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JUDICIAL NOTICE

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Judicial Notice accepts articles 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.

From the Editor-in-Chief

Dear Members,

Fame is fleeting. The thirteenth issue of *Judicial Notice* demonstrates that the adage applies to prominent New York lawyers, judges, and elected officials as well. The four lawyers featured in this issue were lions of the bar and bench in their day, instrumental in shaping New York jurisprudence, yet their accomplishments may be forgotten even among those who recognize their names.

Chancellor James Kent, as portrayed by Hon. Robert Smith, is clearly the father of American jurisprudence. Kent's decisions set the stage for the development of American law, and his four-volume treatise, *Commentaries on American Law*, published after he was mandatorily retired at age 60 in 1823, explains and summarizes the evolution of American law. Kent holds a special place in the heart of the Society; we joined many of Kent's descendants on October 30, 2016 in Beacon New York for the Chancellor James Kent Gravestone Restoration Ceremony.

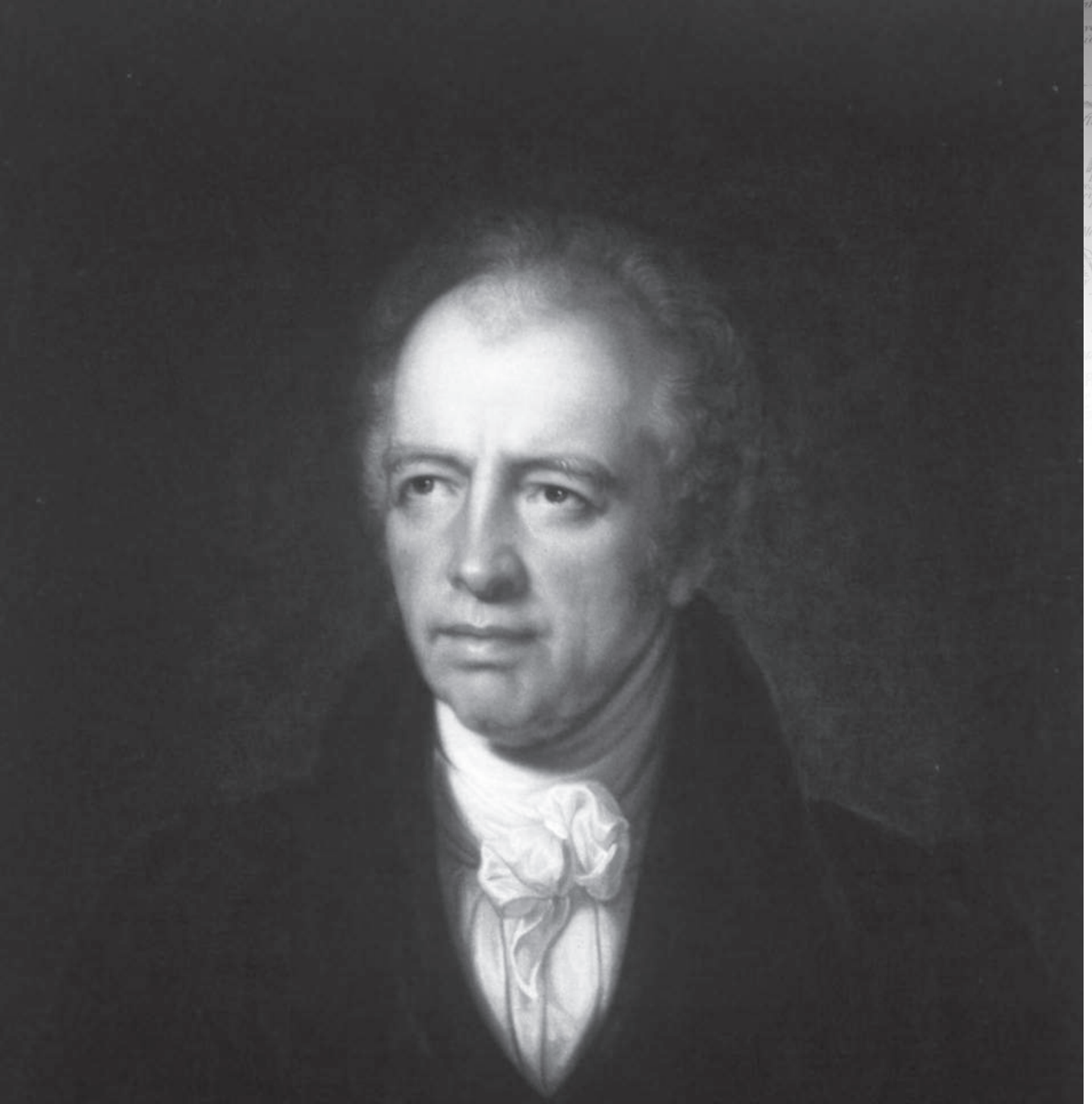
By the dawn of the 19th century, Nathan Sanford was an accomplished young New York City lawyer, hailing from Long Island. As indicated by Ann Sandford, he served as District Attorney for New York (predecessor to United States District Attorney), having been appointed by Thomas Jefferson; United States Senator from New York; Chancellor of the Court of Chancery; and delegate to the New York State Constitutional Convention of 1821-2. His disagreements with Kent at the Constitutional Convention were most pronounced. Kent opposed constitutional provisions to emancipate slaves and broaden suffrage rights to non-property holders, while Sanford was a stalwart of the progressive wing of the convention. He actively promoted the policies of the Van Buren Democrats, including court reform and expansion of suffrage rights.

William S. Fullerton, one of the great trial lawyers of the mid-19th century, was known as the "Great American Cross-Examiner." Michael Green tells us he represented many political figures charged with corrupt practices, but he may have been best known for his incisive cross-examination of adulterous spouses. It is the cross-examination of Henry Ward Beecher, the famous Brooklyn abolitionist preacher, in *Tilton v. Beecher*, in which the renowned pastor was forced to defend himself against the charge of "alienation of affections," otherwise known as adultery, for which Fullerton is remembered.

William Maxwell Evarts, a contemporary of Fullerton, became the leading defense lawyer in the Beecher trial. As Robert Pigott indicates, Evarts was an extremely well-known lawyer of his time, and the longest serving president of the New York City Bar Association (1870-79), where one of the Association's rooms bears his name. Evarts played critical roles in United States history defending Andrew Johnson in his impeachment proceedings and representing Rutherford Hayes in the 1876 disputed election proceedings. His victories in both led to his appointment as Attorney General by Johnson and Secretary of State by Hayes.

Each of the above stories is well told by its respective author. We continue to be indebted to Marilyn Marcus as Managing Editor, Allison Morey as Associate and Picture Editor, David L. Goodwin as Associate and Style Editor, and Nick Inverso as Graphic Designer with the NYS Unified Court System's Graphics Department for making *Judicial Notice* the interesting publication it has come to be.

- Helen E. Freedman



Portrait of Chancellor James Kent by Rembrandt Peale. Court of Appeals Collection.
Courtesy of the Historical Society of the New York Courts

Chancellor James Kent:

FATHER OF AMERICAN JURISPRUDENCE

by Hon. Robert S. Smith

The Honorable Robert S. Smith (Ret.) is head of the appellate practice at Friedman Kaplan Seiler & Adelman LLP in New York. He served as Associate Judge of the New York State Court of Appeals, New York's highest court, from 2004-2014. Before serving on the Court of Appeals, Judge Smith practiced law in New York City. He has argued dozens of appeals before federal and State appellate courts, including two appeals before the United States Supreme Court.
Judge Smith graduated with great distinction in 1965 from Stanford University and received his law degree, magna cum laude, in 1968 from Columbia Law School, where he was editor-in-chief of the Columbia Law Review. He later taught at Columbia, from 1980 until 1990, and at the Benjamin N. Cardozo School of Law from 2006 until 2015.

Who was James Kent? Very few people have any clear idea—even people who went to Chicago-Kent College of Law, or to Columbia Law School back in the day when it was in Kent Hall. Even Columbia students who were honored with the title of James Kent Scholars would probably flunk a quiz on who James Kent was. Yet there was a time when his was a household name to every New York lawyer, and when he was known throughout the country as the "Father of American Jurisprudence."

First the basics: Kent was born in Doanesburg, New York in 1763, the year the French and Indian War ended, and died in 1847, during the Mexican War. He went to Yale, where his studies were disrupted by the Revolutionary War. Law schools didn't exist then, so after Yale he went back to New York, served an apprenticeship and started practicing law. In the mid-1790s, he was a professor, lecturing undergraduates at Columbia College. He served on the New York Supreme Court from 1798 until 1814, when he became the Chancellor of New York. He left the bench at 60, in 1823 (the mandatory retirement rules were even tougher then than now), and wrote a four-volume book, *Commentaries on American Law,* that was published between 1826 and 1830.

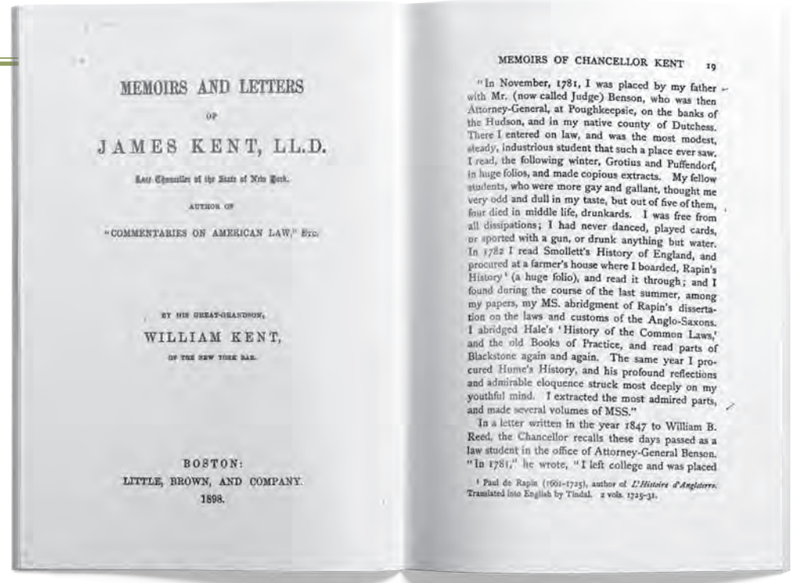
If you and I had met James Kent, we might not have liked him. I love practicing law, and if you are reading this maybe you do too. Kent wrote that he "always extremely hated" it.[1] As a lecturer, he was reputed to be very boring. He quit teaching in 1787 because no one showed up for his lectures.[2] So if you didn't want him as your law partner or law professor, maybe you could just go out and have a good time with him? I doubt it. Here is his description, written in old age, of himself at 18, when he was studying law with other apprentices in a Poughkeepsie law office:

> *My fellow students, who were more gay and gallant, thought me very odd and dull in my taste.… I was free from all dissipations; I had never danced, played cards, or sported with a gun, or drunk anything but water.*[3]

Of those fellow students, he reported with seeming satisfaction that "out of five of them, four died in middle life, drunkards."[4]

Above: Map of New York State, 1869. Library of Congress, Geography & Maps Division, G3801.P3 1869 .R5 RR 485

My fellow students, who were more gay and gallant, thought me very odd and dull in my taste.... I was free from all dissipations; I had never danced, played cards, or sported with a gun, or drunk anything but water.



MEMOIRS AND LETTERS

OF

JAMES KENT, LL.D.

Late Chancellor of the State of New York.

AUTHOR OF

"COMMENTARIES ON AMERICAN LAW," ETC.

BY HIS GREAT-GRANDSON,

WILLIAM KENT,

OF THE NEW YORK BAR.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1898.

MEMOIRS OF CHANCELLOR KENT 19

"In November, 1781, I was placed by my father with Mr. (now called Judge) Benson, who was then Attorney-General, at Poughkeepsie, on the banks of the Hudson, and in my native county of Dutchess. There I entered on law, and was the most modest, steady, industrious student that such a place ever saw. I read, the following winter, Grotius and Puffendorf, in huge folios, and made copious extracts. My fellow students, who were more gay and gallant, thought me very odd and dull in my taste, but out of five of them, four died in middle life, drunkards. I was free from all dissipations; I had never danced, played cards, or sported with a gun, or drunk anything but water. In 1782 I read Smollett's History of England, and procured at a farmer's house where I boarded, Rapin's History[1] (a huge folio), and read it through; and I found during the course of the last summer, among my papers, my MS. abridgment of Rapin's dissertation on the laws and customs of the Anglo-Saxons. I abridged Hale's 'History of the Common Laws,' and the old Books of Practice, and read parts of Blackstone again and again. The same year I procured Hume's History, and his profound reflections and admirable eloquence struck most deeply on my youthful mind. I extracted the most admired parts, and made several volumes of MSS."

In a letter written in the year 1847 to William B. Reed, the Chancellor recalls these days passed as a law student in the office of Attorney-General Benson. "In 1781," he wrote, "I left college and was placed

[1] Paul de Rapin (1661–1725), author of *L'Histoire d'Angleterre*. Translated into English by Tindal. 2 vols. 1725–31.

Pages from *Memoirs and Letters of James Kent, L.L.D., Late Chancellor of the State of New York, Author of "Commentaries on American Law," Etc.* by William Kent, 1898. Courtesy of the Internet Archive

So what did he do that might make us feel more warmly toward him? Two things: He was a great judge, and he wrote the *Commentaries*.

In Kent's time, law and equity cases were litigated in separate courts in New York, and Kent distinguished himself as a judge in both. He was a justice of the New York Supreme Court, a law court, for 16 years. At that time, the title "Supreme Court" was less confusing then than it is today. It was then, as it is now, the most exalted trial court in the state, and it also heard appeals, sitting in banc and reviewing decisions by single justices. It was "supreme" (if you don't count the separate-but-equal Chancery Court) in the sense that there was no real appellate court with jurisdiction over it. There was something called the "Court for the Trial of Impeachments, and the Correction of Errors" (usually shortened, probably sometimes sardonically, to "Court of Errors"), which reviewed both law and equity decisions, but that wasn't what we think of as a court. Its members, when Kent became a Supreme Court justice, were the five justices of that court; the Chancellor; and all the members of the New York State Senate. (Just picture appearing today in a tribunal like that.) The first real appellate court in New York, the Court of Appeals, didn't come into existence until 1847, the year Kent died.

The five Supreme Court Justices rode circuit all over the state—and of course, in the early 19th century, that meant they rode on horses or in stagecoaches. It was a taxing job, and it has been speculated that Kent was not sorry to leave it at the age of 50 for the Court of Chancery, a one-judge court that sat mainly in Albany, but sometimes in New York City.[5] As "Chancellor Kent," Kent became legendary—so much so that one could think, in reading about him, that "Chancellor" was the name his parents had given him.

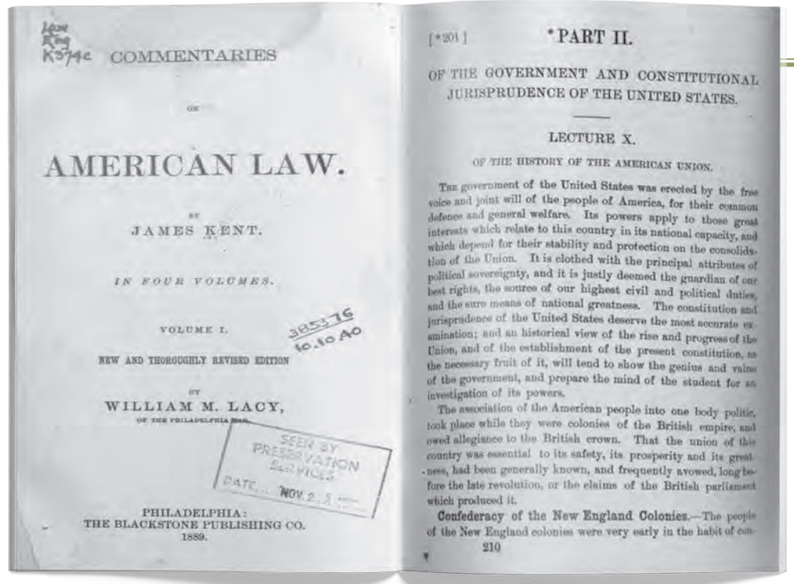
Perhaps his greatest contribution as a judge was to invent a major part of what we now think of as a judge's job: he instituted the custom, new in American jurisprudence, of writing and publishing opinions. When he came to the bench in 1798, he wrote years later, "there [were] no reports or State precedents.... We had no law of our own, & nobody knew what it was."[6] Other judges took up the practice of opinion writing, but Kent, in his own (probably correct) estimation, "gradually acquired preponderating influence," and most of the opinions from his years in Supreme Court, including the many signed *per curiam*, are his.[7]

A sampling of Kent's opinions as justice and Chancellor does not convey, to an uninitiated reader of today, a clear sense of what so awed his contemporaries. The opinions are clear, well-written and persuasive, written in the typical elevated and discursive style of the age. They are a pleasure to read if you like that sort of thing (I do), but the same is true of many other judicial writings from a century or two ago. Reading his opinions alongside those of his colleagues on the Supreme Court, you do not get the sense—as you do when you read, say, Holmes or Cardozo or Learned Hand—that you have encountered a rare master of the craft of judging.

Still, I think I detect in Kent's opinions some things that may be characteristic of their author. It seems that he had one quality I value highly in judges: the ability, or willingness, to put one's personal preferences, and one's vanity, aside. In *Seixas v. Woods*[8]—a case of such enduring fame that I studied it, if my memory does not deceive me, in law school a mere half century ago—Kent upheld the *caveat emptor* principle in a case where goods were not as the seller had represented them to be, but there was no express warranty, and no fraud. Kent found the case "clear... for the defendant" on the basis of "the ancient, and the uniform, language of the *English law*"[9]—though he said that the rule in civil (i.e., Roman) law jurisdictions was otherwise, "and, if the question was *res integra* [an open one] in our law, I confess I should be overcome by the reasoning of the *Civilians*."[10] Years later, Kent as Chancellor decided *Ogden v. Gibbons*,[11] a case that, under the name *Gibbons v. Ogden*,[12] would become one of Chief Justice Marshall's most famous decisions. Of course Kent knew that there was an important constitutional issue in the case; but he resisted any temptation to vent his views about it for posterity, saying only that the right of the New York legislature to pass the legislation at issue (which the United States Supreme Court was to hold invalid under the Commerce Clause) "has been settled (as far as the Courts of this state can settle it)."[13] Kent decided the case on less exciting grounds: the interplay between the state statute and a federal license.

According to the legal historian John Langbein, Kent's place in judicial history owes much to his role in the successful struggle to convert the law into a learned profession. He was an unremitting foe of what Langbein calls "folk law"—the idea, popular in the early days of our republic, that "[o]rdinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways."[14] If there was anything Kent was not, it was a populist. He was quoted as rejecting the idea of translating the "Latin and intricate technical phrases" in his *Commentaries* by saying:

What kind of legal protection would you have if every man could be a lawyer? All things are changing, it is true, but when you find law made easy to the meanest comprehension, look out for countless volunteers in our noble profession, to whom good Latin and correct English are alike inaccessible.



COMMENTARIES

ON

AMERICAN LAW.

BY

JAMES KENT.

IN FOUR VOLUMES.

VOLUME I.

NEW AND THOROUGHLY REVISED EDITION

BY

WILLIAM M. LACY,

OF THE PHILADELPHIA BAR.

PHILADELPHIA:
THE BLACKSTONE PUBLISHING CO.
1889.

[*201] *PART II.

OF THE GOVERNMENT AND CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES.

LECTURE X.

OF THE HISTORY OF THE AMERICAN UNION.

The government of the United States was erected by the free voice and joint will of the people of America, for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. The constitution and jurisprudence of the United States deserve the most accurate examination; and an historical view of the rise and progress of the Union, and of the establishment of the present constitution, as the necessary fruit of it, will tend to show the genius and value of the government, and prepare the mind of the student for an investigation of its powers.

The association of the American people into one body politic, took place while they were colonies of the British empire, and owed allegiance to the British crown. That the union of the country was essential to its safety, its prosperity and its greatness, had been generally known, and frequently avowed, long before the late revolution, or the claims of the British parliament which produced it.

Confederacy of the New England Colonies.—The people of the New England colonies were very early in the habit of con-

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Pages from *Commentaries on American Law* by James Kent, 1889.
Courtesy of the Internet Archive

What kind of legal protection would you have if every man could be a lawyer? All things are changing, it is true, but when you find law made easy to the meanest comprehension, look out for countless volunteers in our noble profession, to whom good Latin and correct English are alike inaccessible.[15]

Kent obviously loved Latin. It is no accident that *"caveat emptor"* and *"res integra"* appear in my brief summary of *Seixas.* And in *Ogden,* his Latin became more literary. The case, readers of Chief Justice Marshall's opinion may remember, concerned a monopoly of steamboat traffic granted by the New York legislature. A mere "coasting license" could not, Kent held, overcome the force of the statutory monopoly. Only some federal statute or Supreme Court decision could do that. Or, in other words:

"We must be satisfied that
Neptunus muros, magnoque emota tridenti
Fundamenta quatit."[16]

That means, I am reliably informed, "Neptune shakes the walls, and the foundations are uprooted by his great trident." It's a vision of the fall of Troy, from the Aeneid.[17] Its connection to the steamboat-monopoly issue may be peripheral. But Kent is entitled to a little fun, and so am I.

As I've said, the modern reader of Kent's opinions doesn't intuitively grasp what made him a great judge. But the *Commentaries* are different—the amazing nature of that achievement leaps out at once. Kent set out to do nothing less than summarize American law—*all* of American law. He wanted to be to the law of his country what Blackstone was to the law of England. By common consent, he succeeded brilliantly. In 67 chapters, he explains international law, constitutional law, personal and real property, and pretty much everything else.[18] No one had ever done that before—and no one ever did it, or ever can do it, again. As the body of knowledge in law, or any other field, becomes more complicated, even the greatest intellect cannot contain it all; today, we admire anyone who even tries to do for any one of those fields what Kent did for all of them. A number of figures in history—Aristotle, Roger Bacon, Da Vinci—have been called "the last person to know everything," but none since around the time of Goethe (1749–1832), roughly Kent's contemporary.[19] Kent can fairly be called the last person to know everything about American law.

The *Commentaries,* as a description of American law, are long out of date, of course. The treatise was "a huge commercial success" in its day, and appeared in many revised editions, but the last was in 1896.[20] No one would read it to find out what the law is now.

But you might read it—not the whole thing, of course, but you might dip into it here and there—just for the joy of experiencing a great work of 19th century legal literature—at least, to repeat a phrase, if you like that sort of thing, and I do. To tempt you, I'll close with a sample picked more or less at random, the beginning of Kent's chapter on "The History of the American Union":

The government of the United States was erected by the free voice and joint will of the people of America, for their common defense and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. The constitution and jurisprudence of the United States deserve the most accurate examination; and an historical view of the rise and progress of the Union, and of the establishment of the present constitution, as the necessary fruit of it, will tend to show the genius and value of the government, and prepare the mind of the student for an investigation of its powers.[21]

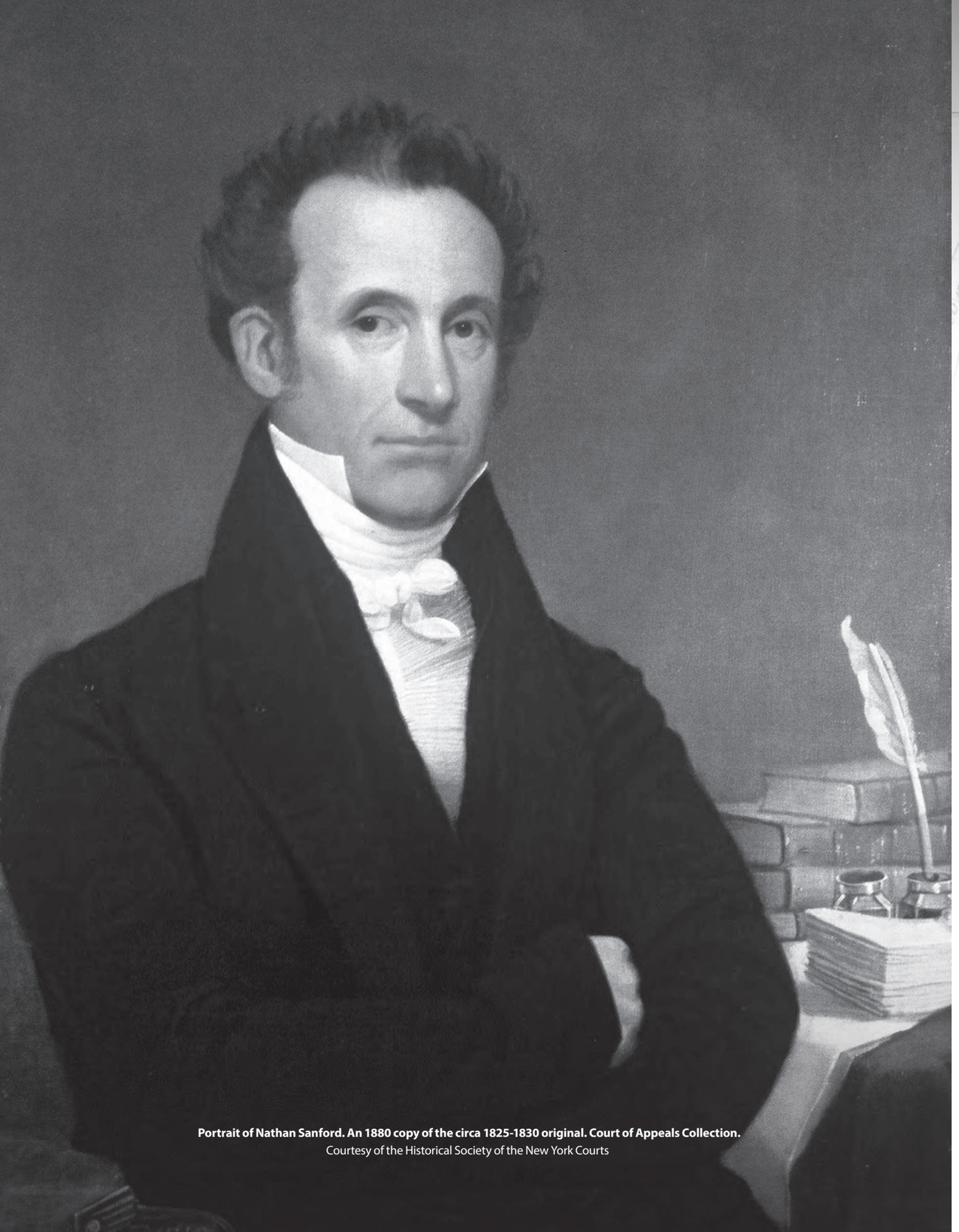
They don't make 'em like that anymore.

EDITOR'S NOTE

At the end of this issue, we include excerpts of a letter James Kent wrote to Thomas Washington in 1828, which provides a unique view the Chancellor's life and career.

ENDNOTES

1. James Kent, *Memoranda of My Life* (unpublished manuscript, on file in James Kent Papers, National Archives, microfilm on file at NYU School of Law), quoted in Daniel J. Hulseboch, "An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic," 60 Ala. L. Rev. 377, 389 n.41 (2009).
2. John H. Langbein, "Chancellor Kent and the History of Legal Literature," 93 Colum. L. Rev. 547, 558–59 (1993).
3. William Kent, *Memoirs and Letters of James Kent., LL.D.* 19 (1898), *available online at* https://archive.org/details/memoirsandlette00kentgoog.
4. *Id.*
5. Langbein, *supra* note 2, at 564.
6. Letter from James Kent to Thomas Washington, New York City (Oct. 6, 1828) *reprinted in* "An American Law Student of a Hundred Years Ago," 2 Am. L. Sch. Rev. 547, 551 (1911), *available online at* https://books.google.com/books?id=7xZCAQAAMAAJ.
7. *Id.*
8. 2 Cai. 48 (N.Y. Sup. Ct. 1804)
9. *Id.* at 54.
10. *Id.* at 55.
11. 4 Johns. Ch. 150 (N.Y. Ch. 1819).
12. 22 U.S. (9 Wheat.) 1 (1824).
13. *Ogden,* 4 Johns. Ch. at 156 (citing *Livingston v. Van Ingen,* 9 Johns. 507 (N.Y. 1812)).
14. Langbein, *supra* note 2, at 566.
15. William Kent, *supra* note 3, at 200.
16. *Ogden,* 4 Johns. Ch. at 159.
17. Emails from Emlen Smith to the author (Nov. 11–12, 2017).
18. See, for instance, 1 James Kent, *Commentaries on American Law* 200–19 (6th ed. 1848), *available online at* https://archive.org/details/commentariesonam01kent.
19. *See* "So You Think You're Smart: The Last Person to Know Everything," Climateer Investing (July 25, 2015, 9:46 AM), http://climateerinvest.blogspot.com/2015/07/so-you-think-youre-smart-last-person-to.html.
20. Langbein, *supra* note 2, at 565.
21. 1 James Kent, *supra* note 20, at 201.



Portrait of Nathan Sanford. An 1880 copy of the circa 1825-1830 original. Court of Appeals Collection.
Courtesy of the Historical Society of the New York Courts

Nathan Sanford

and his Contributions to New York State Law

by Ann Sandford

Ann Sandford holds a PhD from New York University and is the author of *Reluctant Reformer: Nathan Sanford in the Era of the Early Republic* (2017) and *Grandfather Lived Here: The Transformation of Bridgehampton, New York, 1870-1970* (2006). Her articles have covered topics in early modern European history and the history of Long Island. She has been a history professor and a business executive. She lives in Sagaponack, New York. Author photograph by Kathryn Szoka.

Above: *Plan of the Assembly-Chamber Occupied by the Convention*, 1821. Sanford occupied seat number five in the front row on the aisle. Courtesy of the New York State Library

In his youth, Nathan Sanford could not have imagined his eventual rise to public prominence as a lawyer-politician. In just a few years, he would prosper as a district attorney (1803-1815), having been appointed by President Thomas Jefferson for the District of New York (a jurisdiction that encompassed the entire state). He soon entered politics, becoming a New York State lawmaker (1808-1815), United States senator (1815-1821, 1826-1831), and delegate to the state constitutional convention of 1821. He served as chancellor of New York (1823-1826) during the period between his two terms in the Senate.[1] Many of Sanford's contemporaries would view his tenure as district attorney as bringing a period of stability to the office after the scandal of embezzlement that had surrounded the departure of his predecessor, Edward Livingston.[2] This essay aims to shed light on the largely overlooked contributions made by Sanford to law and democracy in the era of the early Republic.

Lawyer

In the summer of 1793, at age sixteen, Sanford completed his studies at Clinton Academy in East Hampton, New York, and journeyed from his home on eastern Long Island to Connecticut where he would attend Yale College. At Yale, he pursued advanced liberal studies to prepare for a career in law. A student notebook from 1794-95 lists topics for the weekly disputations required of junior and senior students. Sanford no doubt attended these debates as a freshman and a sophomore, encountering such questions as "Whether Democratic societies are beneficial" and "Ought property to be a necessary qualification for public office [?]."[3] Sanford's perspective also broadened with exposure to lectures in political philosophy, and other studies in the classics, history, and foreign languages. With good reason, he had come to envision himself a lawyer.

After two years of college, Sanford left to read law in Manhattan with the Federalist Samuel Jones when Jones was the state comptroller.[4] In 1798 he traveled back to Connecticut to attend the prestigious Litchfield School of Law. The school offered courses in topics relevant to Sanford's interests, such as business law and real property. Most students pursued the lectures entitled "The Law Merchant, Contracts, etc." while fewer took courses in "Criminal Law." Some constitutional law was also taught. Sanford would participate at moot court and attend talks on political issues during the fifteen-month course. [5]

His formal student days over, Sanford returned to New York City in 1799. In the following year when he opened his law office, he was typical of the young, ambitious, and public-minded lawyers from modest rural backgrounds who came to Manhattan. During the next few years he earned the certifications required of a lawyer on the go.

In 1801, he was admitted to the Supreme Court of Judicature, which had the authority to review the records of any lower court.[6] He was also accepted as a "solicitor" at the court of chancery, the state civil court held over from colonial times where the chancellor presided and issued rulings, usually without juries.[7] He was admitted as a "counsellor" to practice at the court of common pleas, often called the mayor's court, along with Daniel D. Tompkins, a future governor and vice president, and Peter A. Jay, a son of the Federalist governor of New York, John Jay. Sanford was admitted to the court of chancery in 1805.[8]

His thriving private practice—and growing reputation—gave the young lawyer the opportunity to make his earliest contribution to New York State law: he led the appeal to the state supreme court in *Pierson v. Post,* the landmark case that became popularly known as the Fox Case, and one that is familiar to generations of law students from its prominence in first-year Property courses.[9]

The initial court proceedings in the case had begun in 1802 and took place in the village center of Southampton, a few miles from Sanford's birthplace. The plaintiff, Lodowick Post from Bridgehampton, stated that he and some friends had gone foxhunting near the "beach" in Sagaponack "with dogs and hounds" when they were thwarted in their proper pursuit of a wild animal, a fox. Jesse Pierson, a school teacher out for a walk, spotted the hunters, snatched and killed the fox, and took it home. Shortly thereafter Post, believing the fox in the chase was his, took Pierson to court for knowingly interfering with his pursuit. The jury of six men decided in his favor.[10] In early 1803, Pierson appealed the judgment. He engaged Sanford as his lawyer, perhaps acting on the recommendation of a prominent local politician. The young lawyer may also have accepted the case, in part, as a favor to his cousin, Jesse Pierson.[11] Twenty-six at the time, the case afforded Sanford an opportunity for visibility before the court. In the United States of 1800, critical property law debates dealt more often with movable, that is, personal property than real property. In dealing with how to "establish ownership of wild animals on wasteland," the Fox Case addressed one of the most controversial movable property issues.[12] The appeal was finally decided in September 1805, for Pierson.

In the appeal, Post's lawyer argued that pursuit (of the fox) was ownership. Sanford, using Roman law and other sources of civil law claimed that capture was possession, the basis for title. It was Sanford who convinced the court, which adopted his argument, and his client won the judgment. The case was an example of how New York State courts had begun to accept legal "principles designed to serve the new Republic."[13] An expanding national economy required a basis for the certainty of ownership of particular resources. Pursuit as the basis for property rights could include many claimants, whereas possession would be much clearer, and certain. Civil law came to provide a "way of thinking about property in absolute rather than feudal terms," with its often conflicting property claims.[14]

Legal historian Angelia Fernandez has sought to explain why Sanford, the "eminent attorney," and the other lawyers and judges in the case, remained involved with the appeal for more than two and one-half years as it was held over by the court, term after term. She argues that rather than to reverse the case "on pedestrian procedural grounds or on trite common law," the participants saw a chance to use their training in the classics, allowing the learned Sanford to quote and argue from the codes of Roman jurist Justinian, among others.[15] Justice Daniel Tompkins, who had received his counselor's license for the supreme court with Sanford, wrote the majority opinion for the court following Sanford's arguments.[16] The case added clarity to the legal question—how is property not already owned acquired—and gradually became widely known among lawyers in the nineteenth and early twentieth centuries. In 1804, James Kent, a future critic of Sanford as a politician, became chief justice of the New York Supreme Court and one may speculate whether he influenced the court's decision on the appeal along the lines Sanford had argued. In any event, in his widely read 1827 book, *Commentaries on American Law,* Kent, the influential law professor, wrote at length about *Pierson v. Post* in his section on property law, bringing the case to a wider audience.[17]

Politician

A decade later, now a well-known politician, United States senator Sanford showed his commitment to a more democratic suffrage. In 1816, his support for national election law reform that would have affected New York State moved that debate forward. Senators had submitted a resolution to amend the Constitution. It would bypass state legislatures and require all states to adopt a form of popular voting for selecting the electors who chose the president and vice president of the United States. It would challenge New York's practice of the selection of electors by the legislature. At the time, the states were equally divided between those where electors were selected by a popular vote and those where state legislatures decided who the electors would be. Like Sanford, Federalist Rufus King, the other senator from New York, supported the resolution. The Senate, however, defeated the resolution when it failed to reach the two-thirds majority required of both houses of Congress to initiate amending the Constitution.[18]

Two years later, Sanford proposed popular voting by district as the means to move the selection of presidential electors from state legislatures to the voters. Responding to instructions he had received from the dominant Republican faction in the New York legislature, he offered an amendment to the Constitution on the process for selecting electors (a similar one had already passed the North Carolina legislature). It would divide the states into districts, and "persons qualified to vote for representatives" to the House would also be qualified to vote in the selection of electors. The proposal met with little support in the Senate and languished. In January 1820, however, two-thirds of the Senate, including Sanford, supported a similar resolution. When it was sent to the House, it was tabled. These efforts to expand direct democracy proved hard to achieve. New York State did not adopt popular voting for presidential electors by district until 1828, a decade after Sanford and the state legislature sought the reform through a federal constitutional amendment. In 1832, the state legislature approved the choice of electors by direct, statewide popular vote—the process in effect today.[19]

For some time, the calling of a constitutional convention to reform state government institutions and practices had been widely debated in New York,

Clinton Academy, East Hampton, New York, opened 1785.
Photograph by the author, 2011

reflecting tensions of the period. From 1790 to 1820, the state population had grown from about 340 thousand residents to well over 1.3 million. But wealth did not spread evenly. For many white laborers, small farmers, and tradesmen, the social value of their work and opportunities to become independent proprietors had diminished. The drift seemed to threaten white male heads of households who had achieved a middling status.[20] To avoid a dependency on large farmers or manufacturers for employment, many families moved to western New York State to start anew. While New York City, Long Island, and areas up the Hudson Valley had constituted over 85 percent of the state's population in 1790, by 1830 over 60 percent of the population was living in the new counties to the west and the north of that region.[21]

Free blacks also grew in number in the early years of the Republic, clustered largely in northern cities and towns. In 1820 New York City, they counted for 8.8 percent of the population and tended to hold low-paying jobs. Like white men, they would become enmeshed in the politics of reform, particularly the right to vote. Of all the states, New York's freehold property requirements for voting were among the most stringent. In 1790, about 45 percent of white men were excluded from the franchise. Propertied men of color could vote but due to economic privation, they were few in number. By 1820, turmoil swirled around the issue of access to the ballot; political participation

proved to be the primary factor in calls for revisions to the state constitution.[22] In the state legislature, Sanford's dominant Republican faction saw a constitutional convention as a means to address these grievances.

The 1821 convention offered Sanford the opportunity to experience the highpoint in his career of public service. He led the fight to constitutionalize the primacy of the legislature in reorganizing the court system through statutory law, concluding that the people's representatives, in their deliberations, would seek compromise to support the "public good." He argued that individual rights, however, required placement in the constitution as "principles." As such, he fought for a ban on slavery in the state, libel law that upheld freedom of speech and of the press, and the right of men to vote.

During the twelve weeks of the convention in the fall of 1821, Sanford played an influential role in persuading delegates to expand individual rights and secure them in the constitution. The retired senator took stands on issues that now, after his Senate experience, meant the most to him: reorganization of the courts, prohibition of slavery, the bill of rights, specifically involving libel and guarantees of freedom of the press, and above all, the expansion of the suffrage.

With the state judiciary still dominated by Federalists, Sanford's interests were less in designing a new blueprint for the courts than in defining the political process to be used in developing such a plan. He offered an amendment to the proposal from the judiciary committee, one of the convention's committees devoted to a single agenda topic. Sanford envisioned that "The legislature shall have power to modify, alter or abolish any court of law or equity, to establish new courts of justice, and to transfer the functions, or jurisdiction of one court to any other court.…" Sanford went on to list certain restrictions that he favored for the judiciary. They included the requirement that judges in the higher courts could hold office only "until they shall attain the age of sixty years,"[23] a limitation that was already in the constitution of 1777. Later in the debate, the former district attorney told the delegates that he supported keeping both the court of chancery and the supreme court, with some modifications in their responsibilities. But he continued to argue that the legislature, through its democratic process, should reorganize the courts—a job that should not be left to the constitutional convention. He made his point succinctly: "The great question upon which we differ, is, how much will be done upon this subject in the constitution, and how much shall be left to the legislature." In his challenge to the committee's proposal, Sanford maintained that judicial revisions placed in the constitution "would probably become inadequate to the exigencies of the state in twenty years from this time; and … the legislature would then be destitute of power to make the alteration which the public good might require." He went on to say, however, that the "court of the last resort" should be "established by the constitution" and noted that this idea was imbedded in the United States Constitution.[24] Delegate James Kent, still chancellor, expressed the opposing, and conservative, view that it would be "unsafe to commit such unqualified powers concerning the judiciary to the discretion of a legislative body."[25] Sanford wanted the electorate's representatives to displace some of the power of judges he viewed as partisan by bypassing the lengthy and complex process of amending the constitution.

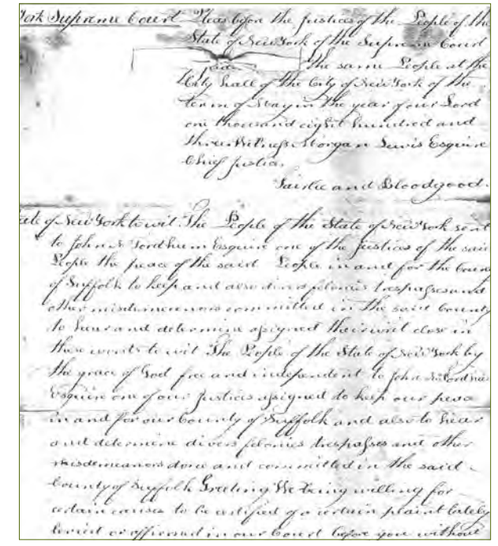
The convention passed Sanford's amendment. The first sentence of Article Five on the judiciary included language Sanford had proposed during the debate when he invoked the legislature and the public good: "Sec. V. The state shall be divided, by law, into a convenient number of districts, not less than four, nor exceeding eight, subject to alteration, by the legislature, from time to time, as the public good may require."[26] Among the responsibilities of the district, or circuit, judges would be trying supreme court civil cases and presiding over certain cases that had previously been tried at the court of chancery. These changes were aimed at reducing the heavy caseload—and the power—of the older courts.[27]

In mid-October, a resolution to ban slavery in the state constitution came to the floor. While Sanford was quiet on the issue, he voted in favor of it; Chancellor Kent joined the majority to defeat the resolution.[28] With his vote, Sanford expressed the sentiment that the end of slavery was one of the fundamental principles that should be encased in the state's constitution, not in statutory law.

Trial for libel was another. While declaring that "Every citizen may freely speak, write, and publish his sentiments," the committee on the bill of rights had proposed, as part of the constitution, that in libel cases, "the truth [of sentiments expressed] may be given in evidence" at the trial if the "matter charged

as libelous, was published with good motives, and for justifiable ends." The committee's report followed an 1805 law in stating that the judge alone would determine whether the motive was good or not. Sanford countered this proposal, however, with an amendment which would require that the presentation of the evidence be made specifically to the jury, not the judge. The jury would determine fact. With his amendment, the senator had voiced his wish, as the recorders noted, to "confide this great trust of protecting the freedom of the press, and deciding upon its abuses, to the juries of the state." Later in the debate on libel Sanford also questioned the political process to be used to effect change in the bill of rights, the same issue he had addressed during the controversies over reforms in the judiciary and the abolition of slavery. He warned that "it [was] … of great importance that the freedom of speech and of the press should be secured by the constitution" and added that "the liberty of the press in this state, now depends upon the pleasure of the legislature."[29] The Sanford amendment passed overwhelmingly, ninety-seven to eight. Chancellor Kent voted against it. As one historian has noted, the amendment "vastly increased the power of juries and decreased that of the bench"[30] where Federalists continued to wield substantial power.

But no issue at the convention—not judicial reform, slavery, or freedom of the press—motivated Sanford's intellectual and political leadership as much as reform of "The Elective Franchise." Convention delegates agreed that suffrage requirements should be difficult to change and therefore belonged in constitutional law. At the end of the convention, a strong majority of delegates would vote to broaden the franchise for white men twenty-one years of age who met residency requirements and certain service criteria, a shift away from the linkage of suffrage with ownership of real property. Free blacks, however, would be required to meet a longer residency and possess a freehold valued at $250.[31] With these requirements, New York joined other states in rolling back the enfranchisement of black men. Connecticut had withdrawn the suffrage from black men in 1818 and Rhode Island would do the same in 1822. It went largely unsaid at the convention that women, many white men, Native Americans, slaves, and free black men who didn't meet the required freehold



First page of the Judgement Roll of *Pierson v. Post*, located at the Division of Old Records, New York County Clerk's Office.

Image courtesy of Angela Fernandez, *Pierson v. Post Judgement Roll*, University of Toronto Dataverse (2017), http://dx.doi.org/10.5683/SP/3HJKJ7

threshold were denied the right to vote. Through his chairmanship of the suffrage committee and strong presence at the convention early in the debate, Sanford played a significant role in defining the theoretical underpinnings of universal manhood suffrage in the state. Conscious of the need for a moral righting of past wrongs, as his votes in the committee of the whole illustrate, he continued to support the inclusion of blacks in the suffrage on an equal footing with whites—that is, until he compromised with a large majority of the delegates and voted to bind black men to a real property requirement.

Not long into the debate Sanford took the floor and delivered an explication of the "principle of the scheme," or plan, supported by a majority of the suffrage committee. He defined the committee's task this way: "The question before us is the right of suffrage—who shall, or who shall not, have the right to vote." He pointed out that the voting tiers in current state law derived from "British precedents. In England, they have their three estates, which must always

have their separate interests represented." The King, House of Lords, and the House of Commons were the governing bodies that represented the monarchy, the aristocracy, and commoners, in sharp contrast to the United States. As an institutional reformer, Sanford aimed to make government more responsive to citizens by expanding the suffrage. He found his voice in a call to republican ideals

> *Here there is but one estate—the people. To me, the only qualifications seems [sic] to be, the virtue and morality of the people.… The principle … is, that those who bear the burthens of the state, should choose those that rule it. There is no privilege given to property, as such; but those who contribute to the public support, we consider as entitled to a share in the election of rulers.*[32]

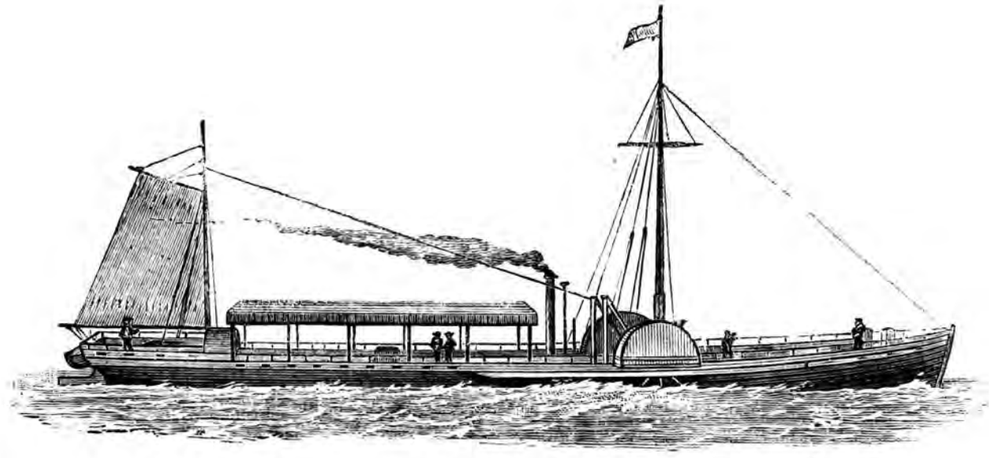
Sanford and his committee had identified suffrage requirements they saw as elements in the "public support" of the "state." They were contributions in the form of specified services or tax payments on real or personal property, "so that the odious distinctions of property" (in the form of land) could end.[33] Unlike the report from Sanford's suffrage committee, which he must have opposed, he never used the term "white" or mentioned race on the floor of the convention.

Condemnations of the exclusion of African Americans heard on the floor were left primarily to a few Federalists, including James Kent.[34] When the vote was called on the "question of striking out the word *white*," somewhat surprisingly, the delegates voted sixty-three to fifty-nine in favor of deleting the term. Members of the suffrage committee, however, voted four to three in favor of keeping the language, presumably the same way they had voted in the select committee. Sanford was in the minority.[35] As citizens in the state, free blacks would have gained the central right of suffrage, become obligated to protect and defend their country, and be expected to pay taxes.[36] The franchise would overlap with a particular definition of citizenship.[37] It was not to be. In early October, as rancor over race engulfed the proceedings, delegates came to believe that white voters in the state would reject a constitution that offered suffrage to blacks without a property requirement. For the first time, Martin Van Buren, the new U.S. senator who had replaced Sanford, voted for black exclusion. Sanford, too, decided to compromise his traditional Republican principles of equal rights and universal manhood suffrage; he consented, reluctantly, to the $250 freehold requirement for African Americans that restricted their right to civic participation.[38]

Judge

Fourteen months later, Sanford turned his attention from debating principled issues of republican governance to adjudicating complex commercial disputes and cases of contract enforcement, among others. He had been nominated chancellor of the state by the governor and confirmed by the senate. The workload of the court of chancery he entered had been growing during the War of 1812 and thereafter. In 1814, a vice-chancellor for New York City and a court reporter had been appointed to expand the court's administrative staff. In part to reduce its overall caseload, however, the new constitution narrowed the jurisdiction of the court of chancery to hearing equity appeals, cases that involved parties located in more than one of New York's judicial districts, and suits that crossed state lines.[39] As early as August 1823, Sanford became embroiled, most notably, in cases that included opposing claims over the regulation of steamboats subject to both state and federal law.

Disputes that involved steamboats often had broad ramifications. The case brought to the court of chancery in 1824 by the Albany-based North River Steamboat Company had its origins in the state legislature many years earlier and in the courts. The North River Company had descended from the partnership between politician, investor, and former chancellor, Robert R. Livingston,[40] and inventor Robert Fulton, who had built the *North River* (later called *Clermont*) in 1807. It was the first commercially viable steamboat to operate on the Hudson River. In a move to stimulate economic growth and reward technological innovation, the New York State legislature granted Livingston a monopoly over steamboat commerce on state waters. Often challenged by competitors, the monopoly survived in the court of chancery under James Kent in a case brought by North River's licensee, Aaron Ogden, against Thomas Gibbons. It claimed exclusive navigation rights for North River in New York's waterways and along the Jersey shore. In his decision, Kent supported an injunction against Gibbons' competing steamboats, thereby ensuring the



Engraving illustrating broadside view of Robert Fulton's *Clermont* steamboat, 1807.
Library of Congress, Prints & Photographs Division, LC-USZ62-110382

continuation of the monopoly, by concluding that the acts of the New York legislature did not conflict with federal law. In 1820, Gibbons appealed the judgement to the Court for the Correction of Errors of New York where he lost again.[41]

In response to his failed suit, Gibbons took his case to the United States Supreme Court where the federal court held jurisdiction since New York's boundary included coastal waters between two states, New York and New Jersey. The landmark case, *Gibbons v. Ogden*, clarified that the Constitution gave Congress ultimate authority to regulate commerce among the states. Chief Justice John Marshall delivered the decision on March 2, 1824, a ruling refined to allow for state regulation, enforceable until a conflict between state and federal law emerged; at that point, state law would yield to federal law. In this decision, the North River Company and Ogden lost the monopoly over steamboat transportation and commerce with New Jersey.[42] *Gibbons v. Ogden* also annulled the "decree of the Chancellor," James Kent.[43]

In June, the ever aggressive and resolute competitor, North River, filed a complaint in chancery court seeking, again, to protect its right of "exclusive" navigation with steamboats in state waters. The plaintiff's attorney resorted to arguing for state over federal power: "It is upon State rights we stand; and State rights are State liberty."[44] Chancellor Sanford disagreed. He decided for the defendant, John R. Livingston, the owner of the steamboat that had engaged in commerce during a landing in New Jersey and a distant cousin of Robert R. Livingston. The vessel had departed from Jersey City and stopped in New York City, a "way landing" en route to Albany, one writer slyly noted.[45] The route touched two states and was deemed legal under the recent Supreme Court decision. Sanford's determination applied *Gibbons v. Ogden* to competition in steamboat commerce on New York State waters. It also may have been the reference point for Horatio Stafford's quip in his pocket guide to travelers printed in September 1824 about the new Troy Steam-Boat Company: its two boats would be "plying *direct*, between Troy and New-York, *by the way of 'Jersey City,'* a perfectly ridiculous farce, even if played 'according to law.'"[46] As an aside, Sanford never had a steamboat named after him during these years, but others did. Companies honored the judges who had promoted their commercial interests in cases dealing with water transportation. North River operated the *Chancellor Livingston* and the *James Kent*, and on March 15, 1825, the *Chief Justice Marshall*, a steamboat owned by the new Hudson River Line, began her maiden voyage from New York City to Albany and on to Troy.[47]

In the fall 1825, President John Quincy Adams created an opening for Sanford to return to the United States Senate: he offered the position of minister to Britain to Senator Rufus King. With strong Republican backing, state legislators elected Sanford to the Senate. He resigned from the court of chancery in early 1826. At age fifty, Sanford could not ignore an opportunity to return to lawmaking for the nation. He also recognized that the chancery as an institution was in decline.

While little known to history during his thirty-year career in law and politics, Sanford had deeply engaged with the divisive issues of expanding democracy. He was enabled by his times to debate and take positions on critical issues of his day in property

law, the vote for presidential electors, the complexities of New York's judiciary, slavery, libel and freedom of the press, universal manhood suffrage, property restrictions on the African American voter, and commercial conflicts. When he died in 1838, he left no record of political thought captured in pamphlets, or diaries with insightful observations. Nor did he leave extensive correspondences with prominent men of his day. His written legacy survives, in the main, through recorded legal arguments and court judgments, in legislative records, and in the few pieces of political correspondence that remain. Ferreting out the facts of Sanford's legacy is further complicated by the tendency of scholars to pay more attention to judges' decisions than the arguments of lawyers, another reason why Sanford has been largely overlooked.

Even when the office of United States attorney for the District of New York celebrated its 225th anniversary at the Plaza Hotel in New York in 2014, the court's website persisted in referencing judges, ignoring the names of past district attorneys[48] who had served in the office Sanford held from 1803 to 1815; another clue, perhaps, to why this lawyer's lasting impact on New York law has been little noticed—until now.

ENDNOTES

1. For the political career of Nathan Sanford, see Ann Sandford, *Reluctant Reformer: Nathan Sanford in the Era of the Early Republic* (2017).
2. *See* Steve Messer, "A History of the United States Attorney's Office in the Southern District of New York," SteveMesserWikiProject, http://moglen.law.columbia.edu/twiki/bin/view/AmLegalHist/SteveMesserWikiProject.
3. Edmund S. Morgan, *American Heroes: Profiles of Men and Women Who Shared Early America* 177–79, 186–87 (2009).
4. *See Descendants of Jacob Sebor, 1709–1793, of Middletown, Connecticut* 15–16 (Helen Beach ed., 1923), *available at* https://archive.org/download/descendantsofjac00beac/descendantsofjac00beac_encrypted.pdf.
5. For Sanford's attendance at Litchfield, see Marian C. McKenna, *Tapping Reeve and the Litchfield Law School,* app. V at 194 (1986) ("Catalogue of Students at Litchfield Law School, 1774-1833"). For courses, see the chart for the year 1794 at Litchfield in V Robert Stevens, *Perspectives in American History* 433 (Donald Fleming & Bernard Bailyn eds., 1971).
6. Minute Book of the New York State Supreme Court of Judicature, May 1, 1801, Division of Old Records, New York County Clerk, Surrogate's Court, New York.
7. License, Nathan Sanford Papers, 1799-1834, Manuscripts and Special Collections, SC14054, Box 1, New York State Library, Albany; James D. Folts, "Courts, State," *in Encyclopedia of New York State* 412(Peter Eisenstadt ed., 2005).
8. Minute Book of the Court of Chancery, April 2, 1805, Division of Old Records, New York County Clerk, Surrogate's Court, New York.
9. Daniel R. Ernst, *"Pierson v. Post,"* 13 Green Bag 2d 31 (2009), *available at* www.greenbag.org/v13n1/v13n1_ernst.pdf.
10. The reference to the "beach" is from the case record in Bethany Berger, "It's Not About the Fox: The Untold History of *Pierson v. Post*," 55 Duke L.J. 1089, 1091, 1119 (2006). The phrase "dogs and hounds" is quoted from the 1805 record in Angela Fernandez, "*Pierson v. Post*: A Great Debate, James Kent, and the Project of Building a Learned Law for New York State," 34 Law & Soc. Inquiry 301, 304 (2009). The description of the 1802 trial is in Angela Fernandez, "The Lost Record of *Pierson v. Post*, the Famous Fox Case," 27 Law & Hist. Rev. 149, 161–65 (2009).
11. For the family linkage, see Grover Merle Sanford, *The Sandford/Sanford Families of Long Island* 14–16 (1975).
12. Fernandez, "A Great Debate," *supra* note 10, at 303, 322.
13. Berger, *supra* note 10, at 1093–94, 1136–37.
14. Fernandez, "A Great Debate," *supra* note 10, at 305. That the case continues to be cited is described in Fernandez, "The Lost Record," *supra* note 10, at 150 n.6; cases in oil and gas, and the ownership of a baseball hit into the stands with multiple claimants are examples.
15. Fernandez, "A Great Debate," *supra* note 10, at 308, 316, 330.
16. *Id.* at 304, 311, 316, 326, 329. Fernandez identifies Sanford as the "stronger of the two" lawyers; prominent Federalist Cadwallader David Colden represented Lodowick Post.
17. Fernandez, "The Lost Record," *supra* note 10, at 149–50; Fernandez, "A Great Debate," *supra* note 10, at 313, 328. The case is described, with excerpts from the justices of the New York Supreme Court and a section for student discussion, in the widely used text by Jesse Dukeminier and James E. Krier, *Property* 15–23 (2d ed. 1988).
18. Senate Journal, 14th Congress, 1st Session 317 (1816). All of the Senate Journal documents cited herein are available from http://memory.loc.gov/ammem/amlaw/lawhome.html.

19. Senate Journal, 15th Congress, 2nd session 28–31 (1818); Senate Journal, 16th Congress, 1st session 125 (1820); chart, "Public Officers Elected Statewide," *in Encyclopedia of New York State*, *supra* note 7, at 496 n.a; *see* Donald Ratcliffe, "The Right to Vote and the Rise of Democracy, 1787–1828," 33 J. of the Early Republic 219, 250–51 (2013).
20. Michael Kammen, "The Promised Sunshine of the Future: Reflections on Economic Growth and Social Change in Post-Revolutionary New York," *in New Opportunities in a New Nation: The Development of New York After the Revolution,* 111–12, 125 (Manfred Jonas and Robert V. Wells eds., 1982); Paul E. Johnson, *Early American Republic*, 1789–1829, at 82, 128–29, 132 (2007).
21. *See* Gordon S. Wood, *Empire of Liberty: A History of the Early Republic*, 1789–1815, at 8–9 (2009); John L. Brooke, "'King George Has Issued Too Many Pattents for Us,' Property and Democracy in Jeffersonian New York," 33 Journal of the Early Republic 187, 200 (2013).
22. Johnson, *supra* note 20, at127; *see* Brooke, "King George," *supra* note 21, at 193–94, 211.
23. *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York* 514 (Nathaniel H. Carter and William L. Stone, eds., 1821).
24. *Id.* at 517–18.
25. *Id.* at 521, 518.
26. *Convention of 1821*, *supra* note 23, at 627, 630, 636; *id.* at app. 690. The quotation is on 636.
27. *See* Folts, *supra* note 7, at 412.
28. *Convention of 1821*, *supra* note 23, at 485–87.
29. *Id.* at 487–95 (the quotations are on 487, 492, and 491). For James Kent and the libel bill of 1805, the addition of the question of motive at the convention of 1821 (proposed by Sanford, who is not identified by Roper), and Kent's opposition to the change, *see* Donald [M.] Roper, "James Kent and the Emergence of New York's Libel Law," 17 Am. J. Legal Hist. 223, 226, 229 (1973).
30. *Convention of 1821*, *supra* note 23, at 495; John Anthony Casais, "The New York State Constitutional Convention of 1821 and Its Aftermath" (1967) (unpublished Ph.D. dissertation, Columbia University).
31. Voter qualifications are in Article 2 of the constitution of 1822. See the proceedings of November 7 in *Convention of 1821*, *supra* note 23, at 632 and app. 661.
32. *Id.* at 178.
33. *Id.* at 179.
34. The Federalists included Peter Jay, a former assemblyman from Westchester County, James Kent, and Rufus King. *See Jim Crow New York, A Documentary History of Race and Citizenship, 1777–1877,* at 124–27, 138–42 (David N. Gellman & David Quigley eds., 2003).
35. *Convention of 1821*, *supra* note 23, at 202: the quotation is on 179. Historians have wrongly equated Sanford's role as chair of the suffrage committee with an assumed vote in committee against black male suffrage. *See, e.g.,* Donald B. Cole, *Martin Van Buren and the American Political System* 70 (1984) ("Sanford's proposal denied all blacks the vote.").
36. *Jim Crow New York*, *supra* note 34, at 4–5. The quotation is on 5.
37. *Convention of 1821*, *supra* note 23, at 192.
38. For the vote on blacks and the freehold, see *id.* at 369–70, 377–78. African American New Yorkers waited until 1870 and an early federal Enforcement Act to exercise the franchise under the Fifteenth Amendment to the U.S. Constitution that legalized the principle of equal manhood suffrage. Frederick Douglass had already acknowledged Sanford's voice. The escaped slave and leader in the abolitionist movement expressed his appreciation for the senator's efforts to restore and expand black suffrage. In his address to the Colored National Convention held in Rochester, New York, in 1853, Douglass declared that "By birth, we [Freed Colored people] are American Citizens … [and, he added, as Nathan Sanford had proclaimed,] 'Here there is but one estate-*the people* … '" Proceedings of the Colored national convention, held in Rochester, July 6th, 7th, and 8th, 1853, *available at* http://coloredconventions.org/items/show/458, 11.
39. Folts, *supra* note 7, at 412. The court of chancery originated in colonial times and was continued under the state Constitution of 1777. Mandatory retirement for the chancellor was still at age sixty—unlike the federal bench where appointments were for life.
40. Robert R. Livingston was the first chancellor of New York State, from 1777 to 1801; he died in 1813 and was the older brother of Edward.
41. *See* "North River Steamboat," en.wikipedia.org; *Gibbons v. Ogden,* 17 Johns. 488 (N.Y. 1820).
42. *See* Daniel Walker Howe, *What Hath God Wrought, The Transformation of America,* 1815–1848, at 235 (2007); R. Kent Newmyer, *The Supreme Court under Marshall and Taney* 49–51. (2d ed. 2006).
43. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 7 (1824)
44. *N. River Steamboat Co. v. Livingston,* Hopk. Ch. 149, 197 (N.Y. Ch. 1824).
45. *Id.* at 212; Cuyler Reynolds, *Albany Chronicles, A History of the City Arranged Chronologically* 45 (1906).
46. Horatio Gates Spafford, *Spafford's 1824 Guide for New York Travellers* 6 (G. Martin Sleeman ed., reprint, 1991).
47. Reynolds, *supra* note 45, at 453.
48. *See New York Times,* October 27, 2014. The 225th anniversary events scheduled from November 2014 to October 2015 to honor the "attorney's office for the Southern District of New York" mainly featured the work of judges. The "Historical Publications" section of the District's website includes downloadable copies of court histories by Charles Merrill Hough (1934; first published in 1923), and by H. Paul Burak (1962). Very few of the district attorneys are named. Nathan Sanford is not identified as a district attorney. See nysd.uscourts.gov/events-exhibits.php. However, biographical information, including Nathan Sanford's, can be found in *The First 100 Years (1789–1889): The United States Attorneys for the Southern District of New York* (United States Court of Appeals, 2nd Circuit, Historical Committee, 1987). A series of essays organized by state, *Bicentennial Celebration of the United States Attorneys, 1789–1989* [1989], has brief biographies of attorneys, including Sanford, and can be found at https://www.justice.gov/sites/default/files/usao/legacy/2011/11/23/bicn_celebration.pdf.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AN ILLUSTRATED EVENING NEWSPAPER.

VOL. VI. All the News. Four Editions Daily. NEW YORK, MONDAY, FEBRUARY 1, 1875. $12 Per Year in Advance. Single Copies, Five Cents. NO. 592.

William Fullerton, Esq. at the Tilton-Beecher trial. *The Daily Graphic,* February 1, 1875, vol. VI, no. 592

Battle in Brooklyn:

The Cross-examination of Rev. Henry Ward Beecher at the Trial of the Century

by Michael Aaron Green

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In August 1874, when Theodore Tilton sued his erstwhile friend and fellow minister, Henry Ward Beecher, for criminal conversation ("*Crim. Con.*") and alienation of affections,[1] a journalistic frenzy descended upon the then-independent city of Brooklyn, New York. In the end, Tilton's case failed to persuade a majority of the jury, and public opinion was divided. But the four-day confrontation, in April 1875, between Beecher, a widely-admired religious and political figure, and ex-Judge William Fullerton captured the attention of the English-speaking world, and was considered during the 19th century to have been the finest example of cross-examination technique put on display in an American courtroom.

The now-largely-defunct *Crim. Con.* cause of action provided for monetary damages for adultery, based on "loss of services."[2] In a closing argument for an earlier, 1865 case, trial lawyer William Fullerton articulated the reasoning for the monetary claim, based on an idealized Victorian vision of the woman's role in family life:

> *[Y]ou can scarcely overestimate the value of the services of the wife at the head of the household. While the husband is battling with the sterner duties of life, she remains at home to form the infant character. If she be vigilant and faithful, she will be what God designed her to be, a help-meet for her husband … she is to teach the immortal mind … The husband may go out into the world to win its wealth and its honors, but she has a far higher sphere in which to act.*[3]

Later in that case, he lectured the gentlemen of the jury in the sternest possible terms:

> *There are mighty considerations involved … considerations which reach and touch every fibre of the social polity … Marriage is a holy ordinance … It was designed not alone to people the earth, but … to secure to the human family the greatest amounts of earthly happiness …*
>
> *Give, then, liberal damages, and thus show the appreciation which you entertain of that holy relation … Strike down the marital relation, and you strike a blow at the roots of society. Uphold it, and you defend your own firesides.*[4]

Above: **The Tilton-Beecher Scandal Case.** *Frank Leslie's Illustrated Newspaper*, February 6, 1875, p. 360-361

Ten years later, there arose the greatest of all American *Crim. Con.* cases.

Rev. Beecher was a towering figure, charismatic and polarizing; Debbie Applegate's 2006 Pulitzer Prize winning biography was justifiably entitled "The Most Famous Man in America."[5] Although Beecher is mostly remembered as an abolitionist (and brother of Harriet Beecher Stowe), his 'Gospel of Love' emphasized personal freedom and happiness, and was a dramatic departure from the fire and brimstone, original-sin message of mainstream American Protestantism, of which Lyman Beecher (his and Harriet's father) had been a leading proponent. Brooklyn's magnificent Plymouth Church was built to house his admiring congregation. Both the church and a related religious publishing empire brought in large sums of money, while he used his stature to weigh in on the major issues of the day. It seems, however, that he also made a habit of becoming intimate with the married women in the congregation.

Beecher disciple Theodore Tilton and his wife Elizabeth grew up together in the Plymouth Church Sunday School, and Tilton had emerged as an orator-preacher in Beecher's mold. Tilton was certainly an unlikely proponent of marital fidelity and traditional roles; he was much closer than Beecher to the more radical feminists of the period—such as firebrand Victoria Woodhull—and an outspoken advocate of liberalizing the divorce laws. Indeed, early rumors of the affair that erupted into the lawsuit had emanated from suffragist circles; no less of a personage than Susan B. Anthony had been an un-intended, overnight guest (trapped by a storm) at the Tilton's home in Brooklyn and witnessed first-hand Theodore's jealous rage; and Theodore, too, may have been less than faithful to his marriage vows.

But the two men's prior friendship and similar views only served to make the battle more bitter, and more enticing for the press and public. The age of mass media was taking shape and this trial would become a defining moment.

Although there was only one simple, factual question at the heart of the case—whether the renowned preacher's friendship with Libby Tilton had crossed the line into physical intimacy—the trial lasted six months and engrossed the attention of the public in a way that would not be repeated until the Scopes trial 50 years later. Modern scholars continue to pore over, and ponder, the intricacies and implications of this one case.[6]

Beecher assembled an all-star team of lawyers for his defense; some of their names are still known today. Headlining the extraordinary cast was William Evarts—orator, statesman, former U.S. Attorney General and future Secretary of State and Senator.[7] Thomas G. Shearman was co-founder of today's powerhouse Shearman & Sterling law firm, while Benjamin Tracy was a decorated Civil War hero and former U.S. Attorney for the Eastern District of New York. Tracy later served (for one year) as an Associate Judge of the New York Court of Appeals, but made his real mark on history as Navy Secretary for President Benjamin Harrison, and was often described as the "father of the modern American fighting Navy."[8] Finally, John K. Porter was a former member of the New York Court of Appeals whose own of moment of fame arrived a few years later, at the 1881 trial of Charles Guiteau for the assassination of President James Garfield.[9]

Tilton's advocates were solid, if less renowned than Beecher's line-up. Reflecting some of the political fault lines of the day, the plaintiff's team even included a former confederate general, who had set up a law practice in New York City.

In an era that relished long speeches, the opening and closing arguments consumed more than two months, but much of drama came from the examination and cross-examination of witnesses. Reverend Henry Ward Beecher denied any impropriety, while his defense team set out to portray Tilton as a sick, jealous egoist, willing to sacrifice the reputations of his own wife and a great religious leader in order to justify his own failures.[10] Mrs. Tilton, as the spouse of a party, was excluded from testifying.

But the most dramatic confrontation in this epic struggle was the cross-examination of the famous defendant. For this task, the plaintiff's team included a much-feared weapon: ex-Judge William S. Fullerton. Although largely forgotten today, Fullerton was sometimes referred to as the "Great American Cross-examiner".[11] A classic 1903 treatise, "The Art of Cross-examination," by Francis Wellman, stated that the Beecher cross-examinations "gave [Fullerton] an international reputation, and were considered the best ever heard in this country."[12]

The handling of salacious material in a courtroom has always required a degree of deftness, especially when there are observers eager for cheap thrills. Fullerton had some experience with this in the 1865 Millspaugh case (cited at the beginning of this article). A remark in the closing argument had induced applause and laughter from the audience—and a gavel from Justice Leonard, who pronounced "[i]t is unbecoming … to give any expression of approbation or otherwise of remarks made by counsel or the Court."[13] This was an opening for Fullerton to wax self-righteous, and he responded:

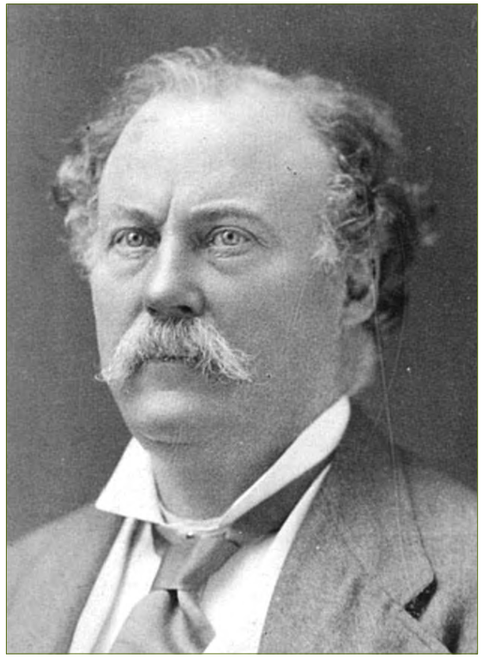
> *I assure the court that it is no gratification to me to have such demonstrations, and I shall utter no word in the remarks I have to make which is designed to excite laughter. I never was engaged in a more serious business in my life.…*[14]

Much of Fullerton's reputation rested on his ability to improvise on the spot. An 1885 issue of *Frank Leslie's Popular Monthly* described a range of courtroom styles:

> *His fame does not rest on his orations and addresses to either courts or juries, but on his shrewdness, patience, good judgment and success in eliciting the answers he wishes from witnesses of the other side. Whether suavity or gentleness, or wit and repartee, or stern authority, are needed, either is at his command; and he often succeeds by their use where an eloquent advocate would fail from sheer want of materials for a speech.*[15]

Facing a recalcitrant Beecher who was supported by one of the finest legal teams that period (or any other) could offer, Fullerton would need to draw on all of his resources.

Presiding over the Beecher spectacle was Hon. Joseph Nielson, Chief Justice for Brooklyn. He was highly esteemed for intellect, but could be "indulgent" towards counsel in his courtroom.[16] Needless to say, "wit and repartee" were on display in the Beecher courtroom. Wellman provides an example of three-way jousting:



Carte de visite portrait of Judge William Fullerton.
Courtesy of the author

Mr. [Shearman] (sarcastically). 'I hope Mr. Fullerton is not going to preach us a sermon.'

Mr. Fullerton. 'I would if I thought I could convert Brother [Shearman].'

Mr. Beecher (quietly). 'I would be happy to give you the use of my pulpit.'

Fullerton (laughing). '[Brother Shearman] is the only audience I shall want.'

Mr. Beecher (sarcastically). 'Perhaps he is the only audience you can get.'

Mr. Fullerton. 'If I succeed in converting Brother [Shearman], I will consider my work as a Christian minister complete.'[17]

Many observers were troubled by the very nature of the case, as there had been a tacit understanding in the United States that the private lives of leading political and religious leaders were off-limits to the press. In his opening statement, Benjamin Tracy could not resist the temptation to draw an analogy to the Crucifixion:

> *[Y]ou cannot but feel, as I do, an overwhelming sense of the importance of this trial. It will loom larger in history than any which has taken place in eighteen centuries. No man of this defendant's fame has ever been called upon to answer such a charge in a court of justice. What a spectacle has been presented in this city of churches!*[18]

But throughout the 1870's, the American public was reeling from revelations of corruption at the highest levels of government, and a new generation of reporters and editors was open to pursuing both truth and lurid headlines. The public was treated to dialogues like this:

> *"Were you in the habit of kissing her," [Fullerton] asked.*
>
> *"I was when I had been absent any considerable time."*
>
> *"And how frequently did that occur?"*
>
> *"Very much; I kissed her as I would any of my own family."*
>
> *"I beg your pardon; I don't want you to tell me you kissed her as you did anybody else. I want to know if you kissed her."*
>
> *"I did kiss her."*[19]

Unable to extract a confession of adultery, Fullerton concentrated on showing a pattern of concealment. The questioning about kissing continued:

> *"Were you in the habit of kissing her when you went to her house in the absence of her husband?"*
>
> *"Sometimes I did, and sometimes I did not."*
>
> *"Well, what prevented you upon the occasions when you did not?"*
>
> *"It may be that the children were there then; it might be that she did not seem to be in the—to greet me in that way."*
>
> *"Well, do you mean by that that you didn't kiss her when the children were present."*
>
> *"I sometimes did, and sometimes did not."*
>
> *"Did you kiss her in the presence of the servants?"*
>
> *"Not that I ever recollect."*
>
> *"Was it not true that you did not kiss her in the presence of the children or the servants, but did kiss her when she was not in their presence?"*
>
> *"No sir, it is not true … as I understand your question."*
>
> *"I don't know how you understand the question; it is about as plain as I can make it. Did you not purposely omit to kiss her in the presence of the children and the servants?"*
>
> *"No sir, I did not, not in the presence of the children, certainly not."*[20]

The theme of concealment was carried over into an examination of letters written by Beecher to Mrs. Tilton, which became known in the press as the 'clandestine letters.'

One letter from Henry Ward mentioned that his wife would be leaving for Havana and Florida the following week (indicating that she would be away for the winter). Fullerton asked why the defendant would send a clandestine letter containing this information, to which Beecher replied: "Well, just at that time it was the most interesting fact, almost, that I had and I would naturally impart it to a friend."[21]

In another, which became known as the 'true inwardness' letter, he told Elizabeth "no one can ever know—no one but God—through what a dreary wilderness I have wandered.' He exhorted her:

> *[s]hould God inspire you to restore and rebuild at home, and while doing it to cheer and sustain outside of it another who sorely needs help in heart and spirit, it will prove a life so noble as few are able to live! And, in another world, the emancipated soul may utter thanks.*
>
> *If it would be a comfort to* you, *now and then, to send me a letter of true* inwardness – *the outcome of your inward life – it would be* safe.[22]

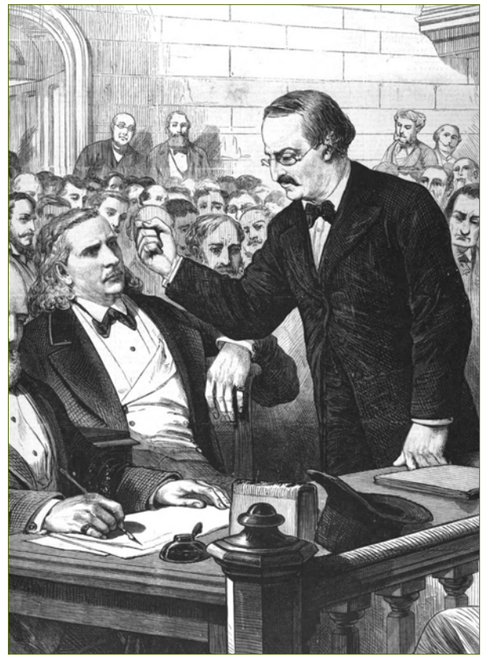
Fullerton homed in on the word "safe," asking: "Why did you say it would be safe for her to do it?" and "[y]our wife was away, was she not?"[23]

At a critical phase of the cross-examination, Fullerton's health became a matter of national news. It was reported to the Judge that the attorney had an attack of vertigo in the hallway, and the proceeding was temporarily adjourned. When it became clear that this was a ruse to buy additional preparation time, the ploy only added to the trial lawyer's mystique. Like any convalescent, Fullerton consoled himself over an extended weekend with a long novel: Beecher's 549-page, melodramatic "Norwood: or Village Life in New England." Beecher had been visiting Mrs. Tilton, and reading and discussing the passages, while he was writing the book.

The attorney returned to court armed with Beecher's own language. More than a century later, an historian would describe Fullerton's use of Norwood as a "tour de force of textual research and forensic strategy."[24]

For example, there was a curious phrase—'nest-hiding'—in one of Libby's letters to Henry. Asked by Evarts on direct examination if this were a word used by him, Beecher was firm: "no sir, it is not my word in any sense or way." On cross, Fullerton read this passage: "while her whole life centered upon his love, she would hide the precious secret . . . as a bird hides its nest under tufts of grass, and behind leaves and vines, as a fence against prying eyes."[25] Beecher had a ready quip, however: "It is beautiful, I think, whoever wrote it, I am willing to own it."[26]

Beecher had given Mrs. Tilton a picture called "The Trailing Arbutus". Fullerton asked if he recalled writing that the flower of Arbutus was like the 'breath of love'. Passages describing the love calls of birds were compared to a note in which Elizabeth had written "the bird has sung in my heart these four weeks."[27]



Former Court of Appeals Judge John K. Porter shaking his fist at the Beecher trial.
Frank Leslie's Illustrated Newspaper, June 5, 1875, p. 205

Contemporaneous descriptions of Fullerton's style generally emphasized his low-key, quiet manner, which concealed a stealthy purpose. A biographical sketch in 1891 extolled:

> *the rare and almost unparalleled faculty of putting the witness at ease and securing his confidence, and then decoying him into the belief that cross-examining counsel's mind was on one subject while he had another mentally concealed for the purpose of exposing the untruthful witness.*[28]

When it was time to turn the tables, however, Fullerton would customarily attack with a rush of unanswerable questions. A local lawyer-historian in Fullerton's native Orange County recalled he "always


THE DAILY GRAPHIC

An Illustrated Evening Newspaper.

THE TRIAL OF REV. HENRY WARD BEECHER

A quiet conference between opposing counsel at the Beecher trial.
The Daily Graphic, February 6, 1875, p. 360-361

reminded me of a Gatling gun in action when in the full swing of a cross-examination."[29]

But it was difficult to gain this kind of edge with a witness like Beecher.

As described in Debbie Applegate's biography:

> *Just as Beecher seemed cornered, he dramatically stood up in the witness box and turned to the judge, asking in a dignified voice, "Your Honor, am I under the rebuke of the Court?" Judge Neilson said no with bemusement, and the examination went on, but Fullerton had lost his momentum and the sympathy of the audience.*[30]

Beecher's frequent lapses of memory (one observer supposedly counted 894 instances[31]) and evasiveness undermined his credibility and left a lasting impression. At one point, pressed by Fullerton on his reluctance to provide direct answers, Beecher famously responded "I am afraid of you."[32]

Still, Beecher's wise-cracking continued through to the end. Fullerton concluded the ordeal by reading from a Beecher sermon, apparently advocating concealment of bad behavior:

> *Conscience frequently leads men to make the most injudicious confessions … to the most injudicious persons. I do not think we are bound to confess crimes in such a way that they will overtake us and fill us with dismay and confusion and destruction, and not only to us but to those who are socially connected with us.*[33]

He then turned to Judge Neilson and said, "There is generally not much done sir, after the sermon but the benediction."

The judge was asking the jury if they were prepared to take up their duties, when irrepressible Henry Ward Beecher called out merrily, "There has been no collection taken up!"

A hostile biographer reported that "this time, there was no laughter."[34]

One paradoxical result of this irony-filled case was that William S. Fullerton's virtuoso performance gained him a considerable degree of celebrity[35]—memorabilia attesting to his public profile can still be found—but did not win the day for his client. The jury failed to reach agreement, with three jurors favoring the plaintiff, and nine supporting Beecher. Tilton faded into an impoverished obscurity, while Beecher's congregation awarded him a special salary of $100,000 to cover his legal costs.[36]

The *New York Times*, however, published a lengthy review of the evidence which noted that among the public at large, there were conflicting views. Some were convinced of Beecher's guilt, others insisted upon his innocence, while a third group "consider[ed] that a Scotch verdict of 'Not Proven' would have been the only just conclusion to have reached."[37] Still, noted the *Times*, "there are comparatively few who will not in their hearts be compelled to acknowledge that Mr. Beecher's management of his private friendships and affairs has been entirely unworthy of his name, position, and sacred calling."[38]

During the more cynical 20th century, inquiry by social scientists shifted to a somewhat different question: since Beecher was plainly guilty, why were the jury and public so reticent to adopt the obvious conclusion? As with every aspect of the cause, multiple factors can be adduced. To mention a few: admiration for Beecher, the prominence and ability of his defense team, Tilton's personal failings, concern for Mrs. Beecher, and general reticence to apply the *Crim. Con* sanctions to this particular personal drama.

Looking back across the generations, obviously much has changed. The very torts on which the case was based no longer exist in New York; and today, there would be women in the jury, if not on the top-tier legal teams and the bench itself. The centrality of newspapers (aided by telegraph wires) in spreading information has been eclipsed by a variety of other mass media.

But human nature, the challenge of dealing with recalcitrant witnesses, and above all the qualities that make for great lawyering—these seem much the same as ever.

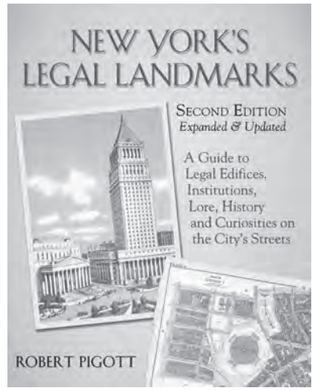
ENDNOTES

1. For a pre-trial ruling, see *Tilton v. Beecher*, 59 N.Y. 176 (N.Y. 1874) (denying defendant's motion for a bill of particulars).
2. *Ballentine's Law Dictionary* 291 (3d ed. 1969).
3. "Address of William Fullerton, Of Counsel for the Plaintiff," *Andrew J. Millspaugh against Seth Adams*, N.Y. Sup.Ct., Jan. Term 1865, *reprinted in* 8 Select Trials at 4 (1865).
4. *Id.* at 26–27.
5. Debby Applegate, *The Most Famous Man in America: The Biography of Henry Ward Beecher* (2006).
6. For a representative list, see Laura Hanft Korobkin, *The Maintenance of Mutual Confidence: Sentimental Strategies at the Adultery Trial of Henry Ward Beecher*, 7 Yale J.L. & Human. 1, 8 n.28 (1995).
7. Albert Shaw, *The Career of William M. Evarts,* 23 Am. Monthly Rev. of Revs. 435, 435–40 (1901), *available at* https://archive.org/details/reviewofreviewsw23newy.
8. Susan S. Dautel, "Benjamin Franklin Tracy," Historical Society of the New York Courts, http://www.nycourts.gov/history/legal-history-new-york/history-legal-bench-bar.html.
9. Hon. Albert M. Rosenblatt, "John Kilham Porter," Historical Society of the New York Courts, http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/porter-john.html.
10. Paxton Hibben, *Henry Ward Beecher: An American Portrait* 226 (1942).
11. "Death List of a Day: Ex-Judge William Fullerton," N.Y. Times, Mar. 15, 1900.
12. Francis H. Wellman, *The Art of Cross-Examination* 192 (MacMillian & Co 1919) (1903).
13. *Andrew J. Millspaugh against Seth Adams, supra* note 4, at 16.
14. *Id.* at 16.
15. "Anecdotes of American Lawyers," 19 Frank Leslie's Popular Monthly 152, 156 (1885).
16. T. Bigelow, "Chief Justice Nielson," *in* 1 *Official Report of the Trial of Henry Ward Beecher* ix, ix–xv (1875), *available at* https://archive.org/details/officialreportt01tiltgoog.
17. Wellman, *supra* note 13, at 193–34.
18. *The Case of Henry Ward Beecher: Opening Address by Benjamin F. Tracy of Counsel for the Defendant* 91 (1875), *available at* https://catalog.hathitrust.org/Record/001960470.
19. Richard Wrightman Fox, *Trials of Intimacy: Love and Loss in the Beecher-Tilton Scandal* 119 (1999).
20. *Id.* at 119–20.
21. Applegate, *supra* note 6, at 448.
22. *Id.* at 120–21.
23. *Id.* at 121.
24. Fox, *supra* note 22, at 138.
25. *Id.* at 139.
26. Applegate, *supra* note 6, at 448.
27. Fox, *supra* note 22, at 139.
28. Henry Scott Wilson, *Distinguished American Lawyers, with their Struggles and Triumphs in the Forum* 397 (1891), *available at* https://books.google.com/books?id=bwk9AAAAIAAJ.
29. Walter C. Anthony, "The Fullerton Family", Historical Papers, No. XIII, Historical Society of Newburgh Bay and the Hudson Highlands, Newburgh, N.Y. 1906, at 204.
30. Applegate, *supra* note 6, at 148–49.
31. Hibben, *supra* note 11, at 277.
32. Wellman, *supra* note 13, at 191.
33. Applegate, *supra* note 6, at 449.
34. Hibben, *supra* note 11, at 279.
35. It did not hurt his public image that there was also a much-acclaimed racehorse named Judge Fullerton on the harness racing circuit.
36. Altina L. Waller, *Reverend Beecher and Mrs. Tilton: Sex and Class in Victorian America* 11 (1982).
37. "The Beecher Trial: A Review of the Evidence," N.Y. Times, July 3, 1875, at 3.
38. *Id.*

William M. Evarts:

Forgotten Lawyer-Statesman and Second Avenue Fixture

by Robert Pigott



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In New York City, there is no park or high school named for, let alone a statue of, William Evarts. The only trace of this towering Gilded Age New York lawyer and statesman is found above the doors of two adjacent tenement buildings at Second Avenue and 14th Street. Named "The U.S. Senate" and "The W. M. Evarts," they commemorate the fact that the townhouse of Evarts, a former U.S. Senator, stood on the site of the two tenements during the latter half of the 19th century. (In contrast, William Seward, New York lawyer and statesman of a generation earlier, got a park, a high school and a statue.)

If Evarts is remembered at all today, it is primarily by legal historians for his 1891 sponsorship, while U. S. Senator, of the law that came to be known as the Evarts Act and created the modern federal court system.[1] The Evarts Act established the United States Circuit Courts of Appeals as an intermediate appellate court between the federal trial courts and the United States Supreme Court (renamed in 1948 by dropping the "Circuit"[2]). Previously, the Circuit Court, a curious hybrid, had existed between the United States District Court and the Supreme Court. (Although the Circuit Courts were rendered obsolete by the 1891 Evarts Act, they were not formally abolished until 1912.)

The Evarts Act

The Circuit Court functioned as both a trial court and an appellate court. Federal trial court jurisdiction was shared by the District Court and the Circuit Court, with jurisdiction over more significant cases residing with the Circuit Court. However, this allocation of jurisdiction did not mean that District Court Judges were relegated to only cases of lesser significance. District Court Judges presided over the more significant federal cases as well, because they also served as Circuit Court Judges. Indeed, there were no federal judges who served only on the Circuit Court. The Circuit Court Judges were drawn from two sources: District Court Judges and Supreme Court Justices "riding circuit." (Supreme Court Justices were generally assigned to the Circuit containing their home states to minimize travel burdens.)

Above: **The former Kings County Courthouse, which housed the Brooklyn City Court in 1875, at the time of the trial in *Tilton v. Beecher.*** Reproduced with permission of the Historical Society of the New York Courts

231 Second Avenue and 235 Second Avenue. Photo courtesy of the author

Frieze of 235 Second Avenue. Photo courtesy of the author

Frieze of 231 Second Avenue. Photo courtesy of the author

The Evarts Act ushered in the federal court structure that has endured to this day of (i) the District Court as the trial court, (ii) the Courts of Appeals as intermediate appellate courts and (iii) the Supreme Court as the highest appellate court, since 1925 generally hearing only those appeals from a Court of Appeals or highest state court that it decides to hear by grant of a petition for writ of certiorari.[3]

However, for reasons that transcend his sponsorship of the Evarts Act, William M. Evarts and his remarkable legal and government career warrant re-examination. The only full biography of Evarts, the principal source for this article, was written 75 years ago.[4]

Early Years and Rise in the New York City Bar

Evarts' earliest years suggested he was destined to become a leader of the Boston, not the New York, bar. Born on Pinckney Street in Boston in 1818, he was descended from Connecticut Declaration of Independence signer Roger Sherman. After attending the Boston Latin School, then on School Street where the Parker House now stands, Evarts graduated from Yale University in 1837 and studied at Harvard Law School in the years 1838-39.

In 1840, Evarts struck out for New York City, beginning his career in the law office of Daniel Lord, a founder of the Lord, Day & Lord firm. The eight-year partnership track not yet the norm, he set out on his own in 1841, opening a law office at 60 Wall Street.

Evarts' abilities were quickly recognized, and, increasingly significant and rewarding legal work was sent his way. In 1842, he was retained as part of the defense team for the trial of a notorious forger, Monroe Edwards (who was convicted despite the efforts of the precocious, 24-year-old Evarts and his co-counsel). At a time when serving as United States Attorney supplemented a lawyer's private practice, but was not a full-time occupation, Evarts, from 1849 to 1853, was an (likely the only) Assistant U. S. Attorney for the Southern District of New York. (At the time, the office, even at the federal level, was called "District Attorney.") His more memorable cases, however, were those handled in private practice. On the eve of the Civil War, in a case echoing the Dred Scott Case, the Lemmon Slave Case, Evarts successfully argued the appeal in the New York Court of Appeals, which affirmed the lower court's decision that transporting slaves into the free state of New York, even in transit from one slave state to another, rendered them free men.[5]

Although Evarts argued many cases involving fine points of constitutional law, his best-remembered case may be a juicy, high-profile one tried in downtown Brooklyn. In 1875, Evarts was the lead lawyer on the team defending Beecher against alienation of affection claims. At the time, Beecher, the brother of Harriet Beecher Stowe, was the pastor of the Plymouth Congregational Church in Brooklyn Heights and one of the most influential men in America. After the wife of Beecher's friend, Theodore Tilton, confessed to Tilton that she had had an affair with Beecher, Tilton sued Beecher in Brooklyn City Court. For the duration of the six-month trial in *Tilton v. Beecher,* Evarts would take the ferry from Manhattan to the then separate City of Brooklyn to make his way to the current site of Brooklyn Law School on Joralemon Street, where the 1865 Kings County Courthouse then stood. Evarts was assigned the cross-examination of Tilton and gave an eight-day closing argument—all to good effect, as a hung jury was declared after six days of deliberation.

Evarts practiced in partnership nearly his entire career, the firm name changing with his partners' arrival and departure. From 1859 to 1879, the firm was called Evarts, Southmayd & Choate, the last name partner being Joseph Hodges Choate (1832-1917), likewise one of the leading members of the New York bar and Ambassador to the Court of St. James from 1899 to 1905.[6] Evarts was the first president of the Association of the Bar of the City of New York, holding that position longer than any of his successors, from 1870 to 1879.

Statesman

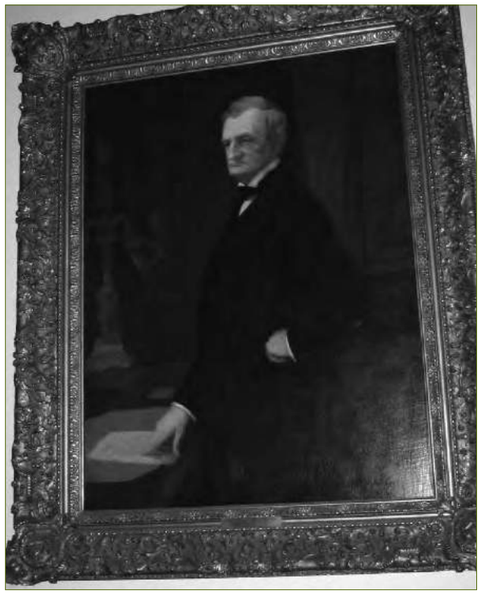
In the years leading up to the Civil War, Evarts had become active in the nascent Republican Party. He delivered the nomination speech for William Seward at the 1860 Republican Convention, but when Abraham Lincoln had secured the delegates' votes needed for the nomination, moved to make the nomination unanimous. Having come to the attention of President Lincoln and Secretary of State Seward, he was sent to England during the Civil War to stem the assistance to the Confederacy that the British were providing through the sale of warships.

True nationwide prominence first came to Evarts through his legal work for President Andrew Johnson in the 1868 impeachment proceedings before the U.S. Senate. President Johnson, a Democrat, had been under attack by the Radical Republicans in Congress, who were opposed to his more lenient approach to reconstruction after the Confederacy's defeat in the Civil War. Johnson's impeachment was triggered by his removal of Secretary of War Edwin Stanton from the Cabinet, which the Radical Republicans contended violated the Tenure of Office Act. Following the vote of impeachment by the House of Representatives, the quasi-trial before the Senate was presided over by Chief Justice Salmon Chase.

U. S. Attorney General Henry Stanbery, not Evarts, was initially lead defense counsel, resigning from the Cabinet so that he could represent the President in the impeachment trial. Evarts was selected as a member of the five-lawyer defense team, each member of which received a fee of $2,025 (well below the fees Evarts commanded in private practice). When Stanbery withdrew for reasons of ill health, Evarts became the leader of the defense team. His closing argument before a packed gallery in the Senate chamber ran 14 hours over four days. (With its typical historical infidelity, Golden Age Hollywood has President Johnson, played by Van Heflin in the 1942 biopic *Tennessee Johnson,* delivering the closing argument himself before the Senate; Evarts does not even make the credits.) Ultimately, President Johnson was acquitted, as the prosecution failed by one vote to obtain the required two-thirds majority of the Senators present.

After his acquittal, President Johnson re-nominated Stanbery for Attorney General, but his appointment was rejected by the Senate. The President then, on Seward's advice, nominated Evarts, whose appointment was approved, albeit over Senate opposition. Evarts served as United States Attorney General for the final eight months of the Johnson administration.

Today's Justice Department, with over 100,000 employees and an annual budget of over $30 billion, bears little resemblance to the modest affair over which Evarts presided as Attorney General. A substantial reorganization and professionalization of the Justice Department began under the Attorney General who succeeded Evarts in 1870. From that point onwards, a significantly expanded Justice Department staff allowed for the delegation of many of the tasks that had previously been borne directly by Evarts and other prior Attorneys General. As was the custom at the time, Evarts maintained his private law practice while serving as United States Attorney General.



Portrait of William Maxwell Evarts in the Evarts Room of the Association of the Bar of the City of New York
(Image published with the permission of the Association).
Photo courtesy of the author

In 1872, Evarts was a highly effective advocate for his country at the Geneva Board of Arbitration, which was convened to resolve the United States' claims against Great Britain for damages caused by the *Alabama* and other warships built by the British for the Confederacy. Thanks in large measure to Evarts' effective advocacy, the proceedings resulted in a favorable settlement of the U. S. claims.

Evarts also successfully represented Rutherford B. Hayes in the proceedings to resolve the disputed Presidential election of 1876, which presented the then rare phenomenon of one candidate winning the popular vote and the other winning the Electoral College vote. The Electoral Commission created to adjudicate voter fraud allegations awarded the election to Hayes over former New York Governor Samuel J. Tilden, who had won the popular vote and, in the view of many at the time, the Electoral College vote as well.[7]

Like his appointment to the Johnson cabinet, Evarts' appointment to the Hayes cabinet followed directly from legal representation by Evarts for which the President owed his office. As President Hayes' Secretary of State from 1877 to 1881, Evarts grappled with such issues as skirmishes on the Mexican border, the move to curtail Chinese immigration, efforts to quell the War of the Pacific among Chile, Peru and Bolivia and the long-running dispute with Great Britain over North Atlantic fishery rights. In hindsight, Evarts' stewardship of the State Department is generally viewed as having been capable, but uninspired. In 1881, just after his tenure as Secretary of State ended, Evarts was appointed by incoming President James Garfield to represent the United States at the International Monetary Conference in Paris.

Evarts' government career culminated with his election to the U. S. Senate in 1885. (He did not achieve this or any of his high government offices by popular election; as provided under the U.S. Constitution before the adoption of the 17th Amendment, he was elected to the Senate by vote of the New York legislature.) Limited by declining health (worsening eyesight, in particular), Evarts was not a dominant member of the Senate. His lasting achievement was the above-described Court of Appeals Act, or Evarts Act. He was ready for retirement at the age of 83 when his single term ended in 1891.

While the fact that Evarts served as U. S. Attorney General, U. S. Secretary of State and U. S. Senator from New York makes for a spectacular record of government service, the substance of that service was not truly noteworthy, particularly in comparison to his extraordinary success at the bar.

Public Figure

Evarts was one of the most sought-after public speakers of his day, renowned for his wit. The dedication ceremonies of several New York City landmarks, including Cleopatra's Needle in Central Park, the Seventh Regiment Armory on Park Avenue and the Statue of Liberty, featured speeches by Evarts. Indeed, Evarts was the chairman of the American Committee for the Statue of Liberty, formed to raise the funds needed to build the statue's pedestal on Bedloe's (now Liberty) Island. Evarts found the time to serve as President of the Union League Club, which, during his term (1882-1885), was located at Fifth Avenue and 39th Street, before the construction of its current, 1931 clubhouse at Park Avenue and 37th Street.

William Evarts' Mansion on the northwest corner of 14th Street and Second Avenue.
Collection of the New-York Historical Society, Robert L. Bracklow Photograph Collection, 66000-1418

Most likely not signaling a revival of interest in Evarts, references to him nevertheless have popped up of late. A film was recently released based on the life of Maxwell Perkins, the legendary Scribner's editor who shaped the work of Fitzgerald, Hemingway and Wolfe.[8] Perkins, whose full name was William Maxwell Evarts Perkins, was Evarts' grandson. Another descendant, great-grandson William M. Evarts, was a managing partner of the Winthrop Stimson firm (now Pillsbury Winthrop) for over 20 years.

Evarts continued to reside in his home on Second Avenue and 14th Street for over 50 years, well after affluent New Yorkers had moved farther uptown. He died there on February 28, 1901 and was buried in Windsor, Vermont, where he had maintained a summer home for many years.

The breadth and depth of Evarts' career in the public and private sectors are unimaginable for a modern-day lawyer. His example makes one's own attempts at the practice of law seem laughably puny by comparison. Nevertheless, as I chaired New York City Bar Association committee meetings in its building's Evarts Room, I can only hope that, as Evarts peered over my shoulder from his portrait on the wall, he inspired me to do just a bit better in my chosen profession.

ENDNOTES

1. Judiciary Act of 1891, ch. 517, 26 Stat. 826.
2. Judicial Code of 1948, ch. 646, §43(a), 62 Stat.869, 870.
3. Judiciary Act of 1925, ch. 229, 43 Stat. 936.
4. Chester L. Barrows wrote *William M. Evarts: Lawyer, Diplomat, and Statesman* as his doctoral thesis at the University of North Carolina. The University of North Carolina Press published it in book form in 1941. Barrows went on to serve as Chairman of the History Department at Adelphi University.
5. *Lemmon v. People*, 20 N.Y. 562 (1860).
6. The firm was known over time as Butler & Evarts (1842-52), Butler, Evarts & Southmayd (1852-58), Evarts & Southmayd (1858-59), Evarts, Southmayd & Choate (1859-79), Evarts, Southmayd, Choate & Beamon (1879-84) and, finally, Evarts, Choate & Beamon until Evarts' death in 1901, although he was not active in the practice in his final years. Its offices were located successively at 60 Wall Street, 2 Hanover Square and 52 Wall Street.
7. Tilden was a classmate of Evarts at Yale University and also, like Evarts, had practiced law in New York City since the early 1840's.
8. The film, called *Genius*, is based on A Scott Berg's biography of Perkins, *Max Perkins: Editor of Genius* (1978).

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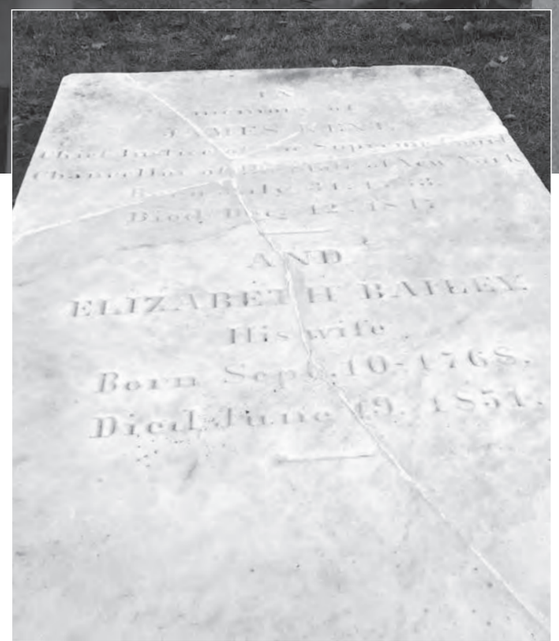
Kent Gravestone Restoration Ceremony



October 30, 2016 • St. Luke's Episcopal Church, Beacon, New York

As Justice Freedman mentioned in her Letter from the Editor, the Historical Society has a special fondness for Chancellor James Kent. In fall of 2016, we traveled to Beacon to celebrate the restoration of Kent's gravestone. When Society President **Hon. Albert M. Rosenblatt** had learned of the stone's disrepair, he reached out to the descendants of Chancellor Kent, who, in an effort led by **Kent Turner,** were able to fund the restoration process. The Society, along with the **Beacon Historical Society,** sponsored a ceremony in which Kent's descendants were able to honor their ancestor.

James Kent to Thomas Washington

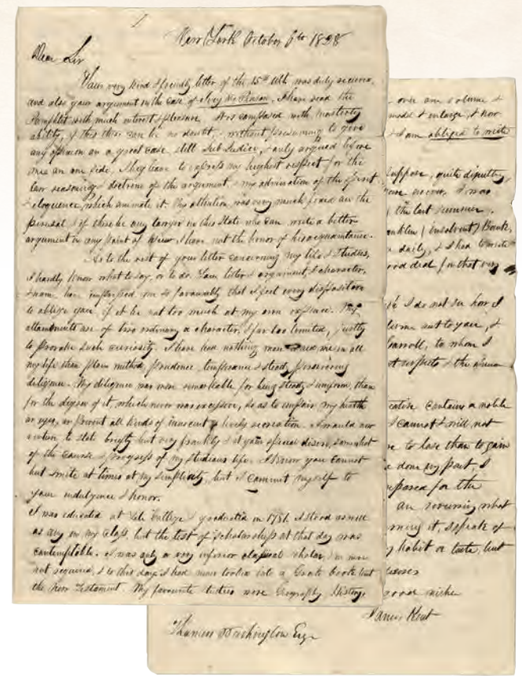
As a complement to Judge Smith's brief biography of Chancellor James Kent, we've published excerpts of a letter Kent wrote to Thomas Washington in 1828. In response to Washington's request for Kent's biography, the father of American jurisprudence thoughtfully reviewed his life and career. These quotes shed light on how one of New York's greatest legal thinkers viewed his achievements. The full letter is available on our website at **http://bit.ly/jk-letter-to-tw.**

October 6, 1828

Dear Sir:

Your very kind & friendly letter of the 15th ult. was duly received, and also your argument in the Case of Ivey vs. Pinson. I have read the Pamphlet with much interest & pleasure…As to the rest of your letter concerning my life & studies, I hardly know what to say, or to do. Your letter & argument, & character & name have impressed me so favorably, that I feel every disposition to oblige you, if it be not too much at my own expense. My attainments are of too ordinary a character, & far too limited, justly to provoke such curiosity.

At the farmers house where I boarded, one of his daughters, a little modest, lovely girl of 14 generally caught my attention & insensibly stole upon my affections, & I before I thought of love or knew what it was, I was most violently affected. I was 21. and my wife 16 when we married, & that charming lovely girl has been the idol & solace of my life, & is now with me in my office, unconscious that I am writing this concerning her. We have both had uniform health & the most perfect & unalloyed domestic happiness, & are both as well now & in as good spirits as when we married.



In Feby 1798 I was offered by Gov Jay & accepted the office of youngest Judge of the Supreme Court. This was the summit of my ambition. My object was to return back to Poughkeepsie, & resume my studies, & ride the circuits, & inhale country air, & enjoy otium cum dignitate. I never dreamed of volumes of reports & written opinions. Such things were not then thought of. I retired back to P in the Spring of 1798 & in that Summer rode all over the Western wilderness & was delighted. I returned home and began my Greek & Latin, & French, & English, & law classics as formerly, & made wonderful progress in books that year.

Above: Letter from James Kent to Thomas Washington, October 6, 1828,
Kent Family Papers, Rare Book & Manuscript Library, Columbia University in the City of New York