the spurious proclamation itself. Per the Lincoln order, federal troops shut both papers down, and imprisoned the *World's* editor, Manton Marble, one of Lincoln's most virulent critics, and assistant editor Joseph Howard, a former *Times* reporter, but an old thorn in Lincoln's side. After an appeal by an editor of the Republican *New York Tribune*, and the threat of court action by the Democratic Governor of New York, Marble re-gained his freedom, and after a few days, resumed publication of the *World*. But Howard languished in prison for three more months, obtaining his liberty only when the respected Brooklyn minister Henry Ward Beecher intervened in his behalf, calling him a "tool" who acted only in "the hope of making some money."³⁸ Three years earlier, Howard had published a false and damaging report that a cowardly Lincoln wore a disguise to sneak through Baltimore en route to his inauguration. Now he paid the price for his libel. And one can't help

thinking that his was one detention in which Lincoln took pleasure.

But why the fuss over a proclamation about volunteers? The Administration believed the Democratic press conspired to release the fraudulent order to send gold and stock prices plummeting the next morning—following which the editors would buy in at bargain

rates, and reap huge profits once the proclamation was disavowed and prices recovered. General Dix later conceded that the accused editors were likely "innocent," but a charge against him for trespass, kidnapping, forcible entry, and inciting to riot went to Municipal Court, of all places. There, a judge held that an element of the federal Indemnity Act (Congressional suspension of Habeas Corpus) was unconstitutional and Dix subject to further action of the Grand Jury. None followed. Whatever the real truth in the *World* case, it represented one instance when Lincoln himself believed the line had been crossed separating press freedom from criminality and treason.



Joseph Howard, 1864
Assistant editor, the New York World
Imprisoned for printing a hoax
Library of Congress, Prints & Photographs Division,
LC-USZ62-132053



FREEDOM OF THE PRESS

EXECUTIVE MANS " May 17, 1864.

Fellow-Citizens of the United States:

In all seasons of exigencies it becomes a nation carefully to scrutinize its line of conduct, humbly to approach the Throne of Grace, and meekly to implore forgiveness, wisdom and guidance.

For reasons known only to Him, it has been decreed that this country should be the scene of unparalleled outrages, and this nation the monumental sufferer of the 19th century. With a heavy heart, but an undiminished confidence in our cause, I approach the performance of a duty rendered imperative by my sense of weakness before the Almighty, and of justice to the people.

It is not necessary that I should tell you that the first Virginia campaign under Lieutenant-General Grant, in whom I have every confidence, and whose courage and fidelity the people do well to honor, is virtually closed. He has conducted his great enterprise with discreet ability. He has inflicted great loss upon the enemy. He has crippled their strength and defeated their plans.

In view, however, of the situation in Virginia, the disaster at Red River, the delay at Charleston, and the general state of the country, I, Abraham Lincoln, do hereby recommend that Thursday, the twentieth day of May, A. D. 1864, be solemnly set apart throughout these United States as a day of fasting, humiliation, and prayer.

Deeming furthermore, that the present condition of public affairs presents an extraordinary occasion, and in view of the pending expiration of the service of (100,000) one hundred thousand of our troops, I, Abraham Lincoln, President of the United States, by virtue of the power vested in me by the Constitution and the laws, have thought fit to call forth, and hereby do call forth, the citizens of the United States between the ages of (18) eighteen and (45) forty-five years to the aggregate number of (400,000) four hundred thousand, in order to suppress the existing rebellious combinations, and to cause the due execution of the laws.

And furthermore, in case any state or number of states shall fail to furnish by the 15th day of June next their enserged quotas, it is hereby ordered that the same be raised by an immediate and peremptory draft.

The details for this object will be communicated to the state authorities through the War Department.

I appeal to all loyal citizens to favor, facilitate, and aid this effort to maintain the honor, the integrity, and the existence of our national Union, and the perpetuity of popular government.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this seventeenth day of May, in the year of our Lord one thousand eight hundred and sixty-four, and of the Independence of the United States the eighty-eighth.

(Signed) ABRAHAM LINCOLN,

By the President:

WILLIAM H. SEWARD,
Secretary of State.

New York World, May 18, 1864

Courtesy of the author

Before this array of evidence approaches a historical lynching, I would suggest strongly that Lincoln also deserves to be judged by what happened—or, more accurately, what didn't happen—next. Just a few weeks after the *World* imbroglio, Lincoln won nomination for a second term as President. The Democrats chose an anti-war favorite, General George B. McClellan. And notably, in the months that followed, the Administration did absolutely nothing to suppress pro-McClellan or anti-Lincoln journalism. Throughout the ensuing campaign, it was back to politics—and press coverage—as usual: no holds barred, and no restrictions by the government.

With some justification, and probably little surprise, considering his record, Lincoln might have postponed the contest entirely. No nation before had ever held a popular election in the midst of civil war. But Lincoln refused to consider this. Even with the American people, as he put it, "partially paralyzed, by a political war among themselves," the "election was a necessity." For "if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us."³⁹

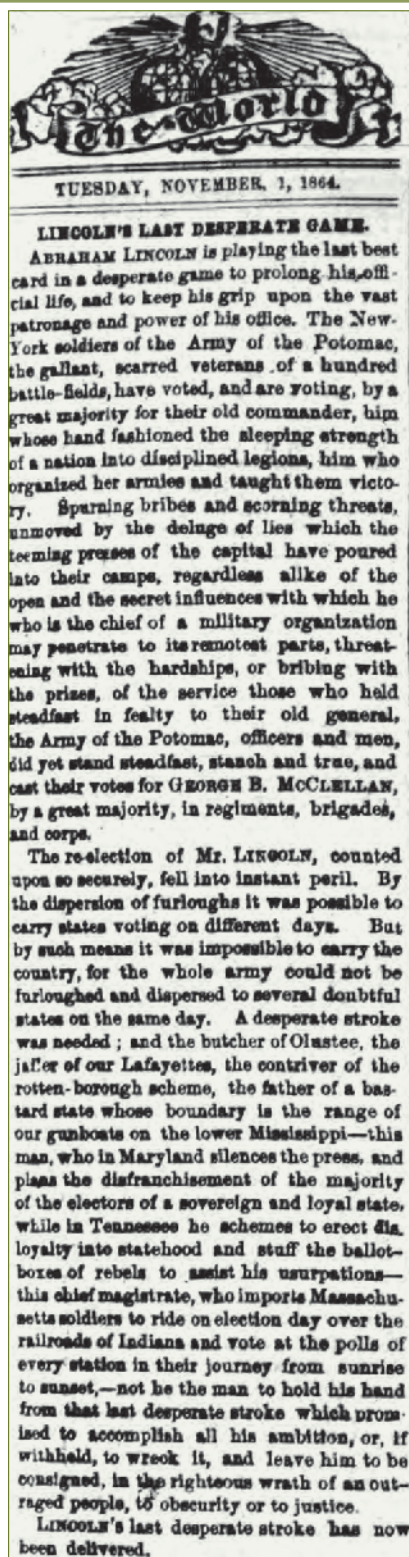
Lincoln had no second thoughts even when the *New York World* issued a series of brutal editorial attacks, complemented by the publication of horrifically racist lithographs aimed at Irish-American voters that visually warned that if Lincoln won, African Americans would rule the nation, with whites the subjugated inferiors. The paper also secretly issued a book called *Miscegenation*, urging with apparent sincerity that blacks and whites intermarry to solve the race problem—a giant hoax designed to goad frightened white supremacists to the polls. As a further dirty trick, the paper even sent the book to Lincoln for a blurb, hoping he would be gullible enough to fall for the scheme and offer praise that the paper might then use to unmask him as a radical integrationist. He wasn't—either gullible or an integrationist. Astonishing stuff, but the race card and the *World* did hurt Lincoln in New York. He barely won the state in 1864.

The major lesson here is that Lincoln never interfered with the *World's* right to be viciously anti-Republican and violently white supremacist in 1864. Politics was a battle, but it was not the same as a civil

war: in Lincoln's view, only a rebellion offered sufficient reason to curtail freedom of the press. Ordinary politics, no matter how ugly or dirty, was as American as apple pie and needed to be perpetuated, along with the newspapers that took sides, even if the very same papers had practiced treason only weeks earlier. Erastus Corning was wrong. Abraham Lincoln did not seek "absolute sovereignty," merely the restoration of the political and press status quo ante bellum.

The absence of interference with the press in 1864 should vindicate, or at the very least leaven, Lincoln's reputation on press freedom. In the end, he acted only when he thought the nation itself was in peril, not his own political hide. He acted to prevent the loss of Border States like Maryland, Missouri, and Kentucky, whose departure would have likely ended any chance to save the nation, and where he hoped for an increase in Union sentiment but sensed that secessionist views could carry the day if fanned by newspapers. Lincoln also acted to prevent the disclosure of troop positions that might endanger his army by tipping off the enemy (and Robert E. Lee, after all, confided that he had planned his entire invasion of Pennsylvania in 1863 by reading the Philadelphia newspapers!).

Speaking at the beginning of the war, Abraham Lincoln laid out his position this way: "Lest there be some uncertainties in the minds of candid men, as to what is to be the course of the government, towards the Southern States, *after* the rebellion shall have been suppressed,



New York World, November 1, 1864
Editorial attacking Lincoln
Courtesy Old Fulton NY Postcards, fultonhistory.com

the Executive deems it proper to say, it will be his purpose then, as ever, to be guided by the constitution, and the laws."⁴⁰ Lincoln never doubted his own ability to give up his extraordinary powers once the war was won—after all, he joked, no sick patient ever developed "so strong an appetite for emetics during temporary illness as to persist in feeding upon them through the remainder of his healthful life."⁴¹ Henry Raymond of the *Times* agreed. "The temporary surrender of these rights is a small price to pay for their permanent and perpetual enjoyment."⁴² As long as a state of rebellion existed, he felt justified in using the emetic of press suppression to guarantee the government's very survival. He believed the Constitution not only did not preclude, but warranted, his actions.


"In any future great national trial," Lincoln predicted, "compared with the men of this, we shall have as weak, and as strong; as silly and as wise; as bad and as good. Let us, therefore, study the incidents of this, as philosophy to learn wisdom from, and none of them as wrongs to be revenged."⁴³ Once again "malice toward none"—especially himself.

Was Lincoln wise or silly—bad or good? He was at least wise enough to remain unsure. In later recalling the episode involving the *Chicago Times*, he told an old friend: "I can only say I was embarrassed with the question between what was due to the Military service on the one hand, and the Liberty of the Press on the other... ." And then, in a tortured

FREEDOM OF THE PRESS

double-negative conclusion that betrayed his own uncertainty about this fundamental issue, Lincoln admitted: "I am far from certain to-day that the revocation was not right."⁴⁴ What did he mean? It remains difficult to know.

One thing for certain: Lincoln believed that history, not the courts, would be the ultimate judge. And even as we learn more about the extent of press suppression under his presidency, we must remember not only to calculate individual acts of suppression, but

to explore the overall policy, and its limits. Lincoln never imposed official, widespread censorship policies beyond understandable control of the military telegraph. The Administration considered each case as it came, often erring on the side of censorship rather than liberty, but imposed no blanket muzzle on the nation's press during what Lincoln called the nation's "fiery trial."⁴⁵ The story of this age of thousands of newspapers, thousands of print voices pro and con, is not how many were suppressed, but how few. 

ENDNOTES

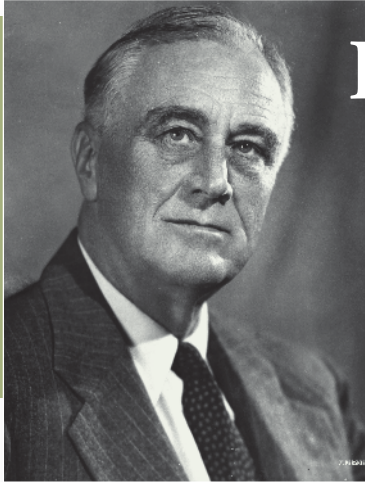
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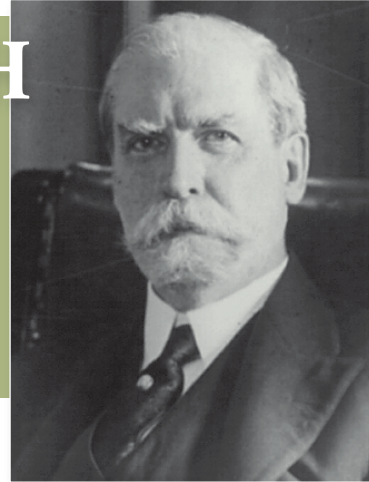


Franklin D. Roosevelt
Collection of the FDR Presidential Library

INTERBRANCH TANGLING:

SEPARATING OUR CONSTITUTIONAL POWERS

JUDITH S. KAYE



Chief Justice Charles Evans Hughes
Library of Congress, Prints & Photographs Division,
LC-USZ62-65444

BEGIN by expressing enormous gratitude to the New York County Lawyers Association for adding me to the dazzling roster of lawyers from across the profession who have delivered the annual Charles Evans Hughes Lecture, starting with Harvard Dean Roscoe Pound in 1960. And could there be a more serendipitous moment for a lecture named for Charles Evans Hughes? I think not. I'll start with some confluences and anniversaries that make this lecture so especially well timed.

Just one hundred and fifty years ago—April 11, 1862 to be exact—Charles Evans Hughes was born in Glens Falls, New York to parents of modest means and high ideals. I feel especially fortunate to be giving this prestigious lecture on the 150th anniversary of the birth of one of the towering figures of twentieth-century America—brilliant lawyer and law teacher, dedicated public servant, Governor of the State of New York, Secretary of State, narrowly defeated presidential candidate, and Justice and later Chief Justice of the Supreme Court of the United States. How on earth, I wonder, did he miss service as a legislator—he covered everything else! And as he moved from post to post, in the interstices he filled his spare time with presidency of the New York County Lawyers Association, the New York State Bar Association, and the American Bar Association, as well as by founding the distinguished Hughes, Hubbard law firm. About

Hughes, Learned Hand wrote that “[s]ure-footed time will tread-out the lesser figures of our day; but, if our heritage does not perish, the work of this man and his example will remain a visible memorial of one who helped to keep alive and pass on that ordered freedom without which mankind must lapse into savagery.”¹

A Coincidence of History

Staying with anniversaries for the moment, it was 75 years ago that Chief Justice Hughes led the Supreme Court of the United States through the most serious challenge ever mounted to its exercise of constitutional power. By that, of course, I have in mind President Franklin Roosevelt's court-packing plan, proposed in response to the Court's nullification of significant portions of the President's New Deal legislation. Like Chief Justice Hughes, President Roosevelt was also a former New York State Governor. They greeted one another as “Governor.” But 75 years ago our nation's “ordered freedom” (to use Judge Hand's words) was at risk, as the President, Congress, and Judiciary all sought to define and maintain their power and our democracy in the wake of the Great Depression.

Every student of a certain age immediately equates the name Charles Evans Hughes with the term “court-packing” and “nine old men.” It is not my intention to expound at length on this period

Judith S. Kaye, Former Chief Judge of the Court of Appeals of the State of New York, and current Of Counsel to Skadden, Arps, Slate, Meagher & Flom LLP, delivered the 49th Charles Evans Hughes Lecture at the New York County Lawyers Association on April 26, 2012. Judge Kaye expresses her gratitude to Marjorie McCoy, former Deputy Clerk of the Court of Appeals, for adding immeasurably to the pleasure of preparing these remarks.

in our history so well covered by scholars far more knowledgeable than I. And, indeed, speaking of fortuities, I commend to you the recently published work of our own New York Law School's Dean Emeritus James F. Simon, entitled *FDR and Chief Justice Hughes: The President, the Supreme Court and The Epic Battle Over the New Deal*.² A compelling read.

How could one not be struck by the coincidence of this 75th anniversary with today's banner headline constitutional confrontation? As we all know, in March 2012 the Supreme Court heard an unprecedented three days of oral argument in the matters collectively known as the "Obamacare cases," challenging President Obama's signature healthcare reform. Pundits and scholars alike characterize these cases as a supreme constitutional moment, supreme in every sense, including the quantity and quality of discourse. I am for the first time thankful that arguments are not televised. Outside the Supreme Court were non-stop protests for and against, a small brass band, a presidential candidate, activists signing autographs and mugging for the cameras, nonstop press, and unceasing hyperbole ever since. Even a new Supreme Court-picking, if not a Supreme Court-packing, plan has been floated.

Indeed, NPR's Nina Totenberg called the Obamacare cases a "constitutional Woodstock." Commentators such as Robert Barnes of the Washington Post, Adam Liptak of the New York Times, and Erwin Chemerinsky of the University of California Irvine School of Law were not alone in noting that the Obamacare cases presented the first time since the New Deal that a monumental domestic program proposed by the President and passed by Congress faced review by the Supreme Court of the United States.

They refer back, of course, to 1936, when the Hughes Court struck down legislative requirements for the coal industry's wages and hours, ultimately laying the groundwork for FDR's court-packing plan, which was announced February 5, 1937. As Dean Chemerinsky commented concerning the Supreme Court's pending review of the Patient Protection and Affordable Care Act: "The potential consequences socially, legally and politically are enormous. The outcome could very well shape how health care is provided in this country for decades to come. If the

court invalidates this law—and one of the issues is whether the entire act should be struck down—it will be the first time since the New Deal that a major federal regulatory statute has been declared unconstitutional. And there is little doubt that whatever the court decides could have an impact on the outcome of the November presidential election."³

Speaking in the Washington Post, Jeff Shesol, author of *Supreme Power: Franklin Roosevelt vs. The Supreme Court*, also noted how the Obamacare litigation parallels the Supreme Court's consideration of the progressive New Deal legislation 75 years ago. Both addressed the scope of federal authority and how our national government is empowered to deal with national problems.⁴ In Shesol's view, however, the stakes were considerably higher in Roosevelt's time, and public opinion shifted overwhelmingly to endorse the necessity of the New Deal programs. He observed that the string of Roosevelt's programs reviewed by the Justices actually gave that Court a way to adjust to that new reality gradually over time.

I felt a particular twinge of concentricity a month ago, on March 29 to be precise, as I was working on these remarks. It was on that was the very day, seventy-five years ago, that the Supreme Court announced seventeen decisions. In the last of these decisions, *West Coast Hotel Company v. Parrish*,⁵ the Court shifted course and upheld, against a Fourteenth Amendment due process challenge, the constitutionality of Washington State's minimum wage law for female workers. It was in fact Chief Justice Hughes, a dissenter in the Court's earlier five-four cases striking down minimum wage laws, who announced the decision. (Chief Justice Hughes and Justice Owen J. Roberts were swing votes on a bitterly divided Court.) In *Parrish*, Justice Roberts (who had previously joined the "Four Horsemen" in striking down the laws) this time voted to uphold the law and tipped the balance the other way, thus furnishing the proverbial "switch in time that saved nine" and defusing a court-packing showdown.⁶

Reportedly, just before Chief Justice Hughes announced the *Parrish* decision, dissenting Justice James C. McReynolds picked up his papers and simply walked off the bench. As I reflected on that scenario, my heart went out to New York State's own great former Chief Judge Benjamin Nathan Cardozo,

INTERBRANCH TANGLING



The Hughes Court, 1932-1937

*Left to Right Standing: Owen J. Roberts, Pierce Butler, Harlan Fiske Stone, Benjamin N. Cardozo
Sitting: Louis D. Brandeis, Willis Van Devanter, Charles Evans Hughes, James Clark McReynolds, George Sutherland*

Photograph by Harris & Ewing, Collection of the Supreme Court of the United States

who in 1932 left the warm collegiality of the New York Court of Appeals for this raging firestorm at the Supreme Court. Those years until his death in 1938 could not have been his happiest.

While there have of course been countless other inter-branch clashes heard before the Supreme Court, the scope and timing of the Obamacare cases provide a unique snapshot of constitutional power battles. Next month will come the end of the Supreme Court's current term, and likely the announcement of its resolution of these cases. We will know then how each of the branches fared, although it may be a while before we see the full impact of the decision.

The Turf in General

The subject of constitutional clashes of power encompasses at least three areas—first, the legitimacy or inherent power of each co-equal branch of government; second, the separation, or distribution, of powers among the branches; and third, the division of power between the national government and the states, known as federalism. I do not intend to elaborate on the third category, federalism, which

could extend these remarks beyond patience. Just think of cases like *Baker v. Carr*, *Bush v. Gore*—indeed the Court's historic opinion in *Brown v. Board of Education*—principally involving issues of the balance between state and federal governments, each with separate court systems and constitutions. Indeed, I didn't intend to linger on the first area either. As we all know, *Marbury v. Madison*⁷ definitively established the legitimacy, or inherent power, of the Supreme Court to review actions of the executive and legislative branches of the federal government. Even the most notorious and unpopular Supreme Court decisions, like *Dred Scott*,⁸ have not altered this basic acceptance of the idea of judicial review.⁹

But then came the ruckus kicked up by President Obama's comment during a highly publicized news conference that it "would be an unprecedented, extraordinary step [for the Supreme Court to overturn] a law that was passed by a strong majority of a democratically elected Congress." Among other things, that provoked a demand from the Fifth Circuit in an unrelated case for a three-page single-spaced memorandum addressing the executive branch's view

of the judiciary's power to review legislative acts, which the Attorney General dutifully furnished. In his letter, Attorney General Holder reaffirmed that "[w]here a plaintiff properly invokes the jurisdiction of a court and presents a justiciable challenge, there is no dispute that courts properly review the constitutionality of Acts of Congress"—adding, notably, that "Acts of Congress are 'presumptively constitutional.'"¹⁰ End of story.

So that brings me squarely to the second area, which will be my focus—the exercise of the Judiciary's unquestioned authority to review acts of the other branches for constitutional validity. While our popularly elected partners in government have broad authority to set social policy, address national problems and serve the public will, it remains for the Judiciary—with deference and independence (a potent mixture!)—to assure the maintenance of our constitutional ideals and values. Not an easy task, as I can tell you from firsthand experience.

Focus on New York State

Back to the subject of anniversaries, I add that I have now passed the three-year mark since the end of my glorious term as a Judge, and then Chief Judge, of the Court of Appeals of the State of New York. Three years is not 150 years, or even seventy five, but still it's sufficient distance to permit me to reflect a bit on the delicate subject of interbranch tangling at the state level, where the courts are from time to time drawn into constitutional controversies involving our partners in government.

Of course, every state has its own constitution. Ours is a hefty forty-six-page, tightly printed document with some provisions duplicating the federal charter, many worded a bit differently but similar in substance, and many unique to New York, with our own state constitutional history. Every New York public officer, every New York attorney, swears to uphold both the Constitution of the United States and the Constitution of the State of New York.

Decisions of the New York State high court are generally the last word on the New York State Constitution. Even on equivalent state and federal constitutional provisions, the New York State court cannot go below the federal floor of rights, but it

can raise the ceiling of rights under its state charter. It will, for example, be interesting to see how the Supreme Court's recent decision upholding strip searches¹¹ fares under the New York constitutional protection against unreasonable searches and seizures, should defendants assert a separate, higher state constitutional standard.

I can tell you that after twenty five years, three months, nineteen days and twelve precious hours, I left the Court of Appeals with a much finer appreciation of the tremendously difficult separation of powers issues arising under our constitutions than I had previously imagined. It goes without saying that, if there were precise constitutional language and authoritative precedents that resolved the hot-button issues, a case would never reach the high court. Just as at the federal level, always there are judgments to be made by judges, independently and deferentially. That's what courts are there for.

So, how have issues of constitutional power played out in New York State? Thankfully, not by evoking the national drama of Obamacare, but they still can sometimes be pretty dicey. With that in mind, and even with the distance of several years from the end of my court service, I intend to stay on solid ground—meaning that I will offer only a few examples, all cases decided during my tenure, and I will limit myself to the competing views as expressed in the court's writings themselves. My point is simply to highlight the delicate balancing these cases require, the public issues at stake, and the various positions that can be taken in such matters.

My first examples, *Silver v. Pataki*¹² and *Pataki v. New York State Assembly*,¹³ were disputes between the executive and legislative branches, each accusing the other of overstepping limitations on their roles as set out in Article III of the New York State Constitution regarding authority to allocate the state budget. The Court played the role of umpire between the branches. These were not the first such disputes and surely will not be the last, as budget battles invariably continue between the branches. The cases divided the Court of Appeals three ways: a three-judge plurality wholly adopting the position of the Governor, a more limiting concurrence joined in by two members of the majority, and a two-judge dissent.

INTERBRANCH TANGLING



The New York State Court of Appeals, 2001

Left to Right: Eugene F. Pigott, Jr., Susan Phillips Read, Carmen Beauchamp Ciparick, Judith S. Kaye, Victoria A. Graffeo, Robert S. Smith, Theodore T. Jones, Jr.

New York State Court of Appeals Collection

The plurality began by expressing doubt that any meaningful line between broad and narrow budgetary changes “could ever be drawn.” And it drew none, concluding that to permit the Legislature to rewrite the details of the Governor’s budget, as embodied in his appropriation bills, would be inconsistent with the aims of the executive budget system. In their view it was the Governor, not the Legislature, who was expected by the constitutional framers to produce an economical and systematic plan for the annual budget of the State. Period.

The two concurring Court of Appeals judges took issue with the proposition that no meaningful line could be drawn between gubernatorial and legislative budgeting powers, observing that line-drawing is what courts do! The concurrence then went on to set out a test, consisting of a number of factors to determine when an appropriation becomes unconstitutionally legislative, such as its effect on substantive law, the durational impact of the provision and the history and custom of the budgetary process. The two judges concluded in the process that their test was necessarily imperfect, but was better than no test at all.

The dissenters saw the constitutional budgeting scheme differently: as a careful system of checks and

balances in which the Governor has initial authority over state finances, and in which the Legislature, while it can always make the determination to spend less, is forbidden from spending more than what is contained in the Governor’s appropriation bills. The dissent concluded that the Governor had taken on the legislative function in this regard and intruded upon the Legislature’s untrammelled authority with respect to those bills. While agreeing that the precise line may be difficult to fix, the dissent posited that “the better question may well be not what the Governor can do in an appropriation bill, but what the Legislature can do in response.” Most tellingly, the dissent cautioned that the Court’s unbounded view of executive authority set a brand new “template for the future.” That is always a concern in decisions of a court of last resort.

Turning next to the Court of Appeals’ constitutional review of legislation enacted by our partners in government, three subjects spring to mind: the death penalty, marriage equality, and the school funding cases. Again, the clashes I will be describing are hardly unique for our high court, or courts generally. Each of them I recall with crystal clarity.

Of the school funding cases, I will say only this. In its very own Education Article, Article XI, the New

INTERBRANCH TANGLING

York State Constitution uniquely directs that the “legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” A guaranteed system of free education for all the State’s children was important enough to garner its own article in our Constitution. But what exactly does this mandate require? Again, the Constitution is hardly precise in directing the legislature on what it must do. The trio of school funding appeals¹⁴ 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.

In the course of re-reading those cases, I realized it would be impossible for me adequately to portray the underlying clash among the branches without similarly engulfing you in the complexities of the State’s constitutional promise to ensure the availability of a sound basic education to all its children. 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. Today, I am sure that each of my Colleagues who participated in the CFE appeals—whatever their views and their votes—remains hopeful that state and local policymakers will continue to strive to give modern-day reality to the mandate of Article XI of our State Constitution, and that watchful advocates will continue to press those issues in the courts as appropriate. That is the essence of our sys-



Judge Kaye delivering the 49th Charles Evans Hughes Lecture at the New York County Lawyers Association on April 26, 2012
Courtesy New York County Lawyers Association

tem of government.

Our marriage equality case, *Hernandez v. Robles*,¹⁵ centered on the more generalized guarantees of due process as well as our state constitutional equal protection clause. Like the guarantee of due process, our equal protection clause is hardly formulaic. It reads “[n]o person shall be denied the equal protec-

tion of the laws of this state or any subdivision thereof.” Whether New York’s Domestic Relations Law is consistent with the constitutional guarantee of equal protection as it has developed through the centuries requires study, thought, judgment. Again, *Hernandez* divided the six judges who constituted the Court of Appeals into three extensive opinions.

At the root of the many differences that separated the judges, including the requisite level of scrutiny, was the question of whose role it was to decide this fundamental societal issue. The majority saw it exclusively for the Legislature. For the dissenters, it was uniquely the function of the judicial branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation. In the word of the dissent, “[t]he Court’s duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.”¹⁶

My final example centers on the death penalty which, as you no doubt recall, became a fierce campaign issue in the 1994 race for Governor. Indeed, the very first legislation signed by Governor Pataki reinstated capital punishment in New York.

My own education in the art of judging actually began with *People v. Lemuel Smith*,¹⁷ argued April 23, 1984, seven months after I arrived on the Court of Appeals directly from private commercial practice, and persisted for the next twenty three years, through *People v. Taylor*,¹⁸ decided October 23, 2007. In each of our death penalty cases, the Court of Appeals concluded that provisions of the statutes denied the

INTERBRANCH TANGLING



Barak Obama
Official Portrait

defendant due process of law, and that those offending provisions could, or could not, be severed without misshaping the law.

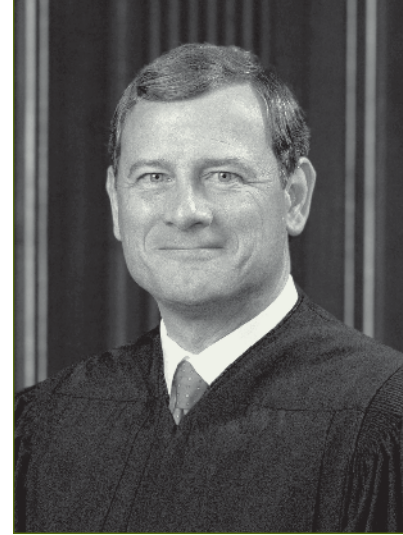
In each case, the court was heatedly divided, with at least two extensive opinions.

In the latter of the cases, *Taylor*, the critical fourth vote to overturn the death penalty, putting an end to New York's death penalty, was actually furnished by one of the dissenters in the earlier cases, on the ground that the Court's prior decision in *La Valle*¹⁹ rendered the death penalty invalid; and while the Legislature could have repaired the statute, it chose not to do so. After *Taylor*, and the tens if not hundreds of millions of dollars New York had spent on the death penalty, I believe the Governor, the Legislature, and the people had enough of the death penalty.

The death penalty saga, from 1983 to 2007, reminds me, by the way, not only of the evolution of the law and the impact of the three branches on one another, but also of the inevitable effect over a period of years of a court of five, or seven or nine dedicated individuals on one another. Let's reserve that meaty subject for another day.

Conclusion

Charles Evans Hughes wisely revealed little of his personal thoughts and emotions during the constitutional crisis that entangled his Court with the other two branches. He did, however, express the view in his later autobiography that "the controversy had the good effect of revealing the strength of public sentiment in support of the independence of the Court.



Chief Justice John G. Roberts, Jr.
Official Portrait

That independence is not a vague, collective attribute; it means the actual independence of the Justices. They are supposed to have shown at the bar or on the bench the learning, integrity and stability which will assure the expert, independent, and conscientious discharge of the supreme duty of maintaining the provisions of the organic law against either executive or legislative departures."²⁰

In other words, whatever their personal views and experiences, and no matter how they came to their position, judges must be sensitive to, and protective of, separation of powers principles in all their ramifications and complexities. Imagine: in just a few sentences Chief Justice Hughes used some form of the word "independent" four times. Having no power over the sword or the purse, clearly the strength of our judiciary lies in the public perception of its independence and integrity. May that ever be so.

Postscript

June 28, 2012: The Obamacare cases are resolved by a deeply divided Court,²¹ Chief Justice Roberts breaching the partisan divide by finding a way to uphold the most controversial provision of the law. I like Dean Simon's words—commenting on three former great Supreme Court Chief Justices who took their colleagues above party politics—that Chief Justice Roberts "may have begun to heed Hughes' advice to project an institutional image of non-partisanship. If he continues to lead the court in that spirit, he may well build his own legacy of greatness."²² 🌿

ENDNOTES

1. Learned Hand, *Tribute to Charles Evans Hughes*, reprinted in 1949 Harvard Law School Yearbook, 9.
2. James F. Simon, *FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle Over the New Deal* (2012).
3. Erwin Chemerinsky, *SCOTUS Tackles Law and Politics of the Health Care Act*, ABA Journal (Mar. 20, 2012, 7:10 AM), http://www.abajournal.com/news/article/chemerinsky_scutus_tackles_lawand_politics_of_the_health_care_act/.
4. Robert Barnes, *Stakes Hard for Court to Ignore*, Wash. Post, Mar. 24, 2012, at A01.
5. 300 U.S. 379 (1937).
6. Why did he switch? *See generally* Edward L. Carter & Edward E. Adams, *Justice Owen J. Roberts on 1937*, 15 Green Bag 2d 375 (Summer 2012).
7. 5 U.S. (1 Cranch) 137 (1803).
8. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
9. *See* William Lasser, *The Political Process*, in *The Oxford Companion to the Supreme Court of the United States* 644, 645 (1992). Inherent power of course includes as well the judicial branch's authority to govern aspects of its administration necessary to assure its proper functioning, most notably the determination of funds adequate to support the courts. You surely appreciate my decision to pass quickly by the court-funding issue. Accepted though judicial independence and the inherent power of review may be, our efforts to obtain reasonable judicial compensation and adequate funding for the New York State courts, whether by negotiation or litigation, were the most miserable times of my entire tenure.
10. Letter at 2, *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649 (5th Cir. 2012) (No. 11-40631), 2012 WL 1130205, at *2.
11. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).
12. 755 N.E.2d 842 (N.Y. 2001).
13. 824 N.E.2d 898 (N.Y. 2004).
14. *Campaign for Fiscal Equity, Inc. v. State of New York*, 861 N.E.2d 50 (N.Y. 2006); *Campaign for Fiscal Equity, Inc. v. State of New York*, 801 N.E.2d 326 (N.Y. 2003); *Campaign for Fiscal Equity, Inc. v. State of New York*, 655 N.E.2d 661 (N.Y. 1995).
15. 855 N.E.2d 1 (N.Y. 2006).
16. *Id.* at 34 (Kaye, C.J., dissenting).
17. 468 N.E.2d 879 (N.Y. 1984).
18. 878 N.E.2d 969 (N.Y. 2007).
19. *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).
20. Charles Evan Hughes, *The Autobiographical Notes of Charles Evans Hughes* 307 (1973); *see also* Charles Evan Hughes, *The Supreme Court of the United States* 235–42 (1928).
21. *Nat'l Fed'n of Indep. Bs. v. Sebelius*, 132 S. Ct. 2566 (2012).
22. James F. Simon, *John G. Roberts and the Leadership of America's Great Chief Justices*, Wash Post, July 16, 2012, http://articles.washingtonpost.com/2012-07-16/national/35487770_1_chief-justice-judicial-commission-judicial-leadership. Simon's three former "greats" are Chief Justices Marshall, Hughes and Warren. Chief Justice Roberts, born in Buffalo, New York, is (by the way) a known admirer of Chief Justice Hughes. *See also* Erwin Chemerinsky, *It's Now the John Roberts Court*, 15 Green Bag 2d 389 (Summer 2012).





RUTGERS V. WADDINGTON



Alexander Hamilton and the Birth Pangs of Judicial Review

Plan of a parcel of ground together with the buildings erected thereon lying between Maiden Lane and John Street in the North Ward of the City of New York surveyed at the Request of Mr. Anthony Rutgers this 27th May 1772 by G. B. L.

DAVID A. WEINSTEIN



It is a widely held view, both among members of the bar and the general public, that the principle of judicial review was established by Justice John Marshall in *Marbury v. Madison*.¹ *Marbury*, however, was not the first time that the courts of the new American Republic confronted the argument that a legislative enactment was in conflict with a state or federal constitutional provision, and was therefore void. One of the first decisions to wrestle

"Plan of a parcel of ground together with the buildings erected thereon...in the North Ward of the City of New York surveyed at the Request of Mr. Anthony Rutgers this 27th May 1772"

Banker plans. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations.

[Note: Henry Dawson reports (see note 21) that the brewery was located on the north side of Maiden Lane, to the east of William Street. This map, in contrast, depicts the brewery as situated on the west side of William Street, on a lot adjacent to the one described by Dawson. Since Dawson is not always accurate, and absent evidence that two breweries existed on Maiden Lane at the time, it seems likely — although not certain — that this image depicts the property at the heart of this case.]

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with such questions after the colonies declared their independence—and the first in which a state statute was challenged as usurping matters properly within federal jurisdiction—was in the New York State case of *Rutgers v. Waddington*.² While the *Rutgers* Court did not ultimately strike down the statute before it, the Court effectively rendered key elements thereof a nullity. Moreover, *Rutgers* holds an outsized place in the evolution of American constitutional law because defendants' counsel, and the primary attorney urging on the Court an expansive notion of judicial power, was Alexander Hamilton, who went on to provide the foundational rationale for judicial review in *The Federalist*. Both Hamilton's role and the unprecedented nature of the question before the Court give *Rutgers* a unique place in American legal history.

Background

The concept that courts have the authority to overturn an act of the legislature did not originate in the United States. It received its first judicial approbation in the 1610 English decision in *Bonham's Case*, in which Lord Coke famously stated that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."³ Views similar to Coke's were pronounced in "a handful" of other cases, but by the time of the Revolution "the principle of judicial review had been decisively rejected in Great Britain."⁴ In particular, Blackstone—the preeminent source of legal authority for Americans of the colonial era⁵—stated unequivocally that a court had no power to overturn the acts of Parliament.⁶

Nonetheless, the notion that an act of Parliament or the Crown could be "unconstitutional" (even in the absence of a written constitution) was clearly one the American patriots understood, and that term was used in their protestations against the various actions of the Crown that gave birth to the revolt against British rule.⁷ Moreover, during the colonial era, private parties could appeal cases to the Privy Council on the ground that they were inconsistent with British Law.⁸ Thus the principle that a local statute must give way when inconsistent with the enactment of a superior sovereign was a part of the colonial legal framework.

During the revolutionary era, states also developed their own written constitutions, which provided a formal governing framework, absent from British law, against which the legality of legislative acts could be judged.⁹ New York's Constitution, enacted in 1777, established a specific mechanism to address bills passed by the Legislature that were "inconsistent with the spirit of this constitution, or with the public good": a joint executive-judicial body called the Council of Revision. The Council had the power to review legislation and return it with objections, which could be overridden by a two-thirds vote of the Legislature.¹⁰ The drafters appear to have intended the Council to serve a function which proponents of judicial review later envisioned for the courts: as a counterweight to the potential radicalism of the popularly elected legislature.¹¹

The first state court experiments in proto-judicial review had their genesis in the anti-loyalist legislation enacted by many states in the waning days of the Revolutionary War.¹² New York State again provides a fitting example. Since New York City served as a loyalist "mecca" during seven years of British occupation, sentiment against those who had sided with the Crown was particularly raw there, and the populist forces that sought vengeance and recompense against wealthy Tory merchants held a strong majority in the Legislature in the early 1780's.¹³ As a result, New York State enacted a lengthy list of harsh acts directed at loyalists that dwarfed those of other states.¹⁴

One such statute was the Trespass Act, which became law on March 17, 1783. The Act provided that any New York resident who "by reason of the Invasion of the Enemy[] left his [or] her . . . Place[] of Abode" would have an action sounding in trespass "against any Person . . . who may have occupied, injured, or destroyed his [or] her . . . Estate . . . within the Power of the Enemy." Pointedly, the legislature provided that no defendant could plead "in justification, any military Order or Command whatever, of the Enemy, for such Occupancy, Injury, Destruction or Receipt."¹⁵

Support for such punitive legislation was not universal. A conservative faction centered around the State's land-holding and mercantile elites, and which included such patriot luminaries as John Jay, believed

that penalizing Loyalists undermined America's commerce by driving propertied men into exile and undermining the new country's relationships with Europe.¹⁶ These views were articulated in detail in a January 1784 letter authored by Hamilton, George Washington's former aide-de-camp, and published under the pen name Phocion. "Phocion" cautioned readers that anti-loyalist acts would cause "a loss of character in Europe," as they would demonstrate that Americans were a people "on whose engagement of course no dependence can be placed." He also argued that these laws trespassed on the authority of Congress, which had "the sole power of making treaties with foreign nations."¹⁷

The Trespass Act had been approved by the Council of Revision, but there is no evidence that the Council was aware at that time of a potential legal obstacle to anti-Tory laws: the Treaty of Paris, which set forth the terms of peace between Great Britain and the United States.¹⁸ The Treaty's specific provisions guaranteed only limited protections for loyalists. Article V provided that Congress would "earnestly recommend" to the States various steps to aid former Tories, including the restoration of confiscated properties, and Article VI barred future confiscations and prosecutions of individuals for their part in the war, or acts that would cause them to "suffer any future Loss or Damage" on account thereof.¹⁹ More broadly, though, the Treaty meant an end to the conflict, and this was implicitly at odds with laws punishing Britain's partisans. Thus, in January 1784 the Council of Revision disapproved two acts directed at the rights of loyalists on the ground that they violated the Treaty and found that one of the bills ran afoul of the "law of nations" as well.²⁰ As to the already-enacted Trespass Act, any conflict between it and the Treaty would need to be tested in court. *Rutgers* provided the vehicle for such a challenge.

The Litigation

The *Rutgers* suit was something of a "test case" for the supporters of the Trespass Act,²¹ and the tale underlying it was deeply sympathetic: an elderly and impoverished patriot widow, Elizabeth Rutgers, sought recompense from two wealthy British merchants, Benjamin Waddington and Evelyn

Pierrepont.²² At the war's outset, Rutgers held title to a brewery on Maiden Lane in Manhattan, but when British troops occupied New York City in 1776 she fled, leaving her property behind. On June 10, 1778, the Commissary General—a civilian employee of the British treasury that took charge of property for use by the British Army²³—licensed the use of the brewery to the two merchants.²⁴ Waddington and Pierrepont then invested substantial funds to repair the brewery, which had been a "shambles" when they took possession.²⁵ On May 1, 1780, they received a license to occupy the property from the British Commander-in-Chief in North America, and were directed by him to pay £150 rent to a British agent, to be used for the support of New York's poor.²⁶ On that basis, they continued to hold and operate the brewery until June 1783, when they were directed by the British Commander to pay rent to Rutgers's agent. Various unsuccessful efforts were made by Rutgers and the merchants to reach a monetary settlement when, two days before the British evacuated New York on November 25, the brewery burned to the ground.²⁷ The property was soon restored to Ms. Waddington, and she commenced the lawsuit.²⁸

Given the importance of the *Rutgers* suit, it attracted the paragons of New York's legal profession. Alexander Hamilton, who had been admitted to the bar less than two years earlier, represented the defendants, and was joined in his representation of the two British subjects by two other veterans of the Continental Army: future United States Supreme Court Justice Brockholst Livingston and future New York Governor Morgan Lewis. Counsel for plaintiff were also of great prominence: Attorney General Egbert Benson (who was Rutgers's nephew, as well as a former member of the conservative faction of the Legislature), future United States Senator John Lawrence, and Revolutionary War veterans William Wilcox and Colonel Robert Troup.²⁹

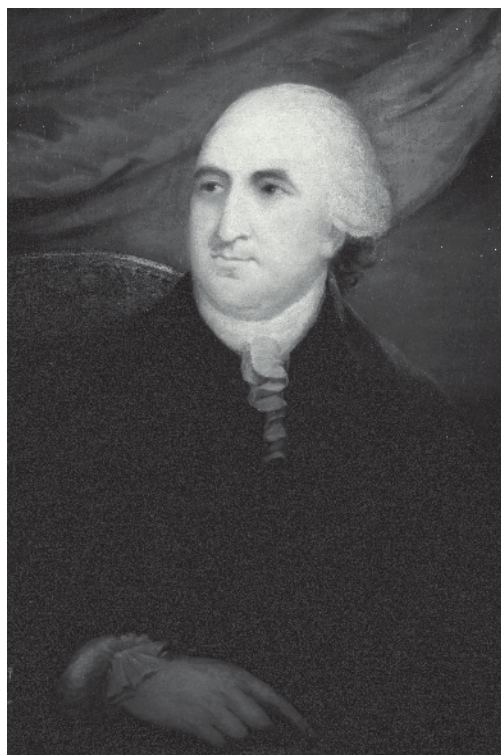
Hamilton's appearance for two Tories was consistent with his long-held views on loyalists; even before the Phocion letters, Hamilton had a history of defending those who maintained fealty to the Crown. When a patriot mob set upon King's College President and ardent Tory Myles Cooper in April 1775, Hamilton (though at this stage a passionate

RUTGERS V. WADDINGTON

revolutionary) stood at the entrance of Cooper's residence and urged the mob to desist.³⁰ This was but one incident in what Hamilton's biographer describes as a "recurring theme" in his career of "the superiority of forgiveness over revolutionary vengeance."³¹ Moreover, New York's anti-Loyalist laws were inimical to Hamilton's support for a strong central government controlling foreign affairs, and his vision of an economy driven by trade and manufacturing demanded the protection of property rights against "mob" rule.³² On a practical level, Hamilton saw the exodus of Tories from New York City as harmful to its fragile economic prospects. Waddington himself was a

perfect exemplar of how an ex-Tory could help return New York City to economic vibrancy; the month before the litigation commenced, he had signed on as a director of the newly created Bank of New York, one of Hamilton's signature projects.³³

The case was to be heard by the Mayor's Court, presided over by New York Mayor James Duane, City Recorder Richard Varick, and five aldermen.³⁴ Duane was a prominent and well-respected figure among the New York revolutionary leadership, having served in the Continental Congress.³⁵ He was also in a



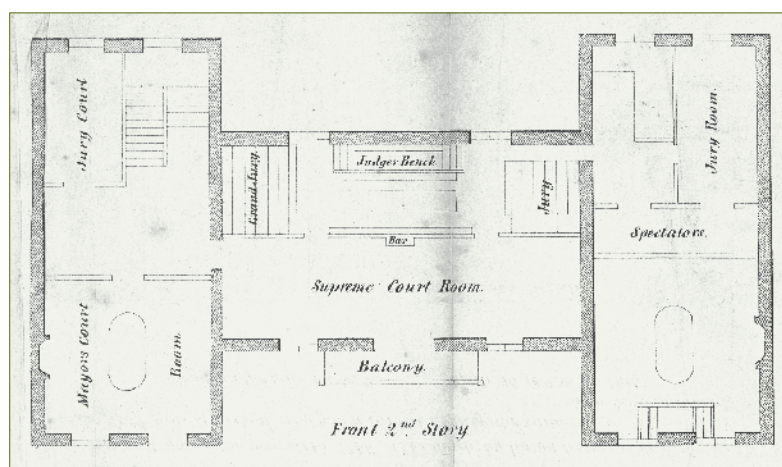
James Duane
Mayor of New York City (1784-1789)
by Robert E. Pine, ca. 1784, Object #1948.54
Collection of The New York Historical Society

unique position to assess the arguments in the case. Defendants' central contention was that the 1777 New York Constitution and the Articles of Confederation were at odds with the Trespass Act, and Duane was connected with all three. He had served on the committee that drafted the New York Constitution,³⁶ participated in writing the Articles of Confederation,³⁷ and was present in the New York State Senate when the Trespass Act was enacted, although the legislative record does not reflect his views on the Act.³⁸

Further, Duane was a large holder of land upstate, and had been associated with the conservative elements of

the Legislature; both he and Varick subscribed to the view that anti-loyalist actions were needlessly depriving New York State of important "men of property."³⁹ At the same time, he was beholden to the anti-loyalist legislature for his position. Days before *Rutgers* was

filed, Duane had been designated Mayor by, and thus served at the pleasure of,⁴⁰ the Council of Appointments. The Council was a body composed of the Governor George Clinton—a staunch supporter of laws disenfranchising Tories—and four senators selected by the State Assembly.⁴¹

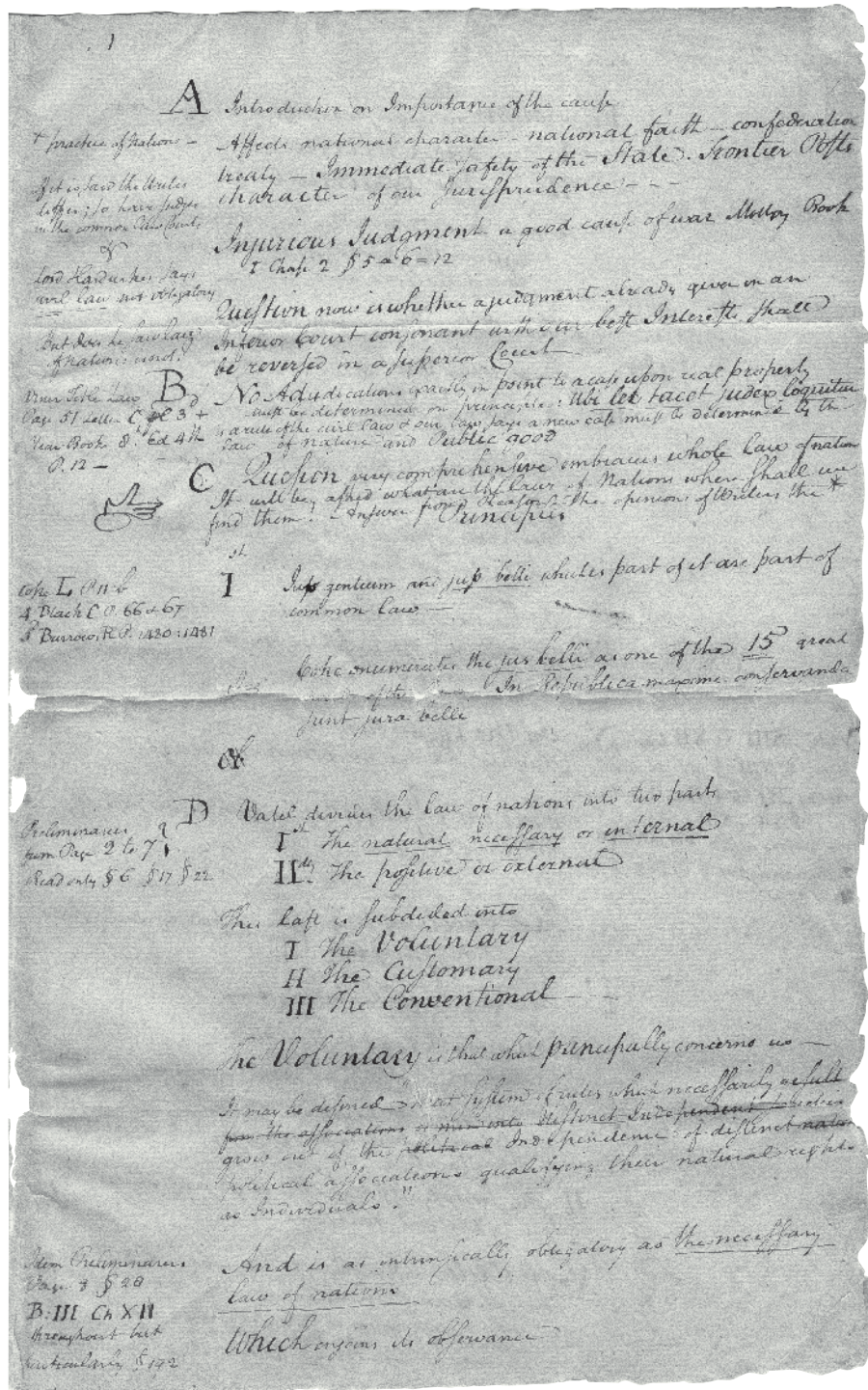


Old City Hall, Plan of the second story showing the Mayor's Court, lower left
1855 Manual of the Corporation of the City of New York
Courtesy of the New York State Library, Manuscripts and Special Collections

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While Duane had extensive experience as a lawyer, in his judicial role he was (like Hamilton as an attorney) a neophyte. On February 24, 1784, Duane and Varick received writs for the first time, and *Rutgers* was among the cases commenced on that day.⁴² Despite his lack of experience, Duane clearly commanded the respect of the parties. Because the case concerned a sum in excess of £20, it could have been removed from the Mayor's Court, yet neither side chose to avail itself of this option.⁴³

The world of the post-colonial legal elite was small and close knit. A 1786 directory listed 35 lawyers in New York City, and 12 times as many prostitutes.⁴⁴ Personal ties among the *Rutgers* attorneys, and between the lawyers and the court, abounded. Hamilton and Troup had been roommates at King's College and thereafter, and Troup was later named, for a time, executor of Hamilton's will.⁴⁵ Hamilton and Varick had been present together at the home of General Benedict Arnold when his treachery was first revealed, while plaintiff's counsel Lawrence conducted the court martial of Arnold's spy, John Andre.⁴⁶ Of particular note were the ties between Hamilton and Duane. In 1780, at Duane's request, Hamilton wrote the then-Congressman a letter articulating his vision for improving the country's governance. The letter set forth in detail Hamilton's support for a strong central government—a "solid coercive union" as he termed it.⁴⁷ Hamilton argued for the "complete sovereignty" of the national government in foreign affairs, including the power of Congress to "mak[e] peace on such conditions as [it]



First page of Hamilton's notes from the case
Special Collections, Hamilton College

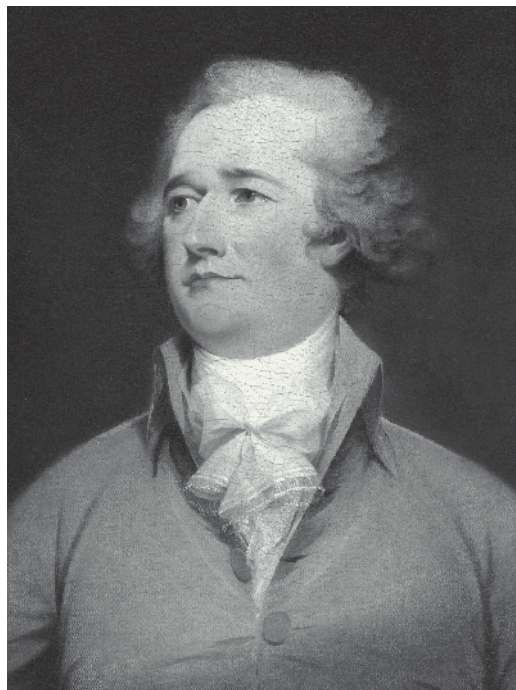
think[s] proper."⁴⁸ Only months before the *Rutgers* litigation commenced, Hamilton also expressed in correspondence with Duane his opposition to anti-Tory

actions, stating that New York had “already lost too large a number of valuable citizens” due to such steps.⁴⁹

Duane had also been something of a professional mentor to Hamilton. When the latter studied law in 1782, Duane made available his extensive Albany library for Hamilton’s use. (Hamilton was further assisted in his legal studies by later *Rutgers* adversary Troup, who resided with Hamilton during this period for that purpose.)⁵⁰

As might be expected from a case involving the State’s top citizens and touching on issues of emotional sensitivity and political import, *Rutgers* attracted great attention. According to an 1866 account, it “excited a degree of interest that no other case in this State ha[d] ever produced.”⁵¹ Argument was heard on June 29, 1784, before “a crowded and attentive auditory,”⁵² in a hall which—to add to the emotional impact—had been “desecrated and defaced by British troops.”⁵³ Unsurprisingly, later accounts indicate that public sympathies lay strongly with the patriot plaintiff, and there was widespread skepticism regarding the defense’s chances. As Hamilton recalled to President Washington years later: “a general opinion was entertained, embracing almost our whole bar, as well as the public, that it was useless to attempt a defense . . .”⁵⁴ After all, the statute explicitly forbade defendants’ only apparent argument: that defendants held the property in compliance with the directives of the occupying power.

Nonetheless, Hamilton constructed a multifaceted attack on the statute, which can be gleaned primarily from Hamilton’s personal notes, the files of the Mayor’s Court having unfortunately been destroyed in an 1858 fire.⁵⁵ The defendants challenged the Trespass



Alexander Hamilton
by John Trumbull, 1792
Courtesy National Gallery of Art, Washington D.C.

Act as inconsistent with several levels of higher authority: the “law of nations,” the peace treaty with England, and the power of the national government to conduct foreign affairs. The first of these arguments—that the Trespass Act was contrary to the “law of nations”—was the legal linchpin of defendants’ case. But how did general principles of international law, drawn from various legal theorists, trump an act of the New York Legislature? For this part of their argument, the defendants relied upon a provision of the New York Constitution of 1777, which declared that the common law was “part of the law of the land.” Since the law of nations was part of the common law, defendants contended, it thereby obtained a

constitutional status. This argument effectively ignored a qualifying phrase in the constitutional text: the common law was “subject to such alterations and provisions as the legislature of this State shall, from time to time, make,”⁵⁶ which seemed (one commentator has noted) to allow “the legislature [to] alter the common law so received [as] it did in the Trespass Act.”⁵⁷

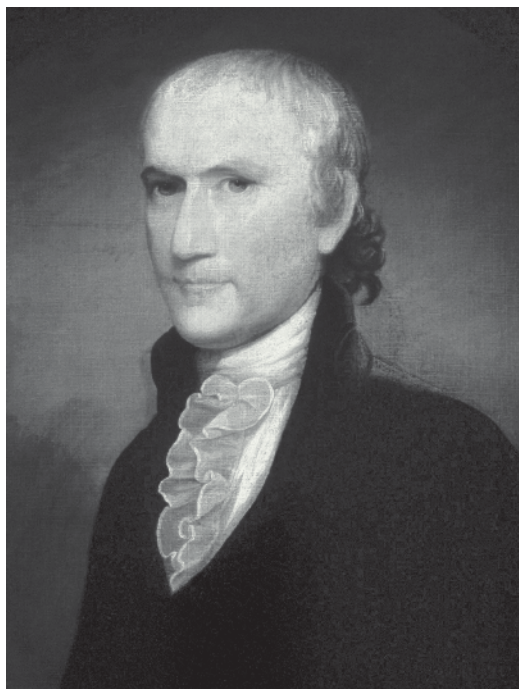
Defendants also argued that, under the law of nations, injuries suffered in relation to a war are forgiven upon its conclusion. Since defendants came into possession of the Maiden Lane brewery when the British military captured the city, any injury that plaintiff suffered from its seizure bore a “relationship” to the war.⁵⁸ Plaintiff objected, contending, for one thing, that British military orders should not be granted such deference because Britain’s cause was unjust.

Hamilton’s rebuttal must have been difficult for many colonists to swallow: the law of nations had no concern for which party was in the wrong in a

conflict, since the combatants acknowledge “no common Judge” by which the question could be decided.⁵⁹ Thus, “[w]hatever arguments may be drawn from the original justice or injustice of the quarrel they must all cease after the treaty of peace; which includes an amnesty for all injuries in the war.”⁶⁰ Such an amnesty, Hamilton contended, was implicit in every peace treaty,⁶¹ which is akin to a contract setting the rights of the parties and their citizens. In that contract, “compensation, recompence, retribution or indemnity . . . whether to the public or to individuals . . . were mutually and reciprocally . . . relinquished.”⁶² It would therefore “be an infringement of the laws of nations to make persons afterwards liable.”⁶³

The claim that the Treaty embraced such an amnesty, however, begged another question: whether, in the absence of anything like the Constitution’s Supremacy Clause in the Articles of Confederation,⁶⁴ the treaty bound the State of New York at all, particularly as the State ultimately refused to ratify it.⁶⁵ Defendants answered this challenge on several levels. First, the United States could only function in the arena of foreign affairs if the national government was paramount. As Hamilton put it: “Our External Sovereignty is only known in the Union. Foreign Nations only recognize it in the Union.”⁶⁶ In essence, defendants thus asserted the existence of an implied Supremacy Clause in the area of international relations, so that the Congressional power to make treaties is “a law Paramount to that of any particular state.”⁶⁷ Once Congress made a treaty, “it would be a breach of the Confederation”—and of Congress’s “constitutional authority”—to violate it.⁶⁸

From there, it was a short leap to a more momentous proposition: a State law that conflicts with the



Egbert Benson
NYS Attorney General (1777-1788)
by Gilbert Stuart, 1794
Courtesy of John D. Gordon, III, private collection

“constitutional authority” of the federal government is “no law”; that is, it is null and void.⁶⁹ (Hamilton supported his contention that a statute could be “adjudged” void, in his notes, by reference to *Bonham’s Case*.⁷⁰) And the State court had the power to make such a finding of unconstitutionality because “[t]he judges of each state must of necessity be judges of the United States,” and must therefore “take notice of the law of Congress as a part of the law of the land.”⁷¹ Since the Articles of Confederation lacked a national judiciary,⁷² only by vesting this power in the state courts could Hamilton posit any meaningful sort of judicial review.

These assertions were extraordinary in a country that had granted only minimal authority to its central government. The defense nonetheless argued that this supreme power was delegated by the States to Congress, relying on the reference in the Declaration of Independence to Congress’s power to make war and peace.⁷³ To rebut the argument that, having approved the Declaration, New York could withdraw from its terms as it wished, Hamilton relied again on the principles of contract law: “It is absurd to say, One of the parties to a contract may at pleasure alter it without the consent of the others.”⁷⁴ Finally, Hamilton argued (in language that betrayed his broader agenda) that if Congress could not bind a state to a treaty of peace because it would interfere with its internal police power, then “the Confederation is the shadow of a shade!”⁷⁵

The defendants’ arguments were suffused with the kind of policy concerns that had long been at the root of the conservative faction’s opposition to anti-loyalist acts, and that were articulated in the Phocion letters. In particular, Hamilton argued the outcome of

the case would impact American foreign relations; it would make “good or ill impressions,” depending on the result,⁷⁶ and could even lead to war in the event New York continued to flout the precepts of international legality.⁷⁷

Finally, Hamilton and his co-counsel contended that, even if the Legislature had the ability to enact legislation contrary to international legal principles, the Trespass Act should not be so construed. Rather, the Court should suppose the framers of the law “wise and honest,” and accordingly construe their intention so as not to violate the Treaty and law of nations.⁷⁸ Another proffered alternative was that the statute did not embrace British subjects, like the two merchants Hamilton represented.⁷⁹

The documents setting forth plaintiff’s arguments have not been preserved, except for a brief pleading. The key points made by Rutgers’ counsel can, however, be found in both an 1855 account based on court records and in the Court’s opinion. Plaintiff asserted that each state was an independent sovereign with the power to pass laws regulating the rights and liabilities of its own citizenry. Such sovereignty was “absolute and beyond control.”⁸⁰ Plaintiff contested the assertion that the compact between the states was unbreakable, asserting that each state could leave the union at any time of its choosing.⁸¹ Plaintiff also noted the Act’s explicit prohibition on defendants’ reliance on military justification.⁸² Finally, plaintiff argued that since the British had been the unjust party to the American War of Independence, they acquired no rights by their conduct in that war.⁸³

While all counsel had the opportunity to speak during the argument, it was the neophyte Hamilton who was the primary advocate for the defense, while Attorney General Benson played this role for the plaintiff.⁸⁴ According to the one available account by an observer of the proceedings (Benson’s law clerk James Kent), each of the advocates rose to the occasion. Livingston, for example, was “copious, fluent, abounding in skillful criticism and beautiful reflections.” As to Hamilton, Kent describes him as having “soared far above all competition The audience listened with rapt admiration to his impassioned eloquence.”⁸⁵ The Court itself seemed to second these impressions in its opinion, praising the “young

gentlemen, just called to the bar, from the active and honorable scenes of a military life, already so distinguished as public speakers.”⁸⁶

The Decision

On August 17, 1784, the Court issued its ruling, followed ten days later by an extensive written decision authored by Duane with the assistance of Varick.⁸⁷ (The aldermen apparently played no role in the decision—a wise exclusion, perhaps, given that one had a pending Trespass Act suit, in which Hamilton appeared for the defense.⁸⁸) The Court’s reasoning and result walked a careful and somewhat tortured line between deference to the Legislature and what it perceived to be the requirements of the “law of nations.”⁸⁹ In the opinion, Duane manifested a clear awareness of the portentous nature of the issues before him. He observed at the outset (with emphasis in the original) that the matter involved “questions, which must affect the *national character*: . . . Questions whose decision will record the spirit of our Courts to prosperity [sic]! Questions which embrace the whole law of nations!”⁹⁰ Cognizant of the political sensitivity of such issues, the Court committed its opinion to writing so that its words would not be “misunderstood or misapplied.”⁹¹

The Court initially rejected plaintiff’s argument that the “customary and voluntary law of nations” did not bind the several states, finding that New York’s Constitution incorporated the common law, of which the law of nations was a “branch.”⁹² Moreover, the Court held that since the United States had joined “the nations of the earth,” compliance with international legal standards had become “an indispensable obligation.”⁹³ Abrogation of such precepts by “a single state, must be contrary to the very nature of the confederacy . . . as well as dangerous to the union itself.”⁹⁴ The Court further accepted defendants’ contention that the power to make war and peace, even under the loose union established by the Articles of Confederation, was the province of the national government, and “no State . . . can alter or abridge, in a single point, the federal articles of the treaty” with Great Britain.⁹⁵ And while the Court conceded that the Act was not repugnant to any particular title of the treaty, it found it to run contrary to the “construc-

tive" amnesty which could be reasoned "from the law of nations to the treaty."⁹⁶

Like defendants' counsel, the Court expressed concern about the harm to the reputation and prospects of the new nation that would be caused by ignoring internationally accepted norms. Duane fretted that "if we should not recognize the law of nations, neither ought the benefit of that law to be extended to us: and it would follow that our *commerce* and our *persons*, in foreign parts, would be unprotected by the great sanctions, which it has enjoined."⁹⁷ In light of these principles, the Court found that "restitution of the . . . rents and issues of houses and lands, which have been *bona fide*, collected by or under the authority of the British Commander, while he held possession of the city, cannot, *according to the law of nations*, be required."⁹⁸

Yet, having walked to the precipice of finding that the Legislature had exceeded its authority, the Court flinched from claiming the power to strike down its acts. Rather, it made the following assertion, seemingly at odds with the remainder of the opinion: "The supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul them. When the main object of such law is clearly expressed, and the intention manifest, the Judges are not at liberty, altho' it appears to them *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government."⁹⁹ Indeed, Duane noted that New York had established a Council of Revision so as to avoid this problem, although the decision of such Council should not "have the force of adjudication."¹⁰⁰

The Court resolved this seeming contradiction by finding that, while the Legislature could act as it wished, repealing the law of nations "could not have been in contemplation" by the Legislature when it passed the Act. If it had desired such a result, it would have said so explicitly, given that it is a matter of "highest national concern."¹⁰¹ Thus, the decision construed the legislative intent behind the Trespass Act as conforming to the Court's construction of the law of nations and, notwithstanding the specific language precluding defendants from raising a defense of military justification, as importing into the statute just

such a defense. As one article summarized the Court's Solomonic reasoning: "While the Mayor's Court did not explicitly claim the power to nullify the statute, that is in effect what it did."¹⁰²

Addressing the specific facts before it, the Court held that from June 1778 through May 1780, when defendants held the brewery by license of the civilian commissary general, the possession was not related to the war, and thus an action for damages was not barred by international law.¹⁰³ From May 1780 through the time defendants surrendered the premises in 1783, however, they held the property by license of the British military commander. That phase of the occupation was related to the war, the Court found, and it denied the damages action for that period as contrary to the law of nations. A jury was convened to determine damages, and it assessed the sum of 791 pounds, 13 shillings and four pence for Rutgers, a sum less than one-tenth the 8,000 pounds she had originally sought.¹⁰⁴

The Aftermath

This remarkably successful outcome for the defendants quickly faced an impassioned backlash. In Duane's words, the ruling "produced the Censure promulgated in the papers," accusing him of trying to "controul the operation of the Legislature."¹⁰⁵ Hamilton himself said, a decade later, that the decision of the Mayor's Court "was the subject of a severe animadversion at a popular meeting in this city as a judiciary encroachment on the legislative authority of the State."¹⁰⁶ Such a meeting did take place as recalled by Hamilton, and a committee was appointed to prepare a public message on the case, whose members included Anthony Rutgers (plaintiff's son) and Melancton Smith.¹⁰⁷ The latter figure, described by one observer as the "life and soul" of the opposition,¹⁰⁸ later served as one of Hamilton's primary foils during the debates over constitutional ratification.¹⁰⁹

The opponents' notice, which was published in the *New York Packet and the American Advertiser*, treated the case as one in which the Court exercised the "power to set aside an Act of the State," protestations to the contrary in Duane's opinion notwithstanding.¹¹⁰ Indeed, the advertisement largely ignored the specifics of the Court's ruling, and instead trained its

fire at the principle of judicial review:

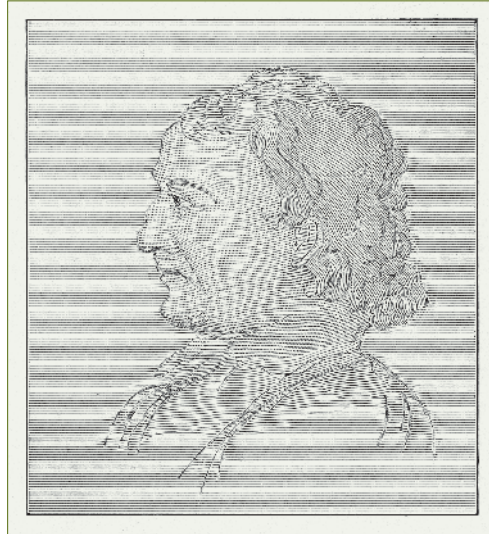
*"That there should be a power vested in Courts of Judicature, whereby they might control the supreme Legislative power we think is absurd in itself. Such power in Courts would be destructive of liberty, and remove all security of property. The design of Courts of Justice . . . is to declare laws, not to alter them."*¹¹¹

These protests were soon followed by proposals for legislative action and calls for the judges' removal, a pattern repeated elsewhere when early American courts found legislative actions invalid.¹¹²

Ultimately, the Legislature adopted a resolution noting the Act had specifically barred a plea of justification based on military occupation, and finding the judgment of the Mayor's Court to be "in its tendency, subversive of all law and good order, and lead[ing] directly to anarchy and confusion." The resolution also accused the Court of acting "in direct violation of a plain and known law of the State," and expressed concern that other courts would follow suit and "end all our dear-bought rights and privileges" so that "Legislatures become useless."¹¹³ The Legislature thus delivered, as one letter to the press characterized it, a "rap o' the knuckles" to the *Rutgers* judges.¹¹⁴

The resolution, and a planned appeal by Rutgers, had an impact: the defendants settled the case, albeit on more favorable terms than Rutgers had first sought. Years later, Hamilton explained the decision to settle as follows: "according to the opinion of our bar, a defense under a military order was desperate, and it was believed that a majority of our Supreme-Court bench would overrule the plea."¹¹⁵

Duane also appears to have been shaken by the reaction to his decision. In a letter to General Washington, the Mayor wrote: "it is to be deplored that foederal attachment, and a sense of national



Melancton Smith
Prominent citizen & member of committee
opposing the decision
Courtesy New York Public Library

obligation, continue to give place to vain prejudices in favour of the Independance and Sovereignty of the individual States. I have endeavour . . . to inculcate more enlarged and liberal principles; but the Spirit of the times seems opposed to My feeble efforts, and I have lost credit with our Assembly, tho' I hope not with the world."¹¹⁶ Hamilton, for his part, was undeterred by the uproar. He represented Tories in forty four additional Trespass Act suits and in numerous other cases.¹¹⁷ He took this path despite constant calumnies in the press, which condemned him for representing "the most abandoned . . . scoundrels in the universe."¹¹⁸

Hamilton never again, though, obtained a decision quite like *Rutgers*, construing the Act as allowing a defense of military justification.¹¹⁹

It is impossible to know how widespread was sentiment against the opinion, but there are indications that opposition to the decision was not one-sided. For one thing, a stronger legislative resolution that called for the appointment of a new mayor and recorder who would "govern themselves by the known laws of the land" was defeated 31-9.¹²⁰ And prominent federalists, including Jay and General Washington himself, expressed support for the Mayor's ruling.¹²¹

More importantly, as pressure from Congress against the anti-Tory laws grew, and as the political pendulum in New York State swung back towards the conservative forces, the arguments articulated by Hamilton gained more purchase. Congressional sentiment against these statutes was driven in large part by growing British concerns. Former loyalists campaigned against such legislation with members of Parliament, publishing a special collection of New York statutes in 1786 to illustrate the problem.¹²² When John Jay, as Secretary for Foreign Affairs for the Continental Congress, reported on British violations

RUTGERS V. WADDINGTON

of the Treaty of Paris, he concluded that the United States had violated the treaty *first* through the enactment of State anti-loyalist statutes, among them the Trespass Act.¹²³ Jay stated that the Act was “a direct violation of the Treaty of Peace, as well as of the acknowledged law of nations.”¹²⁴ His report was followed by a letter from Congress to the state governors urging them to repeal all statutes violating the peace treaty and to grant authority to address conflicts between the treaty and state law in the courts.¹²⁵

New York State, whose legislature was captured by federalist forces in 1786, began to take these steps even in advance of Congress’s letter. Hamilton, who was among the incoming federalist Assemblymen, personally moved a successful resolution to repeal the relevant portion of the Trespass Act on April 4, 1787.¹²⁶ He followed this success by obtaining legislative approval for a bill repealing all New York statutes inconsistent with the Peace Treaty. In introducing the bill, Hamilton noted (perhaps with Duane in mind) that such passage would avoid imposing on judges the dilemma “either of infringing the treaty to enforce the particular laws of the state, or to *explain away the laws of the state to give effect to the treaty*.”¹²⁷ Presiding over the Assembly while the anti-loyalist program was undone was Richard Varick, who had become the body’s Speaker.¹²⁸

Even after the Trespass Act was repealed, its enactment continued to bedevil United States-British relations, and the *Rutgers* decision suddenly became a diplomatic tool with which the United States could rebut the Crown’s attacks. In 1792, British Minister Plenipotentiary to the United States George Hammond cited the Trespass Act among numerous state statutes that he claimed to be in violation of treaty obligations, and disparaged *Rutgers* as evidencing inadequate judicial attention to the rights of loyalists against such legislative depredations.¹²⁹ Secretary of State Jefferson (after receiving input on the matter from his cabinet colleague Hamilton), responded with a detailed exposition of the case, noting the following: “The very case of *Rutgers v. Waddington* which is a subject of complaint in your letter, is a proof that the courts consider the treaty as paramount to the laws of the states Waddington pleaded the treaty, and the court declared the treaty a justifica-

To the PEOPLE of the STATE of NEW-YORK.
Fellow Citizens,

IT is the happiness of people who live in a free government, that they may upon every occasion, when they conceive their rights in danger, from whatever cause, meet, consult, and deliberate upon the proper mode of relief, and address their fellow citizens; pointing out the dangers which they apprehend, and inviting them to concur in measures for their removal.

In the exercise of this privilege, a number of the free citizens of New-York did assemble, and having appointed us their committee, gave it in charge to us to address you on the subject of a late decision of the Mayor’s court, in this city, on the law commonly called the trespass law, in a case brought to issue in that court between Rutgers and Waddington.

This action was founded on a law of this state, entitled, ‘An act for granting more effectual relief in cases of certain trespasses,’ passed in March, 1783; by which it is declared, that it shall and may be lawful for any person or persons who are or were inhabitants of this state, and who by reason of the invasion of the enemy left his, her or their place or places of abode, &c. to bring an action of trespass against any person or persons who may have occupied, injured or destroyed, his, her or their estate, either real or personal within the power of the enemy. And that no defendant or defendants shall be admitted to plead in justification; any military order or command whatsoever for such occupancy.

The plaintiff charged the defendant for the use and occupancy of a certain brew-house and malt-house, in the city of New-York, the property of the plaintiff.

To this charge the defendant plead, that the premises in question were occupied part of the time under the British army, who took possession thereof by virtue of a permission from the commander in chief of said army, and the remainder of the time by virtue of license and permission granted by the said commander in chief to a certain person, under whom the defendant held; which licenses and permissions the said commander had authority to give by the law of nations.

The defendant further plead, that by the treaty of peace, all right, claim, &c. which either of the contracting parties, and the subjects and citizens of either of them might otherwise have to any compensation, &c. whatsoever, for or by reason of any injury or damage, whether to the public or individuals which either of the said contracting parties, and the subjects or citizens of either, might have done, or caused to be done to the other, in consequence of, or in anywise relating to the war between them, from the commencement to the determination thereof, were mutually and reciprocally, virtually and effectually relinquished.

Notice opposing the decision
New York Packet, and the American Advertiser
November 4, 1784

Courtesy, American Antiquarian Society

tion, in opposition to the law of the state, for that portion of the time authorized by the commanding officer, his authority being competent & gave judgment for that part, in favor of the defendant.”¹³⁰ Thus, a decision once reviled as an intrusion by the courts on the prerogative of the Legislature was now proof of the United States’ adherence to international agreements.

The most significant legacy of *Rutgers v. Waddington*, though, was as a building block in the intellectual foundation of judicial review and federal supremacy. Indeed, Hamilton’s subsequent defense of these principles in *The Federalist* echoed both the arguments he crafted for and his general experience in the *Rutgers* litigation. In Federalist No. 22, Hamilton set forth the rationale for state subservience to the federal government in the making of treaties. He noted that under the Articles of Confederation, such treaties were “liable to the infractions of thirteen different legislatures,” and he asked (as he had both as Phocion and as Waddington’s counsel): “Is it possible that foreign nations can either respect or confide in such a government?”¹³¹

In Federalist No. 78, Hamilton set forth his defense of judicial review, and posited the importance of such review in protecting minority views. Courts have the duty, Hamilton argued, to “declare all acts contrary to the manifest tenor of the Constitution void.”¹³² In this way, judges can protect the Constitution against the “occasional ill humours of society.” Such “ill humours,” if not checked, can create “serious oppressions of the minor party in the community.”¹³³ To fulfill their role as a barrier against dangerous majoritarian impulses, judges must be given life tenure, so they are willing to “hazard the displeasure” of their appointing authority.¹³⁴ It takes no great leap of imagination to see the post-war legislative acts against loyalists, and the pressure placed on Duane for ruling in their favor, as data points underlying Hamilton’s argument.

The success of Hamilton’s arguments is evidenced by the degree to which they soon became almost commonplace. With the Supremacy Clause

of the Constitution in place, the Supreme Court struck down a Virginia statute limiting the rights of British creditors in 1796, on the ground that it violated the Treaty of Paris.¹³⁵ And in an ironic coda to the *Rutgers* litigation, a lawsuit once again involving Benjamin Waddington—more than thirty years after his original legal controversy—demonstrated the sea change in Congressional power over war and peace. Waddington, whose defense in *Rutgers* was premised in significant part on the fact that he was a British subject, had since become an American citizen. He was sued by traders allegedly owed funds from transactions with his brother Henry, whom they claimed was Benjamin’s partner. Since the business dealings out of which the debts were incurred took place in London during the War of 1812, the Court for the Correction of Errors of New York found them barred by the “law of nations,” which prohibited such intercourse with the enemy. Crucial to this decision was the principle that the United States was a single, unified polity in matters of foreign affairs. Thus, once Congress declared war, war was also “declared by the united will of the people of the United States, and there can be no doubt of its being a moral, as well as civil duty, in every individual to obey the law.”¹³⁶

This pronouncement in the second Waddington litigation reflects the transition of the United States in the years since the first, from disparate collection of quasi-independent states under the Articles of Confederation to a single nation capable of adopting coherent national policy. In so many of the steps in this transition—from the establishment of a national bank to the creation of a standing army—it was Alexander Hamilton who took the lead, often amidst great controversy. So too, in the arguments he crafted in *Rutgers*, Hamilton made the first steps, slow and halting as they were, towards establishing the intellectual foundation for federal legal supremacy enforced by judicial review. In this way, his representation of two wealthy British merchants reflected one further contribution by Hamilton towards the creation of the new American nation. 🌿

ENDNOTES

1. See, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 1 ("The concept of judicial review of the constitutionality of state and federal statutes by the Supreme Court is generally rested upon the epic decision in *Marbury v. Madison*."); Matthew Harrington, *Judicial Review Before John Marshall*, 72 Geo. Wash. L. Rev. 51, 51 (2003) ("The federal courts' power to review acts of the legislative or executive branches for conformity with the Constitution is commonly believed to have its origins in Chief Justice John Marshall's opinion in *Marbury v. Madison*."); Letter from Attorney General Eric Holder to Fifth Circuit at 1, *Physician Hosp. of Am. v. Sebelius*, 691 F.3d 649 (5th Cir. 2012) (No. 11-40631), 2012 WL 1130205, at *1 ("The power of the courts to review the constitutionality of legislation is beyond dispute The Supreme Court resolved this question in *Marbury v. Madison*").
2. Scholars have identified seven cases in the revolutionary era (i.e., prior to ratification of the Constitution) in which there is plausible evidence that one of the parties sought to invalidate a statute. See William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455, 473 (2005). Two of these state court decisions predate *Rutgers*, and arguably can claim the title of the first to consider a constitutional challenge to a statute. In *Holmes v. Watson* (1780), the New Jersey Supreme Court invalidated a statute allowing for seizure of loyalist property. The record indicates that the court found the law's provision that cases heard thereunder must be decided by a jury of six men contravened the right to a trial by jury, but there is no extant written opinion. Treanor, *supra*, at 474; Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 Chi.-Kent L. Rev. 825, 848 (2006), available as working paper at http://lsr.nellco.org/nyu_plltwp/36/. In the 1782 Case of the Prisoners, *Commonwealth v. Caton* (4 Call.), the Virginia Court of Appeals considered a challenge to Virginia's treason statute on the ground that it conflicted with the State Constitution's pardon clause. Two judges upheld the challenge—one on uncertain grounds and one holding the statute unconstitutional. Six ruled against it, with one explicitly recognizing the power of judicial review, and one stating that such power did not exist. See Treanor, *supra*, at 489–96.
3. *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (1610).
4. Treanor, *supra* note 2, at 468–69. Coke himself appears to have retreated from the notion that judges could overturn parliamentary acts, if *Bonham's Case* actually reflected his support for this principle in the first instance. See Harrington, *supra* note 1, at 60 n.38.
5. "It is impossible to overemphasize the impact of Blackstone on legal education in America. After 1770 every American lawyer . . . began his study of legal and political institutions with the *Commentaries*." Robert Cover, *Justice Accused: Antislavery and the Judicial Process* 16 (1975); see also 1 *The Law Practice of Alexander Hamilton: Documents and Commentary* 284 (Julius Goebel, Jr. ed., 1964) [hereinafter "LPAH"] ("The almost instant prestige that attached to the *Commentaries* led to the abandonment of *Dr. Bonham's Case* in the war of pamphlets, speeches and resolves").
6. William Blackstone, 1 *Commentaries on the Laws of England* 90 (2d ed. 1872) ("[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it.").
7. E.g., *Declaration and Resolves of the First Continental Congress*, October 14, 1774, available at http://avalon.law.yale.edu/18th_century/resolves.asp ("All which statutes are impolitick, unjust, and cruel, as well as unconstitutional").
8. Treanor, *supra* note 2, at 468 n.45.
9. Harrington, *supra* note 1, at 69.
10. N.Y. Const. of 1777, art. III, available at <http://nhinet.org/ccs/docs/ny-1777.htm>; Walter Stahr, *John Jay 77* (2005). Specifically, the Council was composed of the governor, the chancellor, and the judges of the supreme court. Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York 1760–1790*, at 168 (1981).
11. Countryman, *supra* note 10, at 169 ("By creating an elaborate structure in which public action could be slowed down or halted by the assembly, the senate or the council of revision, [the 1777 constitution] tried to guarantee that there would be no direct equation between popular desire and what the government did.").
12. See Hulsebosch, *supra* note 2, at 826 ("[T]he reaction of some lawyers and judges against the antiloyalist legislation passed in the states during and just after the Revolution—created the occasion and inspired the justifications for the earliest examples in American courts of what is now called judicial review"); Treanor, *supra* note 2, at 497 ("One might argue that judicial review thus emerges, in part, to protect groups disadvantaged in the political process: the loyalists and creditors.").
13. See Matthew Davis, *Memoirs of Aaron Burr* (1836), available at <http://www.gutenberg.org/ebooks/7852>; Jennifer E. Steenshorne, *Evacuation Day*, N.Y. Archives, Fall 2010, at 10. Davis labels the populists "violent whigs."



14. Countryman, *supra* note 10, at 238–39; *see also* Hulsebosch, *supra* note 2, at 836 (anti-loyalist program in New York was “more extensive than in other states but not unusual in kind”).
15. Session Laws, 1783, Chapter 31.
16. Countryman summarizes this view as follows: “The persecution of merchant royalists had to end, for it put credit in jeopardy; it involved irregular taxation and even the seizure of the merchants’ property; it presented the danger that they would take their talents, connections and capital elsewhere; and by violating the treaty of 1783, it destroyed the international climate of confidence on which commercial prosperity had to rest.” Countryman, *supra* note 10, at 254. Jay wrote to then-Attorney General Egbert Benson (who later defended anti-loyalist legislation as plaintiff’s counsel in *Rutgers*) that “your irregular and violent popular proceedings and resolutions against the [T]ories hurt us in Europe.” *See* Hulsebosch, *supra* note 2, at 839.
17. Letter from Phocion to the Considerate Citizens of New York on the Politics of the Day (1784), available at http://archive.org/details/cihm_57335.
18. *See* LPAH, *supra* note 5, at 288 (analyzing whether treaty could have arrived in New York capital of Kingston before Council acted; “of this there is no evidence”).
19. Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, available at http://avalon.law.yale.edu/18th_century/paris.asp.
20. Alfred B. Street, *The Council of Revision of the State of New York: Its History, A History of the Courts with which its Members were Connected; Biographical Sketches of Its Members and its Vetoes* 246–49 (1859). The first, which deemed all residents of the State that had supported the British to be aliens, was rejected in part “[b]ecause it contradicts both the spirit and the letter of the provisional treaty with Great Britain” and because “by the law of nations, alien friends may possess property.” *Id.* at 247. The second, which restricted the ability of loyalists to collect debts, was found to “militate[] against the article of the treaty with Great Britain which stipulates for the just payment of debts on either side.” *Id.* at 248.
21. Henry B. Dawson, Introduction to *The Case of Elizabeth Rutgers versus Joshua Waddington: Determined in the Mayor’s Court, in the City of New York, August 7, 1786*, at xvi (1866); LPAH, *supra* note 5, at 282. Goebel questions the overall accuracy of information presented by Dawson. LPAH, *supra* note 5, at 289 n.17. For one thing, the title of the book misstates the date of the Court’s decision by two years.
22. In the Court’s opinion in *Rutgers*, the defendants are referred to as “subjects of the King of Great Britain” (e.g., Opinion at 11). Given that New York City had been under British control until just prior to the suit’s commencement, it is unclear how a subject of Britain residing in New York was distinguished from a citizen of the United States.
23. Treanor, *supra* note 2, at 480. Dawson, however, refers to the “Commissary General of the Army.” *See* Dawson, *supra* note 21, at xii.
24. Dawson, *supra* note 21, at xii.
25. LPAH, *supra* note 5, at 289–90.
26. *Id.* at 290.
27. *Id.* at 290, 318 (Statement of Benjamin Waddington).
28. Dawson, *supra* note 21, at xii–xiii.
29. LPAH, *supra* n.5, at 293 nn. 31–32.
30. Ron Chernow, *Alexander Hamilton* 64 (2004).
31. *Id.*
32. When Hamilton served in Congress in 1782, he had helped to draw up the resolution urging states to adhere to the preliminary terms of the treaty with Britain. Hulsebosch, *supra* note 2, at 840–41.
33. Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898*, at 277 (1999).
34. Dawson, *supra* note 21, at xvii.
35. *See generally* Edward P. Alexander, *A Revolutionary Conservative: James Duane of New York* (1966).
36. Stahr, *supra* note 10, at 74.
37. Alexander, *supra* note 35, at 129; LPAH, *supra* note 5, at 307 n.67.
38. Alexander, *supra* note 35, at 161.
39. “[B]oth Duane and Varick were gentlemen who did not wish to see Tory men of property—oftentimes their personal acquaintances and potential political allies against the lower classes—frightened away from New York.” *Id.* at 164.
40. On the power of the Council to remove its appointees, *see* Stahr, *supra* note 10, at 350.
41. Countryman, *supra* note 10, at 168, 237; Stahr, *supra* note 10, at 159. On Clinton’s views on Tories, *see* Alexander, *supra* note 35, at 202; Countryman, *supra* note 10, at 235–36.
42. *See* Charles P. Daly, *Historical Sketch of the Judicial Tribunals of New York From 1623 to 1846*, at 58–60 (1855). It is not known whether the Mayor’s Court met during the period of the Revolutionary War, as its records were removed from the State by departing loyalists. *Id.* at 54, 58; *see also* LPAH, *supra* note 5, at 315.
43. Daly, *supra* note 42, at 60; *see also* Alexander, *supra* note 35, at 262 (“[S]uch was the reputation of Duane and Varick that transfers were rarely made.”).
44. *See* Richard Brookhiser, *Alexander Hamilton: American* 56 (1999). In the words of Chernow, this coterie of professionals was “constantly thrown together in and out of

- court. Much of the time they rode the circuit together, often accompanied by the judge, enduring long journeys in crude stagecoaches that jolted along bumpy upstate roads. They stayed in crowded, smoky inns and often had to share beds with one another, creating a camaraderie that survived many political battles." Chernow, *supra* note 30, at 188.
45. Indeed, while at King's College, they shared the same bed. Chernow, *supra* note 30, at 53; *see also id.* at 491–92 (on Troup's role as executor).
 46. *Id.* at 141; LPAH, *supra* note 5, at 292 n.29.
 47. Letter from Alexander Hamilton to James Duane (September 3, 1780), *available at* <http://teachingamericanhistory.org/library/index.asp?document=991>.
 48. *Id.*; *see also* Chernow, *supra* note 30, at 138–39.
 49. Countryman, *supra* note 10, at 255 (citing Letter of Hamilton to Duane, August 5, 1783).
 50. *See* Chernow, *supra* note 30, at 168–69.
 51. Dawson, *supra* note 21, at xvi–xvii; *see also* LPAH, *supra* note 5, at 291 ("Of all the cases brought under the Trespass Act, [Rutgers] caused the greatest excitement.").
 52. Dawson, *supra* note 21, at xvii.
 53. Daly, *supra* note 42, at 61.
 54. Remarks on the Treaty of Amity, Commerce, and Navigation, Made Between the United States and Great Britain (July 5, 1795), in 5 *The Works of Alexander Hamilton* 151 (Henry Cabot Lodge ed., Fed. Ed. 1904), *available at* http://files.libertyfund.org/files/1382/0249-05_Bk.pdf.
 55. Dawson, *supra* note 21, at xviii.
 56. The specific language of the 1777 Constitution in this regard was as follows: "And this convention doth further . . . declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same." N.Y. Const. of 1777, art. XXXV.
 57. Hulsebosch, *supra* note 2, at 846; *see also* Treanor, *supra* note 2, at 481 (noting that it was a "necessary assumption" of defendants' arguments that the Trespass Act did not constitute an "alteration" of the common law permissible under the State constitution, but one not set forth in the surviving briefs).
 58. LPAH, *supra* note 5, at 376–77 (Brief No. 5). LPAH includes six separate "briefs" written by Hamilton for the *Rutgers* litigation. These are undated sets of notes and drafts, rather than formal legal submissions. *See id.* at 334.
 59. *Id.* at 341 (Brief No. 2).
 60. *Id.* at 344 (Brief No. 2).
 61. *Id.* at 356 (Brief No. 4) ("Every treaty of Peace includes an *Amnesty express or virtual*."); *id.* at 361 (Brief No. 5).
 62. *Id.* at 327–28 (Defendants' Plea).
 63. *Id.* at 344 (Brief No. 2).
 64. *Id.* at 296.
 65. *See* Hulsebosch, *supra* note 2, at 838 ("Both houses of the New York state legislature refused to ratify the Peace Treaty because, they claimed, Britain had violated the law of nations during the war.").
 66. LPAH, *supra* note 5, at 374 (Brief No. 6). At times, Hamilton seemed to argue for even broader federal supremacy, under which "the law of each state must adopt the laws of Congress." *Id.* at 351 (Brief No. 3). He drew a distinction, though, between "local laws" which a state may enact "in relation to its own Citizens" and those "in relation to foreigners," as to which "those of United States must prevail." *Id.*
 67. *Id.* at 377 (Brief No. 6).
 68. *Id.* at 350 (Brief No. 3).
 69. *Id.* at 380 (Brief No. 6) (emphasis in original).
 70. *Id.* at 358 (Brief No. 6).
 71. *Id.*
 72. *See The Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1150–51 & n.2 (2d Cir. 1988). The only permanent court created under the Articles was for the adjudication of appeals from state court prize cases, arising under admiralty jurisdiction. *Id.*
 73. *Id.* at 374 (Brief No. 6); *see also id.* at 378 ("Each State has delegated all power of this kind to Congress.").
 74. *Id.* at 379 (Brief No. 6); *see also id.* at 351 (Brief No. 3).
 75. *Id.* at 373 (Brief No. 6).
 76. *Id.* at 339 (Brief No. 2).
 77. *Id.* at 345 (Brief No. 2).
 78. *Id.* at 357 (Brief No. 4); *see also id.* at 360 (Brief No. 5) ("[I]t ought not easily if at all be presumed that the Legislature could not [sic] mean to contravene the treaty."); *id.* at 382 (Brief No. 6) ("[C]an we suppose all this [violation of law of nations, Confederation and Treaty] to have been intended by the Legislature? The Answer plainly is THE LAW cannot suppose it.").
 79. *Id.* at 359 (Brief No. 4); *id.* at 388 (Brief No. 6).
 80. Daly, *supra* note 42, at 61.
 81. *Id.* at 62.
 82. LPAH, *supra* note 5, at 329 (Plaintiff's Replication and Demurrer).
 83. Opinion at 29–30. Citations to the Court's opinion are from Dawson, *supra* note 21, which can be found at www.archive.org. The opinion uses the "long s" (f), which for ease of understanding is replaced here with the standard "s."

84. Daly, *supra* note 42, at 61.
85. LPAH, *supra* note 5, at 302 n.61 states that this quote refers to an argument in a different Trespass Act case. Other authors, however, attach this description to Hamilton's argument in *Rutgers*. See Brookhiser, *supra* note 44, at 58.
86. Opinion at 5. The statement could also refer to Livingston, Troup and Wilcox.
87. Alexander, *supra* note 35, at 163. Duane wrote the aldermen on August 14, telling them that they could review the case materials in his office. Three days later, he issued his judgment, with the opinion following ten days later. See LPAH, *supra* note 5, at 306. For evidence that Duane sought to "ensure that he alone would write the court's opinion," see Philip Hamburger, *Law and Judicial Duty* 348 n.42 (2008).
88. LPAH, *supra* note 5, at 301.
89. Duane's biographer calls the decision a "political compromise" in which the Court "straddled the issue as best it could." Alexander, *supra* note 35, at 162–63.
90. Opinion at 4.
91. *Id.* at 5.
92. *Id.* at 23.
93. *Id.* at 21.
94. *Id.* at 29.
95. *Id.* at 38; see also *id.* at 28 ("It seems evident that *abroad* [the states] can only be known in their federal capacity.") (emphasis in original).
96. *Id.* at 44.
97. *Id.* at 23–24 (emphasis in original).
98. *Id.* at 35 (emphasis in original).
99. *Id.* at 41 (emphasis in original).
100. *Id.* at 42–43.
101. *Id.* at 44.
102. Hulsebosch, *supra* note 2, at 847.
103. See Opinion at 20 (claim that possession with permission of the Commissary-General "had any relation to the war . . . is altogether without foundation") (emphasis in original); Opinion at 37 ("[T]he term for which the tenements were held by the permission of the Commissary General can, on no construction, *have a relation to the war* . . .") (emphasis in original).
104. Dawson, *supra* note 21, at xxiv; LPAH, *supra* note 5, at 310–11.
105. Letter from James Duane to George Washington (Dec. 16, 1784), available at http://www.familytales.org/db-Display.php?id=ltr_jad4300.
106. Camillus Defense of Mr. Jay's Treaty from *The Argus* No. IV ("Camillus No. IV"), Lodge, *supra* note 54.
107. Dawson, *supra* note 21, at xxiv. Dawson says the meeting took place on September 13, 1784. He also states, however, that the advertisement produced by the committee created by the meeting was published on September 6. *Id.*
108. Davis, *supra* note 13.
109. See Chernow, *supra* note 30, at 263. The primary anti-federalist critique of judicial review, set forth in Letters of Brutus XI, may—according to some theories—have been authored by Smith. Treanor, *supra* note 2, at 470 n.58.
110. Dawson, *supra* note 21, at xxix.
111. *Id.* at xxxiii.
112. See Harrington, *supra* note 1, at 52 (early exercise of judicial review "usually ensured the start of impeachment proceedings"); Hulsebosch, *supra* note 2, at 865 (noting "legislative backlash" to efforts at early judicial review in Virginia, New Jersey, New York, Rhode Island, North Carolina and New Hampshire).
113. Quoted in Dawson, *supra* note 21, at xlv. The vote on the final resolution was 25–15.
114. Hamburger, *supra* note 87, at 357 (quoting Letter to Mr. Holt, N.Y. J. & State Gazetteer, Nov. 18, 1784).
115. Camillus No. IV, *supra* note 106; see also Dawson, *supra* note 21, at xlv ("[I]t is said that Mr. Waddington, alarmed at these manifestations [i.e., the legislative resolution], and at the threatened Appeal and Writ of Error, soon after compromised with Mrs. Rutgers."). LPAH says that the amount of the settlement is unknown, but probably closer to the jury's award of £ 791 than the £ 8,000 sought by plaintiff. LPAH, *supra* note 5, at 311.
116. Duane, *supra* note 105.
117. LPAH, *supra* note 5, at 419.
118. Chernow, *supra* note 30, at 199.
119. *Id.*; Camillus IV, *supra* note 106. A number of these suits were pending at the time the decision was issued in *Rutgers*. Several likely settled, while the result of many others is unknown. See, e.g., LPAH, *supra* note 5, at 426, 448, 454, 464.
120. Dawson, *supra* note 21, at xlv; see also Davis, *supra* note 13 (noting party line split in opinions on the case). In contrast, when a Rhode Island court ruled a statute unconstitutional in the contemporaneous case of *Trevett v. Weeden*, the Legislature summoned the judges for an explanation, and replaced four of them. Treanor, *supra* note 2, at 478.
121. See Duane, *supra* note 105 (citing Jay's approval); Letter from George Washington to James Duane (Apr. 10, 1785) ("[R]eason seems very much in favor of the opinion . . . and my judgment yields a hearty assent to it.").
122. See Hulsebosch, *supra* note 2, at 834 & n.32.

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123. See Stahr, *supra* note 10, at 201–06.
124. 31 *Journals of the Continental Congress, 1774–1789*, at 857 (John C. Fitzpatrick ed., 1934), available at <http://memory.loc.gov/ammem/amlaw/lwjcLink.html>; see also Stahr, *supra* note 10, at 204.
125. Office for Foreign Affairs, Documents from the Continental Congress and the Constitutional Convention, 1774–1789 (Apr. 6, 1787), available at <http://hdl.loc.gov/loc.rbc/bdsdcc.21601>.
126. Camillus No. IV, *supra* note 106; Hulsebosch, *supra* note 2, at 858.
127. Hulsebosch, *supra* note 2, at 858.
128. Countryman, *supra* note 10, at 267 (describing tenth legislative session’s repeal of Trespass Act); see also *id.* at 271 (Varick Assembly Speaker for 10th Legislative session). The controversy over *Rutgers* in New York State may not have ended here, however. When New York ratified the United States Constitution on July 26, 1788, it added an explanatory amendment stating that “no treaty is to be construed so to operate as to alter the Constitution of any state.” New York (State). Secretary of State. Engrossed copy of the United States Constitution ratified by the Convention of New York State, 1788. (NYS Archives); see also Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 126 (1996). Rakove posits two possible “considerations” behind this particular amendment: to forestall further decisions like that in *Rutgers*, or to protect the State’s planned purchase of land from the Iroquois. Rakove, *supra*, at 389–90 n.87.
129. Letter of Hammond to Jefferson, March 5, 1792. Hulsebosch cites Hammond’s letter as evidence that “[d]iplomats in London had received news of a decision in the New York City Mayor’s Court,” and thus the litigation had become “an international event.” Hulsebosch, *supra* note 2, at 848.
130. Letter of Thomas Jefferson to George Hammond (May 29, 1792). In his comments on a draft of the letter, Hamilton stressed the subordination of the states to the treaties of the federal government, and—as he had argued before the Mayor’s Court—that Jefferson should refrain from arguing the rights and wrongs of the war in assessing British concerns about treaty violations; rather such treaties must be construed under the supposition that “both parties [are] in the right,” since there is no “common judge” to impose fault. Cabinet Paper of Alexander Hamilton to Thomas Jefferson (Mar. 1792), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1381&chapter=64387&layout=html&Itemid=27.
131. The Federalist No. 22 (Alexander Hamilton).
132. The Federalist No. 78 (Alexander Hamilton).
133. *Id.*
134. *Id.*
135. *Ware v. Hylton*, 3 U.S. 199 (1796). The first effort to strike down an act of Congress as unconstitutional was made in *Hylton v. United States*, 3 U.S. (1 Dall.) 171 (1796), in which Hamilton successfully argued for the government.
136. *Griswold v. Waddington*, 16 Johns. 438 (N.Y. 1819).



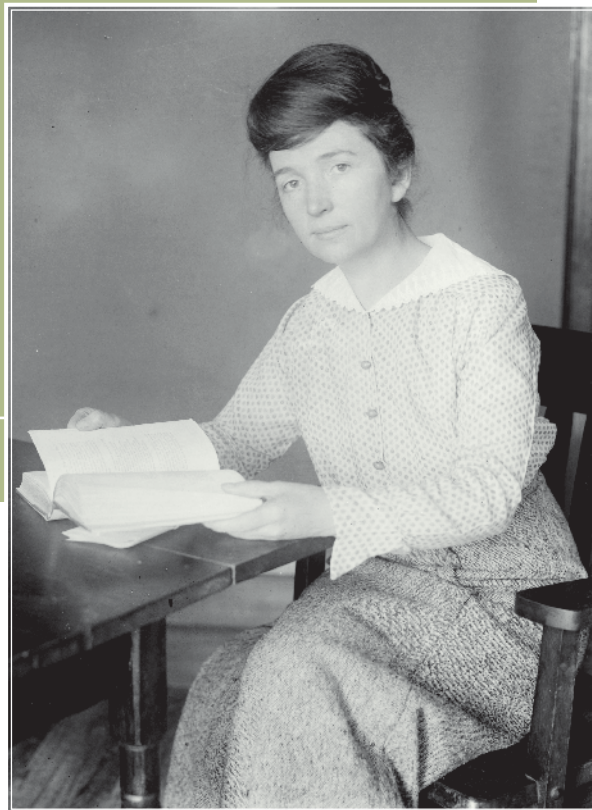
People v. Sanger and the **BIRTH of FAMILY PLANNING CLINICS** *in AMERICA*

MARIA T. VULLO

IN 1916, IN THE BROWNSVILLE NEIGHBORHOOD of Brooklyn, New York, Margaret Sanger opened the first birth control clinic in the United States. Just a few days into the operation of the Brownsville Clinic, the New York Police Department raided the clinic, closed it down and arrested Sanger.¹ Sanger was convicted of “obscenity” under New York’s “Little Comstock” law for disseminating information relating to contraception. In the celebrated court case that followed, the New York Court of Appeals, while affirming Sanger’s conviction, granted legal protection to physicians and pharmacists prescribing contraceptives “for the cure or prevention of disease,” paving the way for the establishment of family planning clinics in New York State. The Court’s decision also marked the first step in the battle for establishing the constitutional right of privacy nationwide.

Margaret Sanger and the Birth Control Movement

Margaret Sanger was born in Corning, New York in 1879. As a nurse caring for women who had succumbed to self-induced abortion, Sanger became active in the social reform movement that, among other things, sought to make contraception legal in New York. Influenced by European thinkers like Thomas Malthus and John Stuart Mill, Sanger’s reform movement connected many of society’s ills to the plight of poor, often immigrant, women who



Margaret Sanger

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were forced to choose between too-frequent childbirth and self-induced abortion.

Sanger personally understood the troubles of a contraceptive-free society: her mother had 18 pregnancies, bore 11 children, and died in 1899 at the age of 40, when Sanger was 17 years old. For the rest of her life, Sanger was galvanized by the horrors she encountered that resulted from unwanted pregnancy and illegal abortion, including the harsh fact that a large number of maternal deaths were caused by infections resulting from illegal or self-induced abortion.²

Well ahead of her time, Sanger challenged notions of female domesticity by advocating for a woman’s right to control her reproductive cycle as a “basic freedom.”³ Birth control, she argued, would allow all women to develop their own self-consciousness and acquire skills that would guide society to greatness.⁴ In 1914, Sanger sounded a battle cry in her

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newspaper, *The Woman Rebel* (tagline: “No Gods, No Masters”):

*Is there any reason why women should not receive clean, harmless, scientific knowledge on how to prevent conception? . . . The woman of the upper middle class has all available knowledge and implements to prevent conception. The woman of the lower middle class is struggling for this knowledge.*⁵

As her writings reflect, Sanger sought to equalize access to contraception for all women, regardless of wealth or social class. Despite their prohibition, various forms of contraception and information about contraception were quietly available to women who had both good medical contacts and financial means. But poor women without contacts or the means to pay for a private physician either were denied access to these services or could access them only under exceptionally unsafe circumstances. Many women who could not obtain birth control from their doctors relied on household products as contraceptives, which often caused infections, burns, or worse. And, when contraceptives failed or were unavailable, women resorted to self-induced or black-market abortion. Many women died from such procedures, a disproportionate number of them poor women desperate to control the size of their families.

Sanger also urged the medical community to take ownership of the development and distribution of safe, reliable contraception. At the time, the American Medical Association (“AMA”), founded in 1847, shunned what was considered unscientific birth control practices.⁶ Sanger hoped that physicians would become the primary means through which women could obtain birth control. As Sanger explained in one of her many speaking tours:

In my opinion the proper authorities to give advice on birth control are the doctors and nurses. . . For though the subject is largely social and economic yet it is in the main physical and medical, and the object of those advancing the cause is to open the doors of the medical profession, who in turn will force open the doors of the laboratories where our chemists will give the women of the twentieth

*century reliable and scientific means of contraception hitherto unknown.*⁷

Anthony Comstock and His War on “Obscenity”

Sanger’s social reform agenda collided with that of the infamous morality crusader, Anthony Comstock.⁸ As an active worker in the Young Men’s Christian Association (“YMCA”), Comstock built his name as an anti-vice crusader by demanding that the police compel saloons to abide by Sunday closing laws.⁹ Later, he led the New York Society for the Suppression of Vice, assuming responsibility for “the enforcement of laws for the suppression of trade in and the circulation of obscene literature, illustrations, advertisements, and articles of indecent or immoral use.”¹⁰ Convinced that official law enforcement was



Anthony Comstock
Anthony Comstock, Fighter, by Charles Trumbull
(New York: Fleming H. Revell Co., 1913), frontispiece

ineffective, Comstock assembled a vice squad that assumed quasi-governmental functions, performing arrests and seizing evidence for use in criminal prosecutions, all in order to protect Comstock's self-proclaimed code of morality. Contributions from wealthy New Yorkers—including mining millionaire William E. Dodge, Jr., financier J.P. Morgan and industrialist Samuel Colgate—funded Comstock's salary and expenses.¹¹

Comstock's greatest triumph was securing passage of the 1873 federal law, named the Comstock Act, that prohibited the delivery or transportation of "obscene, lewd or lascivious" material as well as any methods of, or information pertaining to, birth control.¹² Notably, the draft initially considered by the United States Senate contained an exemption for physicians.¹³ Without much discussion on the floor, however, the physician exemption was removed from the bill, which passed the United States House of Representatives on March 1, 1873 by a vote of 100 to 37.¹⁴

The federal Comstock Act was limited in its scope to materials sent through the mail. As a result, in the year following its passage, twenty-four state legislatures enacted mirror laws criminalizing contraceptive "obscenity" within state borders. These "Little Comstock laws" allowed so-called moral purity crusaders like Comstock to work with state and local police to close down distributors of "obscene" materials.¹⁵ New York's statute, prohibiting both the manufacture and the sale of contraceptives, was the

first to be passed by any state.¹⁶

Unabashed by Comstock's declaration of war, Sanger took on Comstock in 1912 with the publication of her first two articles in the *New York Call*, entitled "What Every Mother Should Know" and "What Every Girl Should Know."¹⁷ Although neither article contained information about birth control, Sanger's explicit discussion of venereal disease so upset Comstock that he used his power as a postal inspector to have the publication banned from the mails. In response, Sanger's next edition of the *New York Call* contained an empty

page together with the notice "WHAT EVERY GIRL SHOULD KNOW: NOTHING! BY ORDER OF THE POST OFFICE DEPARTMENT."¹⁸

Sanger's next encounter with Comstock came when an agent of Comstock made an unannounced visit to the Sanger family home in 1915. Representing himself to Margaret Sanger's husband, William, as an impoverished father in search of aid, the agent purchased a birth control pamphlet, thereby providing evidence for obscenity charges. A month later, Comstock personally arrested William. Margaret Sanger was absent at the time of these events, as she earlier had fled to Europe to avoid prosecution on federal charges under the Comstock Act stemming from her distribution of *The Woman Rebel*. Comstock personally attended and testified against William at his trial, and William was convicted under New York's Comstock law for disseminating his wife's pamphlets.

MOTHERS!

Can you afford to have a large family?
Do you want any more children?
If not, why do you have them?
DO NOT KILL, DO NOT TAKE LIFE, BUT PREVENT
Safe, Harmless Information can be obtained of trained
Nurses at

46 AMBOY STREET
NEAR PITKIN AVE. — BROOKLYN.

Tell Your Friends and Neighbors. All Mothers Welcome
A registration fee of 10 cents entitles any mother to this information.

מוטערס!

וויס איז פערמעגליך צו האבען א גרויסע פאמיליע?
וויילט איזר האבען נאך קינדער?
אויב נישט. ווארום האט איזר זיי?
מערדערט ניט. נעמט ניט קיין לעבען. נור פערדעם זיך.
ווערט אונשטעלעכע אינפארמאציע קעגן איזר פנקסט פון טראיערע טויטעס און

46 אמבוי סטריט נער פיסקן עוועניו **ברוקלין**

טאמ האט בעקאנט צו איינע פריינד און שטודנט. קינדער מוטער און זיילקסטן
פיר 10 סענט אינשטרוינגער זיינע איזר פנקסטעס צו דינקע אינפארמאציעס

MADRI!

Potete permettervi il lusso d'avere altri bambini?
Ne volete ancora?
Se non ne volete piu', perche' continuate a metterli
al mondo?

NON UCCIDETE MA PREVENITE!
Informazioni sicure ed innocue saranno fornite da infermiere autorizzate a
46 AMBOY STREET Near Pitkin Ave. Brooklyn
a cominciare dal 12 Ottobre. Avvertite le vostre amiche e vicine.
Tutte le madri sono ben accette. La tassa d'iscrizione di 10 cents da diritto
a qualunque madre di ricevere consigli ed informazioni gratis.

Flyer for 46 Amboy Street clinic in four languages, Brownsville, Brooklyn, NY, undated
Margaret Sanger papers, Sophia Smith Collection, Smith College (Northampton, Massachusetts)

People v. Sanger



Brownsville Clinic at 46 Amboy Street, Brooklyn, NY, 1916
New York World, Telegram and Sun Corp.
Sophia Smith Collection, Smith College (Northampton, Massachusetts)

Two weeks later, Comstock died; in his obituary, the pneumonia that killed him was linked to his exertions at William's trial. Shortly thereafter, in October 1915, Margaret Sanger returned to New York to face the charges against her and to gain media attention for her cause.¹⁹

The Brownsville Clinic and Sanger's Challenge to New York's Comstock Law

Sanger believed that a legislative approach to challenging the Comstock laws was "a slow and tortuous method of making clinics legal; we stood a better and quicker change by securing a favorable judicial interpretation through challenging the law directly."²⁰ After a lecture tour throughout the United States, Sanger concluded that "a practical test of the law would have the moral endorsement of all thinking people in this country."²¹ Sanger planned to open a birth control clinic in each borough of New York City as a means of openly challenging the Comstock laws.²²

Sanger and her sister Ethel Byrne, a registered nurse at Mt. Sinai Hospital, chose the impoverished, largely immigrant community of Brownsville, Brooklyn for the opening of America's first birth control clinic on October 16, 1916.²³ Handbills in English, Yiddish and Italian advertised the clinic throughout the neighborhood:

MOTHERS!

Can you afford to have a large family?

Do you want any more children?

If no, why do you have them?

*DO NOT KILL, DO NOT TAKE LIFE,
BUT PREVENT.*²⁴

Sanger was anything but reticent about her willingness to be arrested in order to challenge the law. Four days prior to her eventual arrest, Sanger told the *Washington Post* that public officials "might just as well forget their moss-grown statutes and accept birth control as an established fact."²⁵ Sanger also defied the police to interfere with the Brownsville Clinic, which did not distribute contraceptives (or perform abortions) but simply provided factual information about birth control:

*The police are hunting my clinic today. . . .
They can't find it. If they should, they can't hurt it. It is an oral clinic and the law says nothing about not spreading birth control information orally. If they do try to interfere I am legally prepared to carry a hard and bitter fight to the highest tribunal in the land with the best legal talent there is.*²⁶



Margaret Sanger (standing) at the Brownsville Clinic
Library of Congress, Print & Photographs Division, LC-DIG-ggbain-23218

The Arrest

For ten days after it opened, the Brownsville Clinic provided contraceptive information and sex education to 464 recorded clients, charging ten cents apiece.²⁷ As Sanger described it:

*From the first day, the little outer waiting room was crowded. The women came in pairs, with their neighbors, with their married daughters and their husbands. Some came in groups with nursing babies clasped in their arms. Some came from the far end of Long Island, from Connecticut, Massachusetts, Pennsylvania, New Jersey. They came from near and from far to learn the "secret" which they said the rich women all possessed and the poor women could not obtain.*²⁸

Sanger's arrest was a planned police operation. On the ninth day of the Brownsville Clinic's operation, an undercover New York Police Department ("NYPD") detective named Margaret Whitehurst visited the Brownsville Clinic, claiming to be in search of birth control information. Sanger, busily making preparations for a second clinic on Avenue A, was not there.²⁹ Dressed as a washerwoman and pushing a borrowed baby in a stroller,³⁰ Whitehurst immediately aroused the staff's suspicion, but they nonetheless gave her an informational session and a sex education pamphlet, for which Whitehurst left a two-dollar donation (the bill was promptly pinned to the wall with a note reading "received from Whitehurst of the Police Department as her contribution").³¹

The next day, Whitehurst returned to the clinic with three plainclothes NYPD officers. Sanger did not endure the raid quietly. When told that she was being placed under arrest, "[f]or a moment, Mrs. Sanger only stared at the detectives. Then she screamed at Whitehurst: 'You dirty thing! You're not a woman! You're a dog!'"³² Sanger and her assistant were "dragged from the clinic and dumped unceremoniously into a patrol wagon, after they had refused to walk to the Brownsville police station."³³ Refusing her \$500 bail, Sanger spent the night in Brooklyn's unsavory Raymond Street Jail.³⁴ Her sister Ethel was arrested at her home the same evening.³⁵ In a two-count

information filed on November 13, 1916, Kings County District Attorney Harry E. Lewis charged Sanger with exhibiting and offering to sell "instruments, articles, recipes, drugs and medicines for the prevention of conception" and "instruments of indecent and immoral use,"³⁶ in violation of Section 1142 of New York's Penal Law, set forth in the chapter titled "[i]ndecent exposure, obscene exhibition, books and prints and bawdy and other disorderly houses." Section 1142 had been amended several times, and from 1887 read as follows:

Section 1142.

Indecent Articles.

A person who sells, lends, gives away, or in any manner exhibits or offers to sell, lend or give away, or has in his possession with intent to sell, lend, or give away, or advertises, or offers for sale, loan, or

distribution, any instrument or article, or any recipe, drug or medicine for the prevention of conception, or for causing unlawful abortion, or purporting to be for the prevention of conception, or for causing unlawful abortion, or advertises, or holds

MRS. SANGER FIGHTS AS POLICE SEIZE HER IN RAID ON 'CLINIC'

Birth Control "Specialist" Arrested and Dragged From
Amboy Street House.

CARRIED OFF IN THE PATROL.

Calls Woman Officer Names, Compels
Forcible Removal to Police
Station.

Mrs. Margaret Sanger, the birth control advocate who recently opened the first birth control clinic in the United States, at 46 Amboy street, Brownsville, was placed under arrest shortly before 2 o'clock this afternoon, and a half hour later was dragged, protecting, into a patrol wagon by Detectives Mooney and Boylan. Mrs. Sanger was in a towering rage and generally abusive. She refused point blank to walk to the station house. When the patrol wagon arrived she hung back and was dragged to the steps of the vehicle.

There she paused and asked permission to make a speech. It was denied her. As the detectives again began to use force she cried out:

"Is this what you call America?"

The rest of her tirade was lost in the whirr of the motor as the police chauffeur threw on the clutch and the wagon rushed through the protesting crowd.

Miss Fanny Mindell, Mrs. Sanger's assistant, was also arrested. Both are charged with a violation of Section 1142 of the Penal Laws.

Mrs. Sanger and her assistant were taken directly to the Brownsville police station house where they were entered upon the books. The police declare they have additional information against the woman in that they saw her exhibiting and offering for sale a box of pills. She has maintained she only gave verbal information but this, the law holds is a violation also.

Mrs. Sanger Arrested Upbraids Woman Sleuth.

It was at 1:30 o'clock this afternoon that Magistrate Walsh in the New Jersey avenue police court issued two Jane Doe warrants for the arrest of two women alleged to be violating section 1142 of Article 106 of the Penal Laws, which relates to the imparting of information on birth control. Immediately Mrs. Margaret Whitesouse, the woman detective, started for Mrs.

Brooklyn Daily Eagle
October 26, 1916

Courtesy Old Fulton NY Postcards
fultonhistory.com

out representations that it can be so used or applied, or any such descriptions as will be calculated to lead another to so use or apply any such article, recipe, drug, medicine or instrument, or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such an instrument, article, recipe, drug, or medicine can be purchased or obtained, or who manufactures any such instrument, article, recipe, drug or medicine, is guilty of a misdemeanor[.]³⁷

If convicted, punishment entailed a term of incarceration ranging from ten days to a year, a minimum fine of fifty dollars, or both.

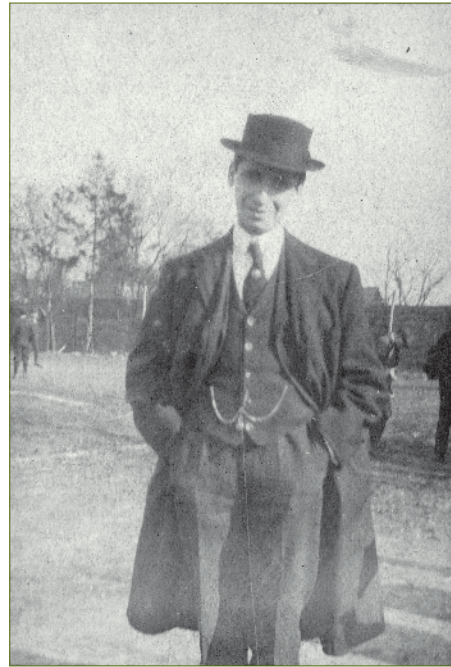
Notably, Section 1145 of the Penal Code—enacted in 1881, and therefore predating the Comstock amendments to Section 1142—exempted physicians from prosecution, at least for “obscenity”:

*Section 1145. Physicians’ Instruments. An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this article. The supplying of such articles to such physicians or by their direction or prescription, is not an offense under this article.*³⁸

By Comstock’s reading, this provision only protected “reputable physicians” and not “infamous doctors who advertise or send their foul matter by mail.”³⁹ As it turned out, the *Sanger* case became the impetus for physicians to be at the forefront of the birth control movement.

The Trial

Both Sanger and Ethel chose as their counsel the progressive young lawyer Jonah J. Goldstein. Born in Canada but raised on the Lower East Side, Goldstein graduated from New York University School of Law in 1911 and began his career as secretary to Alfred E. Smith, then majority leader of the State Assembly and later Governor of New York.



Jonah J. Goldstein
Counsel to Margaret Sanger & Ethel Byrne
American Jewish Historical Society

Goldstein would go on to become a distinguished judge, a committed reformer of the family courts, and a lay rabbi. In his obituary, Goldstein was lauded as “a leading figure in New York’s Jewish community and in the city’s philanthropic and civic activities.”⁴⁰

The prosecution decided to try Ethel and Sanger separately, both misdemeanor charges, before a three-judge panel in the Court of Special Sessions.⁴¹ The People, represented at trial by Edward W. Cooper, sought to try them as hastily as possible so that Sanger would be unable to marshal medical experts and social workers to testify in her defense.⁴² Fighting this rush to judgment, Goldstein made a series of pre-trial motions in an effort to get Sanger a jury trial, or at least a fair judicial panel. Sanger testified in pre-trial hearings that she would refuse to attend her own trial if Justice J.J. McInerney, a notorious enemy of birth control advocates, remained on the panel, because “[i]n every birth control case which has come before him he has exhibited a relentless prejudgment of the case.”⁴³ Indeed, during the sentencing hearing of her husband’s trial, McInerney had stated:

This community, like many others, suffers from a lack of children. The trouble is that many women are too selfish. I think that a lot

*of those who are devoting their time to equal suffrage as Christian women ought to go about advocating childbirth. It would be better for the community.*⁴⁴

Goldstein's pre-trial motions were denied,⁴⁵ but Justice McInerney agreed to have another judge sit in his place.⁴⁶

The press was hungry to cover the "Sanger Cases," and coverage was often sympathetic, describing Sanger as a "heroine" and suggesting that the progressive movement backing Sanger's crusade would one day overtake the conservative status quo.⁴⁷ Sanger's arrest also sparked discussions within the medical and religious communities about women's rights.⁴⁸ The press repeatedly reported on the large numbers of women who came to court in support of Sanger.⁴⁹ One newspaper noted that "[r]arely has the little courtroom of the Special Sessions held such a large feminine element among its 'benchers' as were present today in the much-discussed case."⁵⁰

But, as Sanger would later write, "some came for selfish interests, some to inquire, some to exploit."⁵¹ Gender stereotypes prevailed. Reporters commented on the "American beauties" of all social classes in attendance, including "society and club women in the front rows of seats and limousines waiting outside," describing the trial as a "reception, with Mrs. Sanger the guest of honor."⁵² Coverage was filled with descriptions of "young, willowy and good-looking women."⁵³ One report described a "pretty, fluffy haired little woman in brown fox furs, who had a lot of trouble convincing everybody that she was the wife of a scientist."⁵⁴

Sanger's appearance also was a key detail in press accounts: "Mrs. Sanger wore a blue dress and a yellow coat trimmed with black fur at the neck and sleeves. Her hat was of brown cloth. Her brown hair was gathered up in a knot at the back and as she took her seat she removed her veil and smiled. She is a good-looking woman."⁵⁵ Sanger "looked the part [of a guest of honor] rather than that of lawbreaker, as she sat there, a demure, rather shy looking young woman, with soft brown eyes and hair."⁵⁶

The Trial of Ethel Byrne

Sanger's sister Ethel was tried first, on January 4, 1917. The first "Sanger Case" was attended by a coterie of upper-class birth control advocates, and by 15 Brownsville women who had been summoned as the People's witnesses.⁵⁷ In addition to urging constitutional protection for women's privacy, Goldstein argued that the medical exception under Section 1145 infringed the constitutional rights of the poor, denying them the right to choose the number of children they would have, a right enjoyed by middle-class citizens who could afford the services of private physicians.⁵⁸ Goldstein attempted to call Sanger's personal doctor as an expert witness, but the justices ruled the doctor's testimony inadmissible.⁵⁹ Ethel was found guilty and sentenced to one month's imprisonment in a workhouse on Blackwell's Island.⁶⁰

Capitalizing on the national attention, Ethel announced—just a week before her sister Margaret's trial was to begin—that she would undertake a hunger strike.⁶¹ Goldstein attempted to free Ethel by petitioning for a federal writ of habeas corpus, but then-District Judge Augustus Noble Hand denied the petition.⁶² Ethel's hunger strike was front-page news throughout the country.⁶³ And it worked: after 11 days, she was pardoned by Governor Charles Whitman. As Ethel was leaving prison, the prison's physician threw an invoice for \$100 at her, yelling "Here, you notoriety faker, you'll pay this bill before I get through with you!"⁶⁴

The Trial of Margaret Sanger

With her sister's hunger strike in the backdrop, Sanger's trial got underway on January 29, 1917, before a three-judge panel consisting of Justices John J. Freschi, George G. O'Keefe, and Moses Herrman. Before the prosecution called its first witness, Goldstein moved to dismiss the information, arguing that the Comstock law was an unconstitutional abridgement of free speech and women's "free exercise of conscience and the pursuit of happiness."⁶⁵ Goldstein's motion was summarily denied.

The People presented its case against Margaret Sanger with testimony by Margaret Whitehurst, the undercover "police matron" who had visited



Margaret Sanger outside of the Brooklyn Court of Special Sessions, 1917
Planned Parenthood of New York City

the Brownsville Clinic to collect evidence;⁶⁶ Davis Roelsky, a chemist who verified the chemical content of the boxes of vaginal suppositories, "rubber articles," boric acid pills, and "Mizpah"-brand pessaries,⁶⁷ all introduced into evidence by the prosecution;⁶⁸ Sergeant David Barry and Officer Boylan, police officers on the scene of the raid, who testified that they saw Sanger exhibiting rubber articles to three women;⁶⁹ Joseph Rabinowitz, the landlord of the Brownsville clinic, who testified in Yiddish that Sanger told him she intended to operate a "private dispensary";⁷⁰ and Alice Cohen, a Brownsville mother who, despite being called by the prosecution, swore that she neither had been to the clinic nor ever had seen Sanger.⁷¹

Goldstein offered no witnesses, and Margaret Sanger did not take the stand. Instead, Goldstein renewed his pre-trial motion to dismiss. Although the panel did not reach the constitutional issues, Presiding Justice Freschi was skeptical that the prosecution had proven its case, challenging the prosecution to demonstrate that Sanger had sold or had the articles in her possession for "illegitimate purposes."

The prosecution responded that the contraceptive articles introduced into evidence should "speak for themselves," but Justice Freschi admonished: "I think a physician can in proper cases prescribe these articles under the law" pursuant to the medical exception.⁷² Justice Freschi mused that contraceptives might, according to the law, be used under a physician's prescription and that the mere possession of the articles was not conclusive proof that Sanger intended them to be used illegally.⁷³ Noting that "this is a very close case," the panel reserved decision on the ground that articles that might be employed for birth control might also be employed for "legitimate purposes."⁷⁴

The next evening, Sanger made a speech at Carnegie Hall before 3,000 people, announcing that "she had devoted her life to the cause of voluntary motherhood, and would continue to fight for birth control, courts or no courts, workhouse or no workhouse."⁷⁵

When the court re-convened on the second day of Sanger's trial, the prosecution moved for permission to reopen the case to submit additional evidence of Sanger's intent. Over Goldstein's objection, the court granted the request, and the People called additional witnesses, including reluctant reporters forced to testify about their interviews of Sanger and an officer who attended the Carnegie Hall speech.⁷⁶ Remarkably, the prosecution also called Jonah Goldstein himself to the stand, to be questioned about a magazine distributed at the Carnegie Hall rally, in which he had submitted an article.⁷⁷

Following this additional testimony, Goldstein argued that the People had still failed to meet its burden of proof.⁷⁸ The motion was denied, and Sanger was found guilty as charged.⁷⁹

At sentencing, Justice Freschi offered "extreme clemency" if Sanger promised "to obey the law faithfully in the future."⁸⁰ To the applause of women assembled in the courtroom, Sanger refused, telling Justice Freschi that "I cannot respect the law as it exists today."⁸¹ Sanger was sentenced to 30 days in prison, which she spent in a penitentiary for women in Queens.

Upon Sanger's release from prison, Sanger's champions serenaded her with flowers, "three cheers," and the *Marseillaise*, the victory song of the day.⁸²



Margaret Sanger and Ethel Byrne in the courtroom, 1917
Planned Parenthood of New York City

Even the “women prisoners who gathered at the windows of the cells gave echo to the cheers.”⁸³ A Russian Jewish immigrant by the name of Rose Halpern presented Sanger with a bouquet of flowers, “the gift of devoted Brownsville mothers.”⁸⁴ Sanger thanked her supporters: “To the women of New York I am grateful, especially to the mothers of Brownville. . . . Other duties were put aside while they stood beside us in the fight for birth control, for woman’s right of ownership and dominion over her own body.”⁸⁵

The Appellate Division Affirms

Sanger appealed to the Appellate Division, Second Department, which affirmed the conviction in conclusory fashion on July 31, 1917.⁸⁶ The Appellate Division wrote only that “[t]he considerations which [Sanger] urges against the wisdom and justice of section 1142 of the Penal Law . . . as to preventing conception, are for the Legislature rather than for this court. There is no doubt of the constitutional power to stop public ‘clinics,’ where such articles are furnished and given out in the manner here shown.”⁸⁷

The New York Court of Appeals Hears the Case

The opportunity to challenge the constitutionality of Section 1142 had arrived, and both Sanger and Goldstein seized the moment. Goldstein submitted a searing legal brief to the Court of Appeals. He spent little time discussing the evidence, and instead spent 65 pages challenging the legality of Sanger’s conviction, and the statute itself, on common law and constitutional grounds.⁸⁸

In his brief, Goldstein examined the history of the crime of “obscenity” at common law, concluding that in the courts of England, obscenity was not a criminal offense unless it disturbed the peace or tended to be “a discredit of the prevailing religion.” Goldstein argued that the dissemination of information about birth control, if “chaste, instructive, and creative,” was not indecent, and that the “prevention of conception” and the dissemination of information relative to “prevention of conception” was never classified as obscene at common law.⁸⁹ Goldstein further argued that the prohibition of information concerning birth control was beyond the Legislature’s police powers because it was not “related to the public health, morals, or welfare.”⁹⁰ Additionally, he countered the argument that the dissemination of information about reproductive health will lead to the immorality of women.⁹¹

Foreshadowing Supreme Court jurisprudence 50 years ahead of his time, Goldstein argued that Section 1142 violated the constitutional right of women to determine whether they shall conceive, a “fundamental right” that implicated women’s right to “liberty” as guaranteed by the U.S. Constitution. Personal liberty, he argued, includes not only freedom from physical restraint, but also the right “to be let alone, to determine one’s mode of life and includes the right to exist and the right to the enjoyment of life while existing”⁹²

Unwilling to rely solely on Goldstein’s briefing, Sanger penned her own 250-page supplement for the Court’s consideration, titled “*The Case for Birth Control: A Supplementary Brief and Statement of Facts.*” The book, published in May of 1917, compiled articles by leading thinkers and presented a series of medical arguments in favor of birth control.⁹³

The People's brief stuck resolutely to the facts and argued that Section 1142 was both constitutional and within the power of the Legislature to regulate the health and morals of the public: "The common belief or opinion that the general dissemination of information on the subject of birth control might lead to greater

immorality, is undoubtedly the basis and reason for legislation of this character."⁹⁴ Notably, conceding that a physician's exception already existed when Section 1142 was read together with Section 1145, the People argued that the question of an exemption for physicians was not ripe for review, since Sanger was not a physician.⁹⁵

The Court of Appeals rendered its decision on January 8, 1918, affirming Sanger's conviction. Writing for the Court was Brooklyn-born Judge Frederick Crane, who would become Chief Judge in 1934 and serve a total of twenty-two years on the Court.⁹⁶ Judges Cardozo, Collin, Chase and Hiscock concurred; Judge Hogan concurred in the result, and no Judge dissented.⁹⁷

The Court began with the premise that "it is conceded to be within the police power of the Legislature, for the benefit of the morals and health of the community, to make such a law as this applicable to unmarried persons."⁹⁸ Judge Crane dismissed *A Case for Birth Control*, concluding that "much of the argument presented to us . . . touching social conditions and sociological questions are matters for the Legislature and not for the courts."⁹⁹

But Judge Crane went further, addressing the physician exemption.¹⁰⁰ Although the Court found that because Sanger was not a physician she did not



Mothers meet Margaret Sanger after her arraignment in Brooklyn Court of Special Sessions

Planned Parenthood of New York City

have standing to plead the unconstitutionality of the law on this basis,¹⁰¹ the Court explicitly held that Section 1145 exempted physicians from prosecution under the Comstock law. The Court further held that while the exception did not permit advertising or "promiscuous advice to patients irrespective of

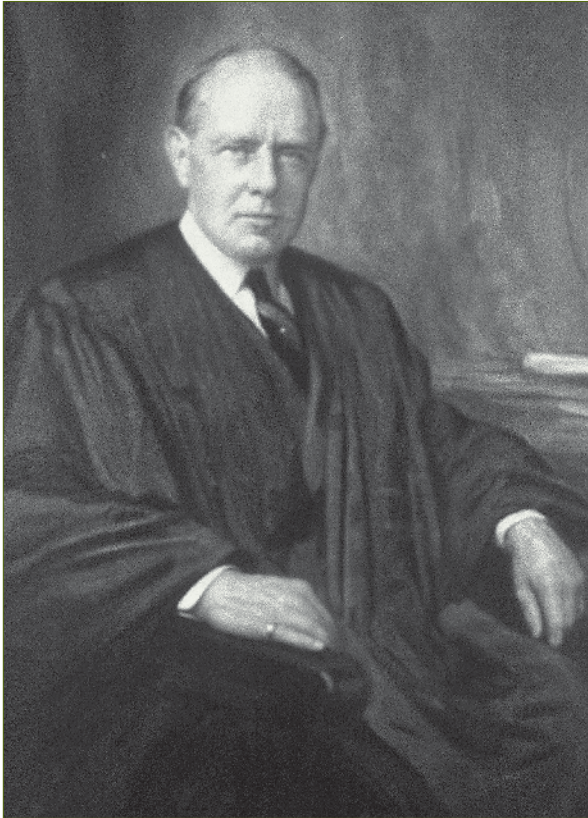
their condition," it was "broad enough to protect the physician who in good faith gives such help or advice to a married person to cure or prevent disease" as well as "the druggist, or vendor, acting upon the physician's prescription or order."¹⁰²

The Court addressed the scope of the exception by tackling a central question: what is "disease"? Judge Crane adopted the definition of "disease" from Webster's International Dictionary: "an alteration in the state of the body, or of some of its organs, interrupting or disturbing the performance of the vital functions, and causing or threatening pain and sickness; illness; sickness; disorder."¹⁰³ This definition was broad enough to include pregnancy itself.

Thus, while the Court of Appeals affirmed the State's right to prohibit laypersons from distributing contraceptive information, it at the same time enabled physicians to prescribe contraception for general health reasons, paving the way for the development of birth control clinics that soon followed.¹⁰⁴

The Aftermath of *People v. Sanger*

By reaffirming a physician's right to prescribe contraceptive devices to treat "disease," the New York Court of Appeals' decision in *People v. Sanger* fundamentally altered the way in which contraceptives were delivered to the public and established the



Chief Judge Frederick E. Crane
New York State Court of Appeals collection

medical community as the primary purveyors of birth control.¹⁰⁵

Sanger thus continued her mission, establishing the Birth Control Clinical Research Bureau in New York City in partnership with a female physician.¹⁰⁶ On the heels of the *Sanger* decision, the American Gynecological Society began to display professional interest in birth control.¹⁰⁷ Within a mere decade of the Court of Appeals decision, birth control clinics staffed with physicians, nurses, social workers, administrative personnel and volunteers emerged across the nation. By 1941, the Birth Control Federation of America—whose name was changed the following year to “Planned Parenthood”—was operating over 200 clinics across the country, servicing over 40,000 people, many of them poor women.¹⁰⁸

Moreover, the adoption of birth control by the medical community led to scientific breakthroughs in contraceptive research and technology. During the 1920s, various research programs, such as those

sponsored by the Rockefeller-supported Bureau of Social Hygiene, led to the discovery and isolation of estrogen and progesterone, two hormones responsible for reproduction. With these discoveries, the scientific principles necessary for the manufacture of synthetic hormonal contraceptives were in place.¹⁰⁹ The official announcement of the scientific breakthrough—the birth control pill—was published in a 1956 article in *Science* magazine.¹¹⁰ On June 23, 1960, and after clinical trials and Sanger’s lobbying efforts, the United States Food and Drug Administration approved the first hormonal contraceptive pill for use in the United States. Subsequent scientific improvements in the birth control pill have led to an affordable method of contraception that is widely available to the public, again as Sanger had envisioned.

Sanger also set in motion a series of cases that would render the Comstock laws obsolete. In 1936, in *United States v. One Package*,¹¹¹ the defendant physician was charged under the Comstock laws with importing obscene material for her patients’ use. Writing for the United States Court of Appeals for the Second Circuit, and citing *Sanger*, Judge Augustus Noble Hand—who 20 years earlier had denied Ethel Byrne’s petition for a writ of habeas corpus—ruled in favor of the defendant, holding:

While it is true that the policy of Congress has been to forbid the use of contraceptives altogether if the only purpose of using them be to prevent conception in cases where it would not be injurious to the welfare of the patient or her offspring, it is going far beyond such a policy to hold that abortions, which destroy incipient life, may be allowed in proper cases, and yet that no measures may be taken to prevent conception even though a likely result should be to require the termination of pregnancy by means of an operation. It seems unreasonable to suppose that the national scheme of legislation involves such inconsistencies and requires the complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world.¹¹²

Following *One Package*, the American Medical Association officially recognized birth control as part

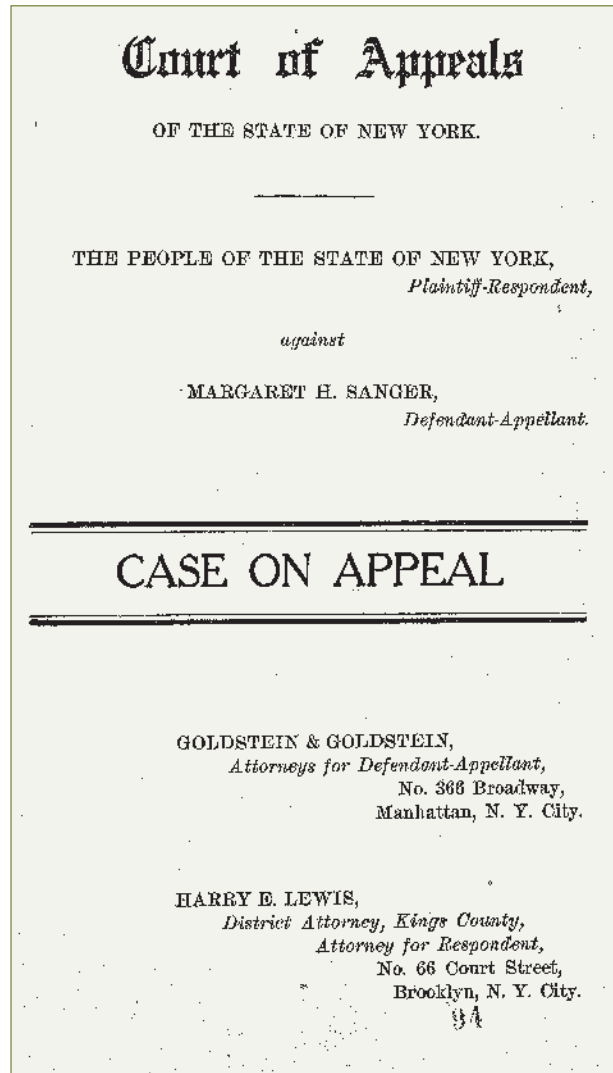
of a doctor's medical practice. Sanger praised the AMA's decision as "the close of a twenty-year struggle for medical recognition of birth control as a legitimate practice."¹¹³

The *Sanger* decision also paved the way for such seminal cases as *Griswold v. Connecticut* in 1965,¹¹⁴ *Eisenstadt v. Baird* in 1972,¹¹⁵ and *Roe v. Wade* in 1973.¹¹⁶ *Griswold's* facts were eerily similar to those in *People v. Sanger*, nearly 50 years earlier. Griswold, the Executive Director of the Planned Parenthood League of Connecticut, gave information, instruction, and other medical advice to married couples concerning birth control. Griswold and her colleague were convicted under an 1879 Connecticut law that criminalized the use of "any drug, medicinal article or instrument for the purpose of preventing conception." In a 7-2 decision, the United States Supreme Court invalidated the law on the ground that it violated the right to marital privacy, legalizing birth control throughout the country.¹¹⁷ In *Eisenstadt v. Baird*, the Court extended this constitutional right to unmarried persons.¹¹⁸

Margaret Sanger died on September 6, 1966, a year after *Griswold*. Her long career merited an extensive front-page obituary in *The New York Times*. In attendance at her funeral was 80-year-old Rose Halpern, one of the Brownsville Clinic's first patients. Fittingly, Dr. Alan F. Guttmacher, then president of the Planned Parenthood World-Wide Association, credited Sanger as the person "who convinced America and the world that control of conception is a basic human right and like other human rights must be equally available to all." Sanger's obituary also provided details on the sociological impact of *People v. Sanger*:

*Mrs. Sanger's American Birth Control League, established in 1921, became the Planned Parenthood Federation of America in 1946 and led to the establishment of more than 250 Planned Parenthood Centers in 150 cities throughout the country. The movement is now worldwide, with 38 member organizations and projects in 88 countries.*¹¹⁹

It all started in Brownsville in 1916. 🌿



Cover of Court of Appeals Brief in *People v. Sanger*
Courtesy New York State Library

ENDNOTES

1. *Police Arrest Mrs. Sanger In Her New Clinic*, N.Y. Call, Oct. 27, 1916, at 1.
2. Gloria Feldt, Op-Ed., *Margaret Sanger's Obscenity*, N.Y. Times, Oct. 15, 2006.
3. Margaret Sanger, *The Pivot of Civilization* 209–10 (1922); Margaret Sanger, *Woman and The New Race* [hereinafter *Sanger, Woman*] 6, 8 (1922).
4. Sanger, *Woman*, *supra* note 3, at 54–56, 60–61, 203–04.
5. Margaret Sanger, *The Prevention of Conception*, *The Woman Rebel*, Mar. 1914.
6. *Id.*
7. Ellen Chesler, *Woman of Valor: Margaret Sanger and the Birth Control Movement in America* 146 (1992).
8. Margaret Blanchard & John Semonche, *Anthony Comstock and his Adversaries: The Mixed Legacy of this Battle for Free Speech*, 11 Comm. L. & Pol'y 317, 320 (2006).
9. *Id.*
10. *Id.* at 326.
11. *Id.*
12. 42 Cong. Ch. 258, 17 Stat. 598 (1873); *see also* Peter Smith, *The History and Future of the Legal Battle Over Birth Control*, 49 Cornell L.Q. 275, 275–76 (1964).
13. Cong. Globe, 42d Cong., 3d Sess. 1436 (1873).
14. Smith, *supra* note 12, at 275–76.
15. Blanchard & Semonch, *supra* note 8, at 327–28.
16. Mary Alden Hopkins, *Birth Control and Public Morals: An Interview with Anthony Comstock*, *Harper's Weekly*, May 22, 1915.
17. Blanchard & Semonch, *supra* note 8, at 353.
18. *Id.*
19. *Anthony Comstock Dies in His Crusade: Labor and Worry Incident to War Against Vice Bring Fatal Illness at 71 Years*, N.Y. Times, Sept. 22, 1915; *Disorder in Court as Sanger is Fined*, N.Y. Times, Sept. 11, 1915.
20. *Margaret Sanger is Dead at 82; Led Campaign for Birth Control*, N.Y. Times, Sept. 7, 1966.
21. Margaret Sanger, *Clinics, Courts and Jails*, *Birth Control Rev.*, Apr. 1918, at 3, available at <http://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=236476.xml>.
22. *Id.*
23. Chesler, *supra* note 7, at 59, 63, 148.
24. *Id.* at 150.
25. *Spread Birth Control*, *Wash. Post*, Oct. 22, 1916.
26. *Id.*
27. Chesler, *supra* note 7, at 150–51.
28. Sanger, *supra* note 21, at 3.
29. *Id.*
30. *Birth Control Clinic Is Raided*, N.Y. Trib., Oct. 27, 1916, at 1.
31. Chesler, *supra* note 7, at 151; *Birth Control Clinic Is Raided*, *supra* note 30, at 1.
32. *Birth Control Clinic Is Raided*, *supra* note 30, at 1.
33. *Id.*; *Police Arrest Mrs. Sanger in Her New Clinic*, N.Y. Call, Oct. 27, 1916, at 2.
34. *Police Arrest Mrs. Sanger in Her New Clinic*, *supra* note 33, at 2.
35. *Id.*
36. Information, *People v. Sanger*, No. 28,735 (N.Y. Ct. Spec. Sess. Nov. 13, 1916).
37. N.Y. Penal Law § 1142 (1887).
38. N.Y. Penal Law § 1145 (1881) (emphasis added).
39. Hopkins, *supra* note 16, at 490.
40. *Jonah Goldstein, Ex-Judge, Is Dead*, N.Y. Times, July 23, 1967.
41. Between 1732 and 1962, the Court of Special Sessions was vested with jurisdiction over inferior crimes. It was statutorily abolished in 1962; since then, the Criminal Court of the City of New York has had jurisdiction over misdemeanors and lesser offenses, as well as preliminary proceedings in felony cases. *See* New York State Archives, http://www.archives.nysed.gov/a/research/res_topics_legal_trials_crimcourt.shtml (last visited Jan. 31, 2012).
42. *Judges May Try to Rush Sanger Trial*, N.Y. Call, Nov. 22, 1916, at 3.
43. *M'Inerney May Not Try Her Case*, N.Y. Call, Nov. 28, 1916, at 28.
44. *Id.*
45. *Court Rules Against Mrs. Sanger*, N.Y. Times, Dec. 5, 1916.
46. *M'Inerney May Not Try Her Case*, *supra* note 43, at 29.
47. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial*, N.Y. Trib., Jan. 5, 1917, at 5.
48. *Id.*
49. *Judges May Try To Rush Sanger Trial*, *supra* note 42, at 3.
50. *Mrs. Sanger At Bar; Women Fill Court; One Brings Knitting*, *Brooklyn Daily Eagle*, Jan. 29, 1917.
51. Sanger, *supra* note 21, at 3.
52. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial*, *supra* note 47.
53. *Mrs. Sanger At Bar; Women Fill Court; One Brings Knitting*, *supra* note 50.

54. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial, supra* note 47.
55. *Mrs. Sanger At Bar; Women Fill Court; One Brings Knitting, supra* note 50.
56. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial, supra* note 47.
57. *Birth Controllers Up Early for Trial*, N.Y. Times, Jan. 5, 1917.
58. Chesler, *supra* note 7, at 153.
59. *Id.*
60. *Mrs. Byrne Must Go to Workhouse*, N.Y. Times, Jan. 23, 1917; *Mrs. Sanger's Aid is Found Guilty*, N.Y. Times, Jan. 9, 1917.
61. *Mrs. Byrne Must Go to Workhouse, supra* note 60.
62. *Mrs. Byrne Starts Lots of Strikes*, N.Y. Times, Jan. 24, 1917. Twenty years later, Judge Hand would write the opinion in *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936), which freed physicians to import contraceptives.
63. *Mrs. Byrne Fast in Workhouse Cell*, N.Y. Times, Jan. 25, 1917.
64. *Mrs. Byrne Freed by Whitman Pardon*, N.Y. Call, Feb. 2, 1917, at 1.
65. Trial Tr. 10, Jan. 29, 1917.
66. *Id.* at 10–26. Like many of Sanger's critics, the prosecution attempted to ascribe malevolent motives to Sanger's distribution of contraceptives to poor immigrants. See Don Sloan, Letter to the Editor, *Margaret Sanger, Eugenicist*, N.Y. Times, Aug. 9, 1992.
67. The Mizpah Pessary was available for purchase at pharmacies, not as a contraceptive device, but as a "womb support" for women suffering from prolapsed uteruses, a frequently diagnosed condition resulting from multiple pregnancies. It also was an effective contraceptive. Chesler, *supra* note 7, at 151.
68. Trial Tr. 26–29, Jan. 29, 1917.
69. *Id.* at 29–41.
70. *Id.* at 43.
71. *Id.* at 42.
72. *Id.* at 39. Called in his obituary "the most patient of men," Justice Freschi was a first-generation Italian-American who would serve on the General Sessions Court for 34 years. See *J.J. Freschi Dead; A Jurist 34 Years*, N.Y. Times, July 30, 1944.
73. *Justices in Doubt in Sanger Case*, N.Y. Times, Jan. 30, 1917.
74. *Id.*
75. *Mrs. Sanger Defies Courts Before 3,000*, N.Y. Times, Jan. 30, 1917.
76. Trial Tr. 81–88, Feb. 2, 1917.
77. *Id.* at 89.
78. *Id.* at 89.
79. *Id.* at 90; *Mrs. Sanger Guilty, Faces Prison Term*, N.Y. Times, Feb. 3, 1917.
80. *Mrs. Sanger Gets 30 Days*, N.Y. Times, Feb. 6, 1917.
81. *Id.*
82. *Mrs. Sanger: No Fingerprinting*, Brooklyn Standard Union, Mar. 1917, at 1.
83. *Id.*
84. *Id.*
85. Sanger, note 21.
86. *People v. Sanger, supra* 166 N.Y.S. 1107, 179 A.D. 939 (N.Y. App. Div. 1917).
87. *Id.*
88. Appellant's Brief at 1–2, *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).
89. *Id.* at 17–30.
90. *Id.* at 37.
91. *Id.* at 38–39.
92. *Id.* at 45–56.
93. Margaret Sanger, *The Case for Birth Control: A Supplementary Brief and Statement of Facts* (1917).
94. Respondent's Brief at 8, *People v. Sanger*, 179 A.D. 939 (N.Y. App. Div. July 31, 1917).
95. *Id.* at 19–21.
96. *F.E. Crane, 78, Dies; Led State Jurists*, N.Y. Times, Nov. 22, 1947.
97. *People v. Sanger*, 118 N.E. 637, 222 N.Y. 192 (1918).
98. *Id.* at 193.
99. *Id.* at 195.
100. *Id.* at 192, 194.
101. *Id.*
102. *Id.* at 192, 194–95.
103. *Id.* at 195.
104. On January 20, 1918, Sanger appealed the New York Court of Appeals decision to the U.S. Supreme Court to seek a broader decision that would allow nurses, as well as doctors, to prescribe contraceptives. Justice Louis Brandeis, a recent appointee, accepted the petition. Because of various delays, including America's entry into World War I, the hearing was not held until November 13, 1919. Four days later, the U.S. Supreme Court dismissed the case for want of jurisdiction, without issuing an opinion. *Sanger v. New York*, 251 U.S. 537 (1919) (per curiam).
105. Carole R. McCann, *Birth Control Politics in the United States: 1916–1945*, at 64 (1997).
106. Margaret Sanger, *Birth Control Crusade Marches On*, The Clubwoman, Aug. 1936, at 6.
107. Chesler, *supra* note 7, at 273.

People v. Sanger

108. *Id.* at 391.
109. *Id.* at 430.
110. *Id.* at 434.
111. *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936).
112. *Id.* at 737.
113. Margaret Sanger, *At Long Last, New Masses*, July 6, 1937, at 19–20.
114. See Brief for Appellee, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496), 1965 WL 115613, at *13–14 (“Of the few jurisdictions that have ruled on the constitutionality of contraceptive statutes all seem to be in agreement with the Connecticut Court that the regulation of contraceptives is a legitimate exercise of the state’s police power to regulate public morals . . . *People v. Sanger*, 222 N.E. 192, 118 N.E. 637 (1918), appeal dismissed for want of jurisdiction, 251 U.S. 537, 64 L.Ed. 403, 40 S. Ct. 55 (1919).”).
115. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single persons for that purpose violates the Equal Protection Clause).
116. See Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1972 WL 126045, at *28 (“A New York statute patterned after the *Comstock Act* served as the basis for conviction of Margaret Sanger when she opened the first birth control clinic in New York and attempted instruction of women regarding their reproductive systems.” (citing *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).) (footnotes omitted)).
117. *Griswold*, 381 U.S. at 486.
118. *Eisenstadt*, 405 U.S. at 453.
119. *Margaret Sanger is Dead at 82*, *supra* note 20.



THE DAVID A. GARFINKEL ESSAY CONTEST

With the generous support of Gloria and Barry Garfinkel, the Society established in 2008 the annual **David A. Garfinkel Essay Contest**, founded in memory of the Garfinkels' son David. This contest targets students from community colleges across New York State, offering them the opportunity to submit essays on topics of New York legal history. The competition seeks to draw students with a wide range of interests in law, history, social science and general research writing. Cash prizes are awarded with the intention of helping with the burden of tuition. The winners of the competition are honored on Law Day held in the magnificent courtroom of the New York State Court of Appeals. Their families and professors are invited for a memorable day at the courthouse which includes the awards ceremony followed by a luncheon where they are graciously and warmly greeted by the Court of Appeals Judges.

In previous years the David A. Garfinkel Essay Contest has looked at a diverse array of legal history topics that have attracted a wide range of students who either built upon, or found a new interest in, the complexities and questions of legal history. Topics explored in past years include: *The Courts and Human Rights in New York: The Legacy of the Lemmon Slave Case* (2008); *The New Netherland Legal System and the Law of 21st Century New York* (2009); *The Evolution of Justice Along the Erie Canal* (2010); *The Legal Legacy*



Law Day 2013

Top L-R: Prof. David Katz, III, Michael Benowitz, Inst. David Hines, Zachary Field (SUNY Prize Winner), Marilyn Marcus, Frances Murray, Dr. Jonas Falik, Josh Pawlikowski (Grand Prize Winner), Prof. John Luby Seated L-R: Deputy Chief Administrative Judge Fern Fisher, Ruby Singh (CUNY Prize Winner)




Law Day 2012

Top L-R: Michael Benowitz, Marilyn Marcus, Frances Murray
Bottom L-R: Amanda Griffin (3rd Place), Mary Erckert (2nd Place), Rodney Schulyer (1st Place)

of the Triangle Shirtwaist Factory Fire (2011); *The Blue and the Gray: New York During the Civil War* (2012); and *Cyberspace and the Law: What are Our Rights and Responsibilities?* (2013).

Special thanks to the wonderful staff at the Court of Appeals for serving as our judges. They read the essays with great care...and much soul-searching. Those essays considered worthy are sent to Former Chief Judge Judith S. Kaye for final selection. We extend our gratitude to Frances Murray, Chief Legal Reference Attorney at the Court of Appeals and a founding Trustee of the Society, for preparing the wealth of materials offered to the students to support their research, and for her expert management of this project.

The David A. Garfinkel Essay Contest would not reach the wide array of schools that it does without the efforts of the court system's liaison to education, its Office of Public Affairs. Our special and grateful thanks to Gregory Murray and Andrea Garcia for their successful outreach to schools across the State.

A complete history of the prior contests since 2008 together with a listing of the winners and those students whose essays are recognized for Honorable Mention, together with all of the winning essays which can be read in full, can be found in the Academic Center section of our website. 

Look back...and forward

The Society has had an exciting round of events since our last publication. I hope many of you were able to attend. Our website now offers webcasts of many of these programs. Please take a moment to look back with us on past events...and forward to upcoming ones.

Marilyn Marcus, Executive Director

What's Happened Recently...

2012 Stephen R. Kaye Memorial Program (Rescheduled)

A Tour of Our Beautiful Courthouses: Preserving, Protecting and Defending Them

June 10, 2013 • The New York City Bar

The 2012 Stephen R. Kaye Memorial Program, previously canceled due to Hurricane Sandy, featured a slide show of our beautiful legal landmarks and a discussion on the efforts to preserve, protect and defend them.

SLIDE SHOW PRESENTATION

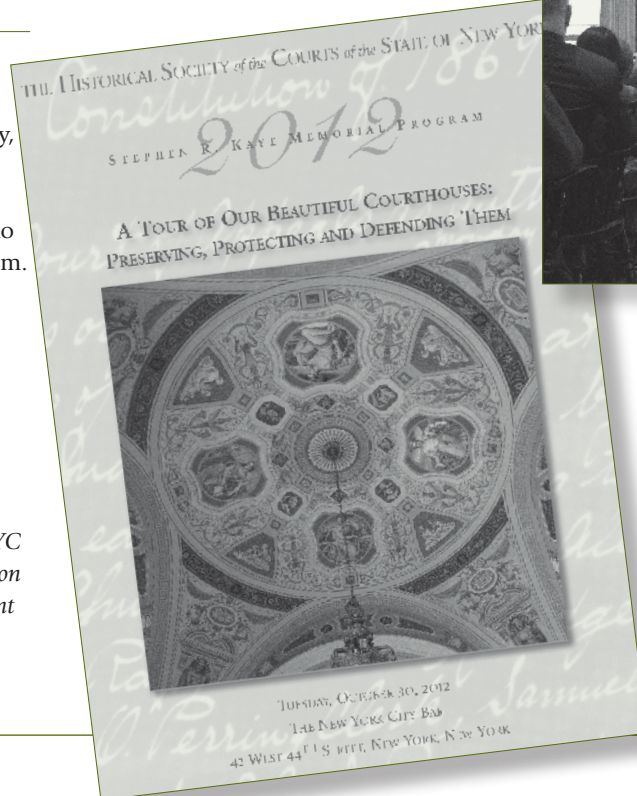
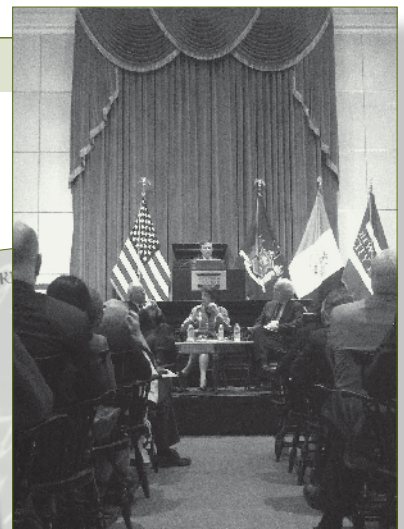
New York Legal Landmarks

Robert Pigott *Corporate Vice President & General Counsel, Phipps Houses*

CONVERSATION

Hon. Judith S. Kaye, *moderator*
with Robert B. Tierney *Chair, NYC Landmarks Preservation Commission*
& Leonard Koerner *Chief Assistant & Chief of Appeals Division, NYC Law Department*

Robert Pigott (at podium) speaking at the event with (L to R) Leonard Koerner, Former Chief Judge Judith S. Kaye and Robert B. Tierney seated in front of him



(continued)

A look back...and forward

PRO BONO: New York Lawyers and Public Service Looking Back Looking Forward

February 19, 2013 • The New York City Bar

We proudly presented this program developed with Chief Judge Jonathan Lippman.

Looking Back on Pro Bono Service

Henry M. Greenberg, Esq. *Partner, Albany office of Greenberg Traurig, LLP*

Litigating Death Penalty Cases Pro Bono

Hon. Robert S. Smith *Associate Judge, New York State Court of Appeals*

Interviewed by Hon. Judith S. Kaye *Former Chief Judge of the State of New York*

Looking Forward to Pro Bono in the 21st Century

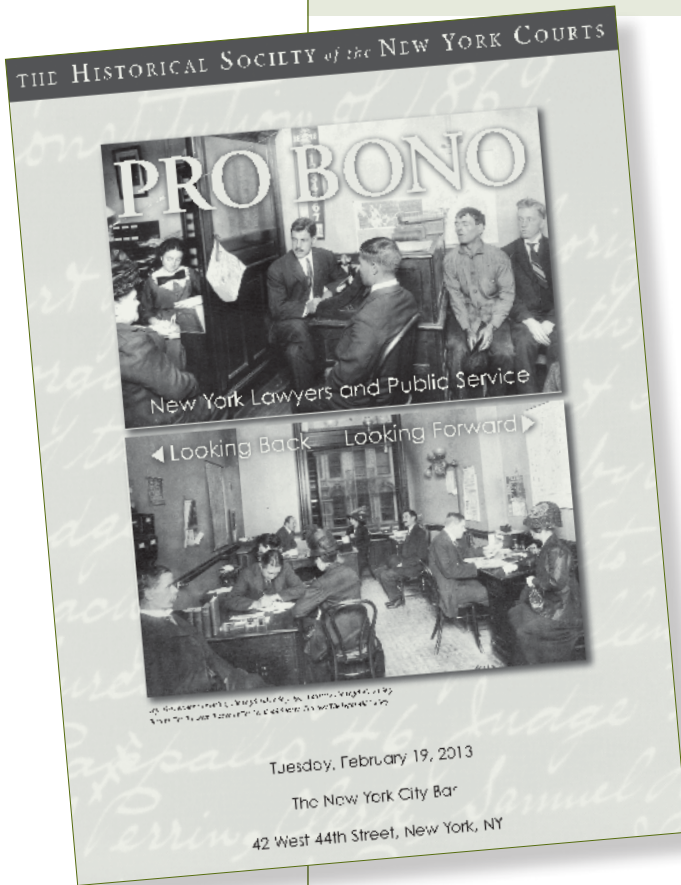
Esther F. Lardent, Esq., *Moderator President & CEO, Pro Bono Institute*

Steve Banks *Attorney-in-Chief, The Legal Aid Society*

Matthew Diller *Dean & Professor of Law, Benjamin N. Cardozo School of Law*

Helaine M. Barnett, Esq. *Chair, Chief Judge's Task Force to Expand Access to Civil Legal Services in NY*

Hon. Victor Marrero *U.S. District Judge, Southern District of New York*



Front (L to R): Dean Matthew Diller, Henry M. Greenberg, Chief Judge Jonathan Lippman, Esther F. Lardent & Helaine M. Barnett Back (L to R): Hon. Victor Marrero, Former Chief Judge Judith S. Kaye, Hon. Robert S. Smith, & Steve Banks



Henry M. Greenberg, Vice-President of the Society, speaking on the history of pro bono in New York

A look back...and forward

The Bartlett Commission, Reshaping the Law: A 50 Year Retrospective and an Enduring Legacy

September 24, 2012 • Furman Hall, Lester
Pollack Colloquium Room, NYU Law School

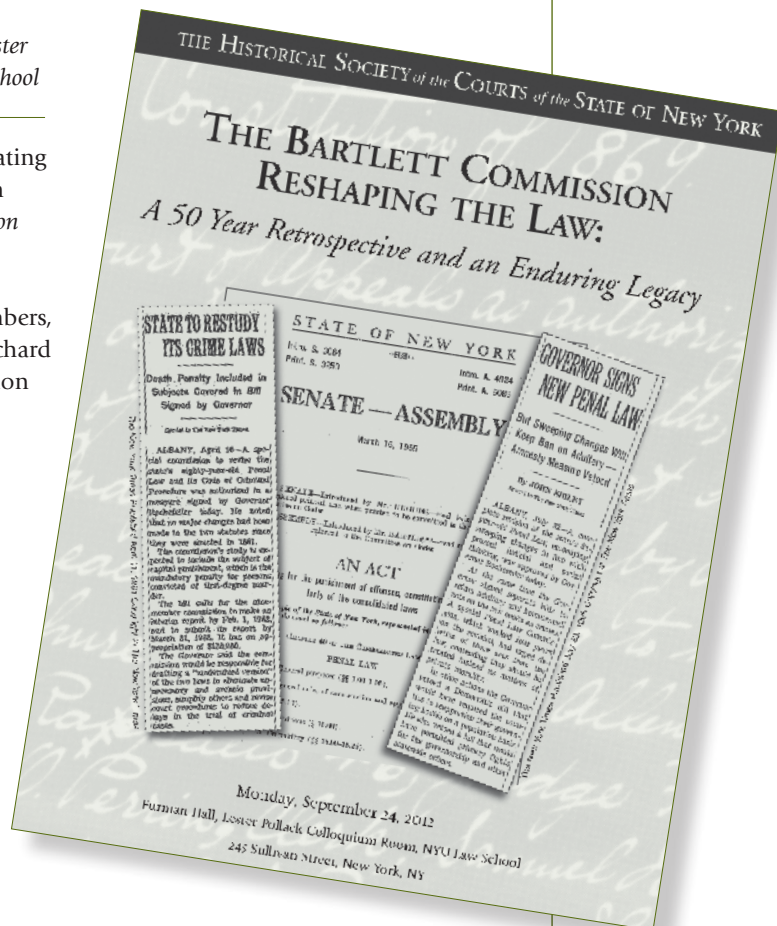
The Society hosted an evening celebrating the 50th anniversary of the formation of the *Temporary Commission on Revision of the Penal Law and Criminal Code*, which became known as the Bartlett Commission. Two of its leading members, Senator John R. Dunne, and Hon. Richard J. Bartlett, who chaired the Commission for over a decade, participated.



At podium (L to R): Richard J. Bartlett, Albert M. Rosenblatt, and John R. Dunne



Guests listening to John Dunne speak about his role with the Commission



(continued)



A look back...and forward

SCALES OF JUSTICE: An Evening of Live Music and Copyright Law

May 23, 2012 • The New York City Bar

This was more like an evening of cabaret than a CLE program as we explored what makes musical material copyrightable while listening to wonderful music.

A MUSICAL CONVERSATION:

When is an Expression of Music Copyrightable?

On the Podium

Robert W. Clarida, Esq. *Partner, Reitler Kailas & Rosenblatt LLC*

At the Piano

Ted Rosenthal *Jazz Pianist, Composer, Educator*

Joined by

Lesley Rosenthal *Vice President, General Counsel and Secretary, Lincoln Center for the Performing Arts*



Ted Rosenthal (at the piano), Albert M. Rosenblatt, President of the Society (behind piano), and Robert W. Clarida (at the podium) at Scales of Justice



Guests listening to the music of Lesley & Ted Rosenthal

A look back...and forward

What's Ahead...Upcoming Program

NOMINATED FROM NEW YORK: THE EMPIRE STATE'S CONTRIBUTIONS TO THE SUPREME COURT BENCH *Solicitors General and the Supreme Court: The New York Influence*

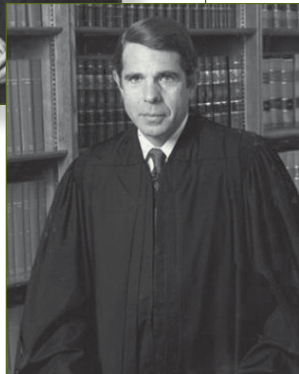
October 25, 2013 • The New York City Bar

Continuing our important partnership with the U.S. Supreme Court Historical Society, we look forward with much anticipation and pride to our upcoming fall program looking at the role of the Solicitor General. Jeffrey P. Minear, Counsel to U.S. Chief Justice John G. Roberts, will moderate a discussion with Prof. John Q. Barrett and former Solicitors General Drew S. Days, III and Paul D. Clement. Justice Elena Kagan will be our special guest participant.



*The Supreme Court of the United States, 2010
Collection of the Supreme Court of the United States*

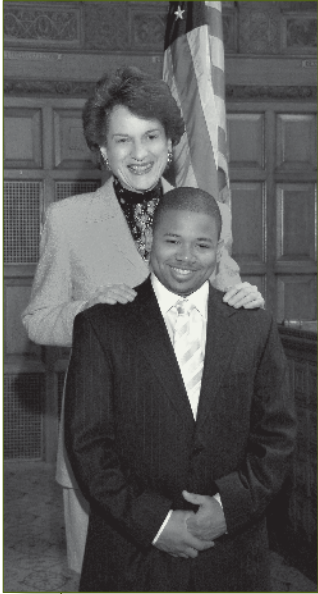
What We're Working on...



ORAL HISTORY

We have captured the oral histories of all of the living retired Judges of the New York Court of Appeals, including the two Former Chief Judges, Judith S. Kaye and Sol Wachtler. We are also developing a video library of the histories of members of the New York Bar who stand as legal luminaries. Transcripts are beginning to be made available to the public on our website.

(continued)



Former Chief Judge Judith S. Kaye with the inaugural contest winner Elijah Fagan-Solis (Hudson Valley Community College)

EDUCATION INITIATIVES

David A. Garfinkel Essay Contest

This annual contest invites SUNY and CUNY community college students from across the State to write an original essay on topics of legal history.

- 2008: The Courts and Human Rights in New York: The Legacy of the Lemmon Slave Case
- 2009: The New Netherland Legal System and the Law of 21st Century New York
- 2010: The Evolution of Justice Along the Erie Canal
- 2011: The Legal Legacy of the Triangle Shirtwaist Factory Fire
- 2012: The Blue and the Grey: New York During the Civil War
- 2013: Cyberspace and the Law: What are our Rights and Responsibilities?

Bard High School Early College

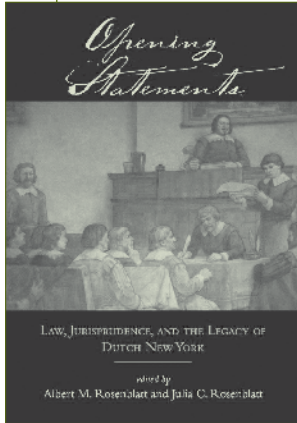
The Society has provided grants to Bard High School Early College, a public school with campuses in Manhattan, Queens and Newark, NJ, to develop classroom curriculum to teach its

students about the role of the courts in a civil society...how to administer justice and preserve the rule of law. The curriculum is designed to reach a diverse population of New York City public school students in middle and high schools.



Former Chief Judge Judith S. Kaye and Society Trustee Roy L. Reardon, Esq. participating in a middle-school class at Bard High School Early College

A look back...and forward



PUBLICATIONS

Our Books

- *Opening Statements: Law, Jurisprudence, and the Legacy of Dutch New York* edited by Julia and Albert M. Rosenblatt, a collection of essays exploring how the Dutch influenced law and jurisprudence in colonial America. (SUNY Press 2013)
- *The Judges of the New York Court of Appeals: A Biographical History*, edited by Albert M. Rosenblatt (Fordham University Press 2007)
- *Historic Courthouses of the State of New York: A Study in Postcards* by Julia and Albert M. Rosenblatt (Turner Publishing Company 2006)

2013 Calendar

100 YEARS AGO 1913 is a snapshot of the then legal state of society in New York with beautiful images and interesting vignettes

SOCIETY'S WEBSITE



The Society launched its new website in 2013 with cutting edge and user friendly tools. It includes a virtual library of legal history, education resources, an expanded collection of images, and links to our social networking sites. www.nycourts.gov/history

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