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JUDICIAL NOTICE

ISSUE 19 ~ 2025

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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.*

Correction: In the article "Murder at Madison Square Garden" (Issue 18, 2023), Thomas Fitzgerald was named as presiding over the first Thaw trial. He was not the presiding judge. At the time there were two Judge Fitzgeralds. Justice James Fitzgerald was the presiding judge. He graduated from Columbia Law School and had a successful career as a judge.

From the Editor-in-Chief

Judicial Notice 19 features four new articles and one reprinted article. Two articles involve the U.S. Supreme Court's seminal 1824 decision *Gibbons v. Ogden*.[1] The first details the history of courts relying on the Commerce Clause the years. The second is about a disaster that followed 16 years after *Gibbons* was rendered. The other two articles show the evolution of New York's recognition of individual rights, workers' rights and LGBTQ rights.

Craig Landy's scholarly article on the Commerce Clause takes us from Chief Justice John Marshall's famous *Gibbons v. Ogden* decision to recent applications of that constitutional provision in cannabis and pork product cases. Landy describes both the expansive use of the Commerce Clause vesting power in the federal government to pass civil rights legislation, and at the same time, prohibiting states from applying their regulatory statutes to commercial activities of out of state merchants.

In an extremely engaging story, Brian E. O'Connor describes the fire of the *Lexington*, a ship built by Cornelius Vanderbilt in 1835 to carry goods on New York waters. Vanderbilt took advantage of the *Gibbons* ruling prohibiting New York from granting a monopoly for steamboat services. The vessel was sold to a company that reconditioned it. In 1840, with 113 passengers and 30 crew members, the *Lexington* was consumed by a fire causing loss of goods, gold and other specie consigned by the Merchant's Bank of Boston, as well as the lives of all but one passenger and three crew members. The Bank sued successfully for loss of its goods, but the passengers' families had no recourse as wrongful death actions did not exist until 1847.

Dr. Bruce Dearstyne provides an insightful article on the development of Workers Compensation laws in New York. With the industrialization of the late 19th and early 20th centuries came a great increase in the number of dangerous occupations. Injured or deceased workers and families had little recourse as proving negligence on the part of owners was often too difficult and costly. Even when the New York legislature attempted to impose strict liability on owners for those engaged in dangerous activities, the New York courts found the law violated the due process clause of the 14th Amendment and the New York State Constitution. But New York persevered!

Professors William Eskridge and Christopher Riano, in a thought provoking and well documented article, review the history of attempts to vindicate the rights of LGBTQ individuals in the New York courts. While the New York courts seemed to be ahead of the curve in the 20th century, the course was more difficult in the 21st century. The New York Court of Appeals did not recognize same sex marriages as other states had. It was not until the state legislature took action that same sex marriages were recognized in New York, only shortly before the U.S. Supreme Court legalized them nationally. However, our authors remain optimistic as the courts are becoming aware that discrimination against any group hurts everyone.

Finally, *Judicial Notice* is pleased to reprint Hon. Sidney H. Stein's article about one of New York's most eminent jurists, Hon. Stanley Howells Fuld. Judge Fuld served on the New York Court of Appeals as Associate Judge from 1946 to 1966 and as Chief Judge from 1967 to 1973. Fuld served as Chief of the Appeals Bureau under District Attorney Thomas Dewey, who as Governor, appointed him to the high court. Judge Stein, who served as one of Judge Fuld's last clerks, together with Jonathan Goldin, reviews the Chief Judge's extensive jurisprudential legacy most elegantly.

We continue to be grateful to our authors for their scholarship and diligence. We thank Allison Morey as Managing Editor and Picture Editor, Dr. Julia Rose Kraut and Patrick R. McKelvey as Associate Style Editors, and Nick Inverso as Graphic Designer with the New York Court System for all their hard work in producing *Judicial Notice* 19.

- Helen E. Freedman

1. 22 U.S. (Wheat)

Portrait of U.S. Supreme Court Justice John Marshall, by Henry Inman, 1832. Courtesy of the Library of Virginia.
Decree in *Gibbons v. Ogden*; 3/2/1824; Engrossed Minutes, 2/1790 - 6/7/1954; Records of the Supreme Court of the United States, Record Group 267. Courtesy of the U.S. National Archives and Records Administration

FROM STEAMBOATS TO CANNABIS

The 200 Year Journey of *Gibbons v. Ogden* and the Commerce Clause

by Craig A. Landy

Craig A. Landy is a retired partner at Peckar & Abramson, PC in Manhattan. His articles have appeared in *Judicial Notice*, *New York History* and *Rhode Island History*. He is a past president of the New York County Lawyers Association and was an adjunct professor of law at New York Law School for over 20 years.

Chief Justice John Marshall might never have imagined that his 1824 decision in *Gibbons v. Ogden* would be the centerpiece of another Supreme Court opinion two hundred years later. But it was. And based on the fractured nature of the high court's five opinions in *National Pork Producers Council v. Ross*[1], *Gibbons* will continue to be at the heart of Commerce Clause cases for years to come. The celebration of *Gibbons's* 200th anniversary is a good time to look back at its enduring legacy and ahead to its future.

The Steamboat Monopoly and the New York Courts

In 1787, the New York State legislature granted John Fitch, the inventor of the steamboat, a twenty-year monopoly over steam navigation of waters within the borders of New York State. This monopoly was subsequently transferred to former chancellor Robert R. Livingston, who in 1802 entered a partnership with Robert Fulton to establish regular steamboat service between New York City and Albany. State legislation further extended the exclusive Livingston-Fulton privilege to 1838, granting the licensees the right to seize and assume ownership of any steam vessel found in New York waters without a valid license.[2]

Naturally, the economic success of the steamboat attracted rivals to the Livingston-Fulton monopoly. Steamboat operators, if they did not buy a license from the monopoly, faced two choices: they could either transfer their passengers to licensed steamboats outside New York waters for the remaining journey to New York City, or they could sail directly from New Jersey or Connecticut into New York, risking the seizure of their vessels. To enforce its exclusive rights, the monopoly first tried to negotiate with an offending rival to sell a license, or in some cases, to buy the rival outright. If talks failed, the monopoly turned to the courts. In 1811, a lawsuit was brought to enjoin James Van Ingen of Albany from competing against the monopoly on the Hudson River. After the New York Chancery Court refused to grant the injunction, Livingston and Fulton appealed.[3]

Biographical cigarette card of Robert Fulton recognizing inventors and their inventions. New York Public Library, George Arents Collection.

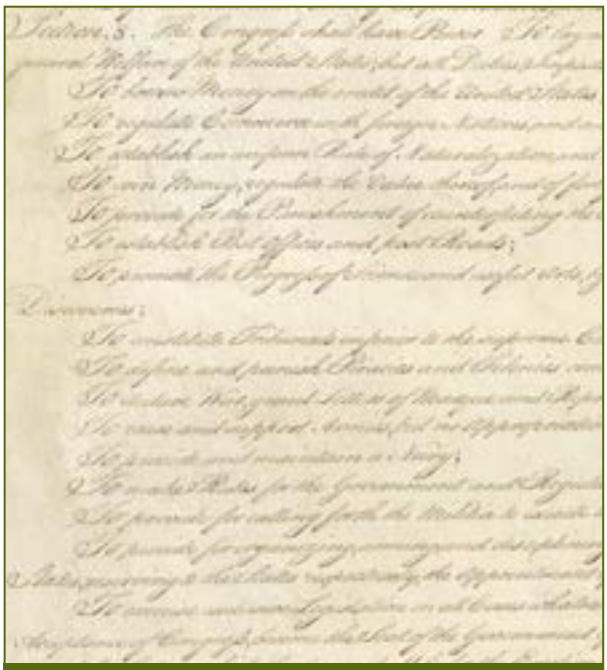
Portrait of Robert R. Livingston, attributed to Gilbert Stuart, c. 1793. Courtesy of Clermont State Historic Site, image courtesy of The Athenaeum.

Counsel for Van Ingen argued that the states relinquished all powers not exclusively delegated to the United States and therefore the state-created steamboat monopoly interfered with Congress's power to regulate commerce granted under the Commerce Clause of the U.S. Constitution. Thomas Addis Emmet, a distinguished member of the New York Bar and long-time attorney for the Fulton concerns, countered by listing examples of state laws that operated concurrently with Congress's assent, including state laws prohibiting importing slaves. These laws, Emmet argued, were valid – as was the steamboat monopoly law – so long as they did not directly clash with any express federal law.

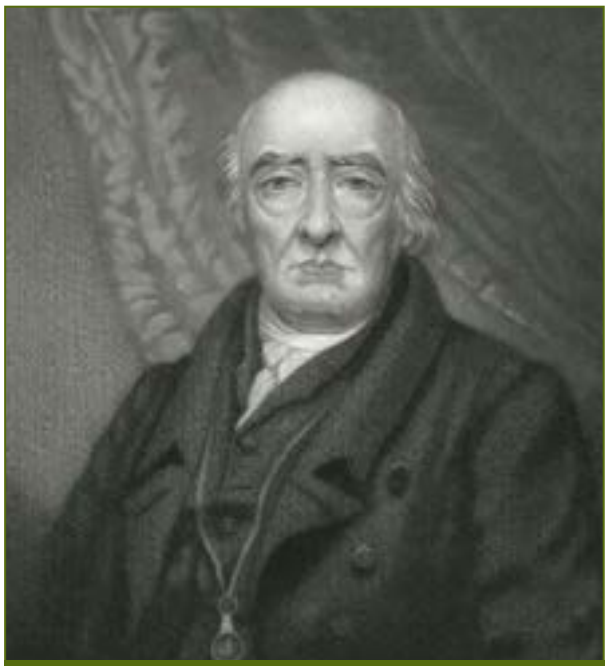
Chief Justice James Kent of the New York Supreme Court of Judicature, and the other members of the Court for the Trial of Impeachment and the Correction of Errors, reversed the Chancery Court and issued the injunction, adopting the constitutional arguments of Livingston and Fulton's counsel, stating, "[b]ut when there is no existing [state] regulation which interferes with the [commerce power] grant, nor any pretense of a constitutional interdict, it would be most extraordinary for us to adjudge it void, on the mere contingency of a collision with some future exercise of congressional power. Such a doctrine is a monstrous heresy."[4]

After Fulton died in 1815, the North River Steam Boat Company, a successor to the Livingston-Fulton partnership, continued to license third parties the right to operate steamboats in New York waters under its monopoly. Colonel Aaron Ogden, a former governor of New Jersey, received a franchise to operate steamboats between New York and Elizabethtown, New Jersey. Ogden subsequently formed a partnership with Thomas Gibbons and operated passenger steamboats between those two cities. However, personal animosities fractured the Ogden-Gibbons partnership and Gibbons established a rival ferry service covering the same trans-Hudson route that the Ogden and Gibbons had served.

As tensions mounted between these two partners-turned-rivals, Ogden struck first in the courts and obtained an injunction based on rightful ownership of the franchise monopoly against Gibbons, restraining him from navigating within the waters of New York with steamboats. James Kent, then chancellor of the State of New York, confirmed Ogden's right and



The Commerce Clause: Article 1, Section 8 of the U.S. Constitution. Courtesy of the U.S. National Archives and Records Administration.



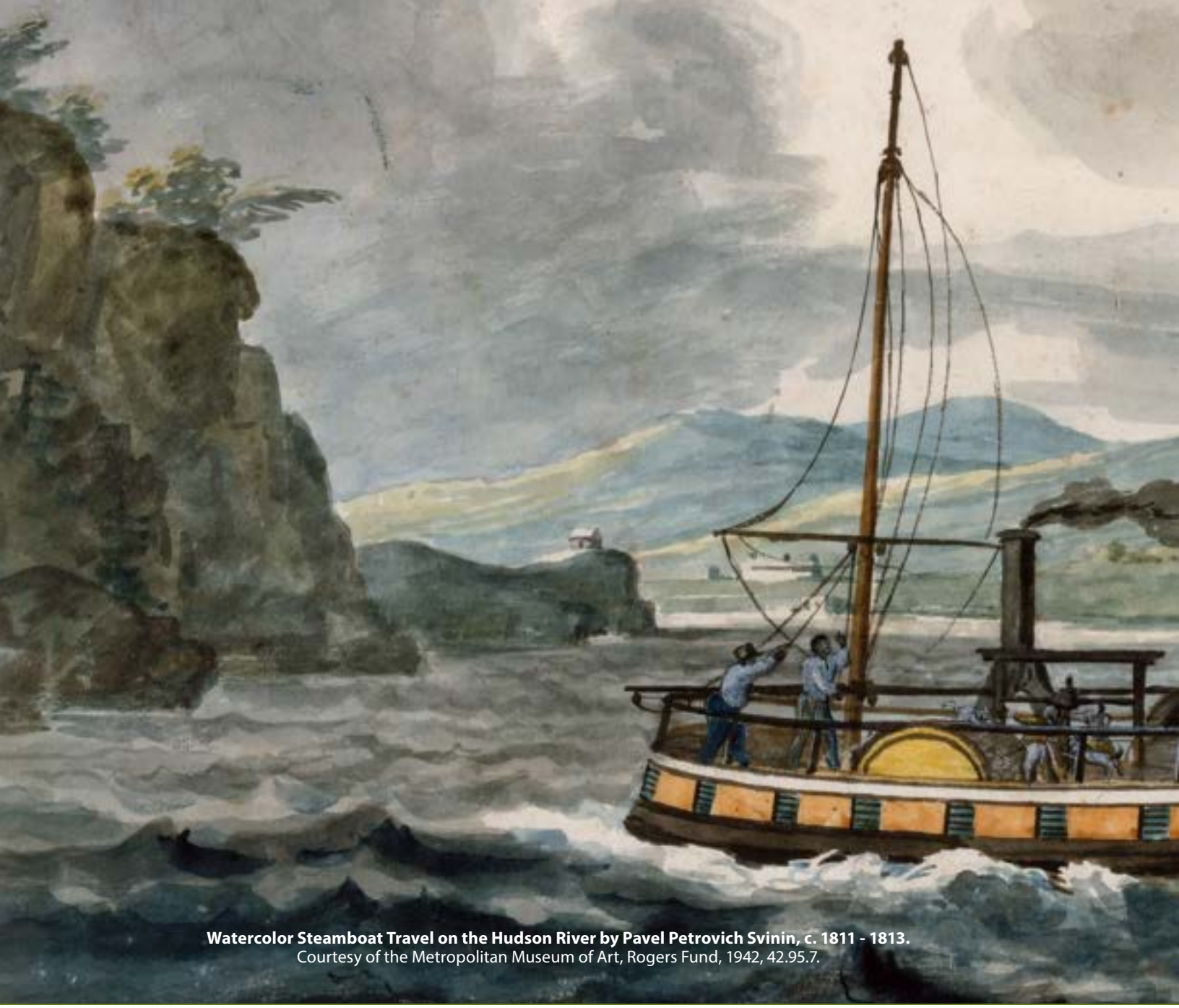
Engraving of Thomas Addis Emmet (1764-1827), by W.G. Jackman. Collection of The New-York Historical Society, 61167.

granted a permanent injunction against Gibbons, rejecting Gibbons's defense that the federal license Gibbons had acquired to carry on the "coasting trade" between New Jersey and New York, supplied the necessary congressional action to block New York's monopoly grant.[5]

When New York's Court for the Correction of Errors unanimously affirmed Kent's decision, Gibbons appealed to the United States Supreme Court, placing before that court for the first time the meaning of the Commerce Clause in Article 1, Section 8 of the United States Constitution.[6]

Daniel Webster, the celebrated New England orator, opened with a dormant Commerce Clause argument before the high court on behalf of Gibbons by urging an expansive interpretation of the Commerce Clause in which congressional inaction in matters of commercial regulation reflected an intent to assert its authority over the entire field of interstate commerce to the exclusion of state regulation.[7] Thomas Oakley, one of two well-known New York attorneys hired by Ogden, followed Webster by arguing that New York's granting the monopoly was a proper exercise of concurrent power over commerce within its waters, which a state may exercise so long as its laws do not interfere with any right under the Constitution or laws of the United States. Next, Thomas Addis Emmet, Ogden's other counsel, reprised his argument in *Van Ingen*, illustrating the dire results which would flow from Webster's regulatory scheme in which exclusive federal power over commerce would ultimately lock states out from exercising their traditional role in regulating commerce both within their borders and beyond. By raising and defending the complexities of state and federal regulation of interstate commerce, Emmet aimed to show that "nothing but a direct and absolute collision can produce such an interference as will render the State grants invalid…."[8]

With Webster's expansive interpretation that the power over interstate commerce is an exclusive federal power on shaky ground after Oakley and Emmet's arguments, Attorney General William Wirt, the last to argue on behalf of Gibbons, asserted that the New York law directly interfered with commerce between New York and New Jersey and therefore of the two grants – one federal and one state – the federal must prevail.[9]



Watercolor Steamboat Travel on the Hudson River by Pavel Petrovich Svinin, c. 1811 - 1813.
Courtesy of the Metropolitan Museum of Art, Rogers Fund, 1942, 42.95.7.

Chief Justice Marshall authored the opinion of the Court finding that New York's exclusive grant over steam navigation on New York's water to the North River Steam Boat Company was invalid. While Marshall spent considerable effort rebutting the arguments of Ogden's counsel that the states and federal government shared concurrent power over interstate commerce, he chose to avoid ruling on the exclusivity question and instead narrowly grounded his opinion in the Federal Coasting Act, which allowed licensed vessels to carry on the coasting trade. The Chief Justice viewed the Act as nothing less than congressional authorization for Gibbons's steamboat to navigate New York waters. Marshall's choice allowed him to avoid resting the decision on the thornier issue of shared powers over interstate commerce, while giving him the opportunity to express sympathy for the idea that Congress's commerce power was exclusive (at least as to interstate navigation), thus divesting the states of the power over such matters. Commentators, both contemporary and modern, have differed over why Marshall took this narrower path, but the decision crippled the franchise system in New York which had safely controlled steamboat traffic on its waters for seventeen years.[10]

Commerce Clause: Targeting Congressional Power

Professor Richard Primus in his article "The *Gibbons* Fallacy" pointed out that "Every living American lawyer learned in law school to confront Commerce Clause issues first and foremost as issues about the extent of Congress's power to regulate."[11] Since the turn of the twentieth century, the prevailing discussion around the Commerce Clause has been the expansion of congressional regulation. This narrative runs from *Champion v. Ames*,[12] where lottery tickets were deemed "commerce" subject to Congress's regulation across state lines, through *Hammer v. Dagenhart*,[13] where federal child labor laws were found to be outside the scope of the Commerce Clause, to the New Deal cases, including *U.S. v. Darby*,[14] upholding the Federal Labor Standards Act. The Commerce Clause also formed the cornerstone of the civil rights movement, starting with the Supreme Court's landmark decision in *Heart of Atlanta Motel, Inc. v. U.S.*,[15] which held that Congress acted within its Commerce Clause powers in passing the Civil Rights Act of 1964 forbidding racial discrimination in

hotels, motels, restaurant, theatres and other public accommodations engaged in interstate commerce. Such was the breadth of the Commerce Clause in the eyes of the Supreme Court that from 1937 to 1995, no federal law was struck because it exceeded the scope of the Commerce Clause.[16]

Beginning in 1995, however, first in *U.S. v. Lopez*[17] and later in *U.S. v. Morrison*,[18] the Supreme Court ushered in a new era striking down the federal Gun Free School Zone Act and the federal Violence Against Women Act, respectively, as exceeding congressional Commerce Clause power.[19] Today, the scope of Congress's power to legislate under the Commerce Clause is far from settled.

Commerce Clause: Targeting State Laws

In the 19th century, Congress enacted few laws under its Commerce Clause power. Thus, no federal statute faced constitutional challenge on Commerce Clause grounds until after the turn of the twentieth century.[20] The Commerce Clause was nevertheless central to 19th century constitutional law, but it was raised not in cases testing the constitutionality of federal laws, but rather testing the validity of state laws, starting with *Gibbons v. Ogden*. This is not surprising since the Commerce Clause was the Framers' response to state protectionism in the form of overt discrimination through state tariffs targeting out-of-state goods.[21]

In the twenty-five years after *Gibbons*, the Supreme Court was bogged down with cases concerning whether interstate commerce was the exclusive domain of Congress or could be shared concurrently with the states.[22] Not until *Cooley v. Board of Wardens*[23] did the Court finally declare that the power to regulate interstate commerce was shared between Congress and the states, in the absence of federal legislation to the contrary. But that shared power was limited. Since *Gibbons*, the Supreme Court has construed the Commerce Clause to be not only an affirmative grant of authority to Congress to regulate interstate commerce, but also a limitation on the powers of the states to enact laws that placed a substantial burden on interstate commerce. This has become known as the dormant Commerce Clause doctrine.

Dormant Commerce Clause: Then

The first dormant Commerce Clause cases arose in the late nineteenth century and targeted state laws that discriminated against out-of-state businesses, such as *Webber v. Virginia*,[24] where the Supreme Court struck down a Virginia law requiring out-of-state producers to pay a tax that in-state businesses did not have to pay. A second branch of the dormant Commerce Clause sprouted in the mid-twentieth century targeting non-discriminatory state laws whose burden on interstate commerce exceeded local gains. In *Pike v. Bruce Church*,[25] the Court held that a state law that did not discriminate in favor of in-state interests and only incidentally burdened interstate commerce was subject to a more permissive balancing test and would only be invalidated if the burden imposed clearly exceeds the local gains. This analysis became known as the *Pike* balancing test.[26]

Dormant Commerce Clause: Now

As jurisprudence around the dormant Commerce Clause evolved through landmark decisions like *Pike v. Bruce Church*, its principles have been tested in new economic landscapes and regulatory challenges. With 39 states legalizing the production and use of cannabis in some form, non-resident applicants for licenses to sell cannabis products have recently challenged those state cannabis laws requiring a licensee to be a state resident, as violating the dormant Commerce Clause. Non-resident applicants have charged that residency requirements facially discriminate against out-of-state residents and are only in place for economic protectionist reasons. Under Maine's medical marijuana law, for example, all officers and directors of licensed medical marijuana dispensaries were required to be Maine residents. A Delaware-based cannabis company owned by non-Maine residents sued the State of Maine claiming the residency requirement violated the dormant Commerce Clause by protecting Maine residents and discriminating against non-residents. Striking the residency requirement, the First Circuit agreed.[27]

Outdoor advertisement for recreational cannabis use in Washington State, 2012. Thirty-nine states have legalized production and use of cannabis in some form, but applicants to sell cannabis products must be state residents or, in some states, convicted of a cannabis-related offense under state law. Library of Congress, Prints & Photographs Division, photograph by Carol M. Highsmith, LC-DIG-highsm-50798.

Factory production of canned pork products, 1943. Library of Congress, Prints & Photographs Division, FSA/OWI Collection, LC-USW3-031575-C.

Similar challenges have been brought against New York's residency requirement for licenses to sell recreational cannabis, with split decisions. In *Variscite NY One v. New York*, one federal district judge found a violation of the dormant Commerce Clause because it was protectionist of in-state interests to the detriment of out-of-state license applicants and preliminarily enjoined implementation of that requirement across five regions of New York State, including Brooklyn.[28] While the state's appeal was pending before the Second Circuit Court of Appeals, the parties settled the case with New York and agreed to award the plaintiff an adult use retail dispensary license, without applying the residency requirement to the plaintiff.[29] More recently, another federal judge refused to preliminarily enjoin New York from issuing licenses under state law giving "extra priority" to applicants convicted of a cannabis-related offense under New York law, finding that "[g]iven that the national market for cannabis is illegal, it would make little sense to apply the dormant Commerce Clause to New York's cannabis licensing scheme."[30] Oral argument of the appeal from this order was heard on December 19, 2024 before the Second Circuit Court of Appeals.

In related developments, California, Oregon, and Washington have passed laws authorizing the state to enter cross-border compacts with other states to permit interstate cannabis sales.[31] The question of whether these agreements might provoke dormant Commerce Clause issues – especially from out-of-state producers facing new regulations from the importing states – seems to have been resolved in the negative by a 2023 U.S. Supreme Court ruling.

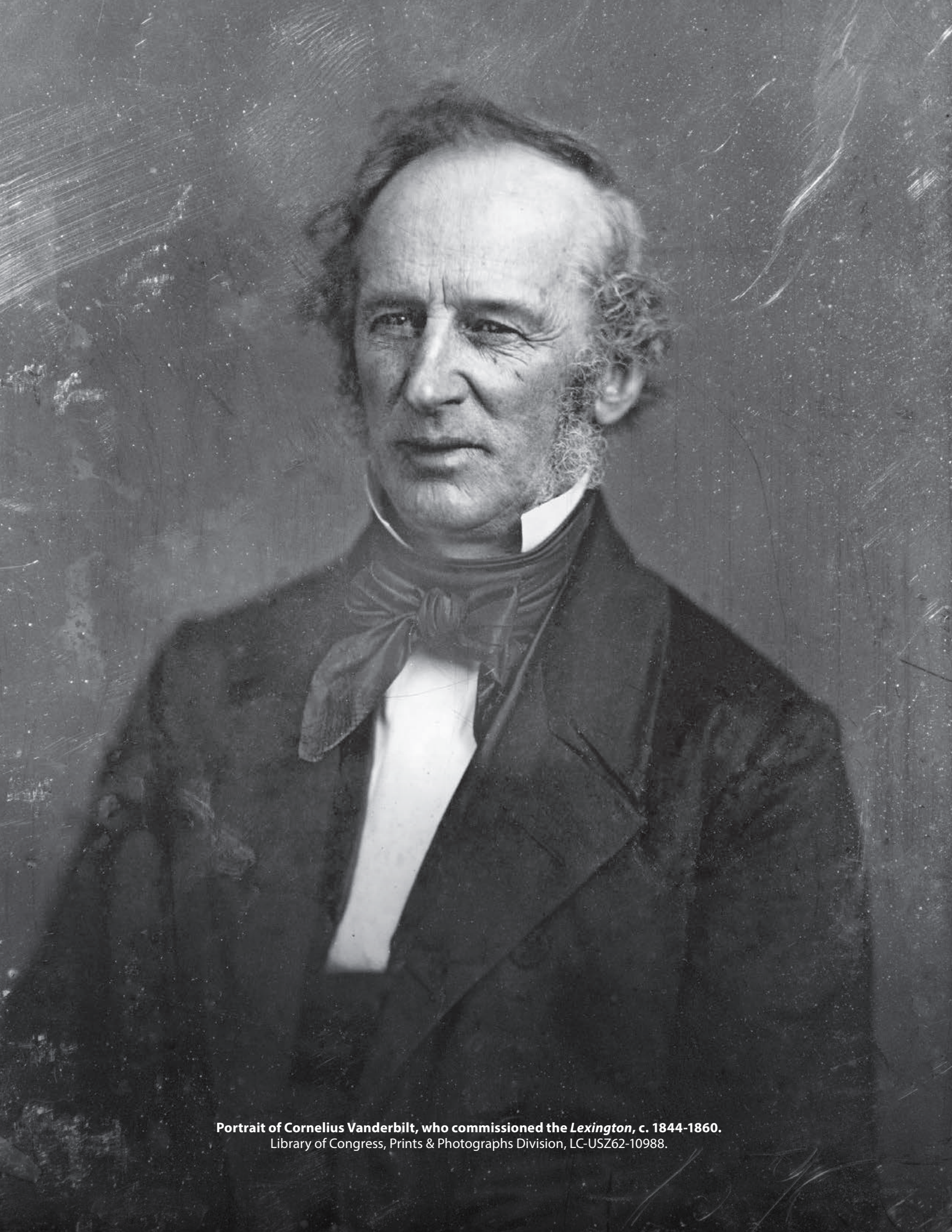
In a 5-4 ruling that blurred ideological lines, the high court upheld a controversial California animal-welfare law and rejected an argument by pork producers that the law, known as Proposition 12, violated the second branch of the dormant Commerce Clause by regulating the pork industry outside California. Proposition 12 bars the sale in California of uncooked pork products when the seller knows or should have known that the meat came from the offspring of a breeding pig that was confined "in a cruel manner", defined as less than 24 square feet (about twice the area of an average bathtub) of living space.[32] In the majority opinion, Justice Neil Gorsuch, relying on *Gibbons*, rejected the pork council's main argument that Proposition 12 violated the dormant Commerce Clause because it had the practical effect of controlling commerce outside the state given that Californians consume about 13 percent of all U.S.-raised pork. Such a rule, Justice Gorsuch wrote, "would cast a shadow over" a broad range of non-discriminatory state laws widely accepted as constitutional, even though they may have an impact beyond the enacting state, such as state income tax laws. A plurality of the Court also held that Proposition 12 survived the *Pike* balancing test, although most of the justices could not agree on a controlling rationale. Three justices doubted the courts should ever engage in *Pike* balancing, while six others agreed that courts could still consider *Pike* claims and balance the economic burdens of a state law against its noneconomic benefits.[33] In a separate partial dissent, Justice Brett Kavanaugh wrote that Proposition 12 not only undermined federalism, but it also could provide a blueprint for states with sufficient economic influence to pass laws in the future imposing on their sister states their moral policy preferences on such divisive issues ranging from undocumented immigrants to union labor to abortion.

Interstate discord and rivalries of the kind Justice Kavanaugh feared may return the country to the trade wars of two centuries ago, when states sought to protect their economic interests at the expense of their sister states, prompting the Framers to adopt the Commerce Clause and Chief Justice Marshall to end the fight between New York and its neighboring states in *Gibbons*.[34] With Congress today frequently in political deadlock, states with the economic resources to control markets may once again try to resolve the country's most divisive issues by passing laws that target one another.[35] If that happens, one can only assume that we have not heard the last of the dormant Commerce Clause from the federal courts.

As *Gibbons* celebrates its 200th anniversary, there is a newfound appreciation that, while New York lawyers Oakley and Emmet lost their case, their arguments on the shared balance between federal and state control over interstate commerce were not only soon thereafter adopted by the Supreme Court, but also have continued to shape the jurisprudence of the Commerce Clause in the Supreme Court from the era of Chief Justice Roger S. Taney (1836) until the present.[36] As one commentator has noted, "quite an accomplishment for a pair of attorneys who 'lost' their case!"[37] Since *Gibbons* was the first major case to address the confluence of government regulation and technological change, it is not surprising that the decision continues to resonate. The issues of weaponizing commerce as a tool of social upheaval and changing technology are as relevant today as they were two hundred years ago at the dawn of the American steamboat era.

* Some material in this article has been drawn from Craig A. Landy, *Bursting Boilers, Collisions, and Races: The Devastating Aftermath of the 1824 Landmark Case Gibbons v. Ogden on Steamboat Travel in New York,* 100 NEW YORK HISTORY, 269, 273-278, 286 (Winter 2019-2020). Used by permission of the publisher, Cornell University Press.

1. 598 U.S. 356 (2023).
2. New York Laws of 1808, ch. 225. For the background of the steamboat monopoly and its transfers, see Thomas H. Cox, *Gibbons v. Ogden: Law, and Society in the Early Republic,* 30-43 (2009).
3. *Livingston v. Van Ingen*, 9 Johns. 507 (1812)
4. *Van Ingen*, 9 Johns. at 550-55.
5. *Ogden v. Gibbons*, 4 Johns. Ch. 150 (N.Y. Ch. 1819). Chancellor Kent saw the Coasting Act's federal license requirement relied on by Gibbons as merely permitting the licensed vessel to engage in coastal trading without clearing customs at every port, which was supplemental to, but not exclusive of, the state's rights to franchise the use of steamboats on its waterways.
6. *Gibbons v. Ogden*, 17 Johns. 488 (N.Y. Ct. Err. & App.1820). The Commerce Clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
7. Webster's argument is reported in *Gibbons v. Ogden*, 22 U.S. 1, 3-41 (1824).
8. *Id.* at 113-125.
9. *Id.* at 158. Attorney General Wirt was acting in his private, not public, capacity, a practice common during the early republic.
10. *Id.* at 230-278. *See, e.g.,* Cox, *supra* note 3 at 193.
11. Richard Primus, *"The Gibbons Fallacy"*, 19 Jl. Const. L. 567, 600 (2017).
12. 188 U.S. 321 (1908).
13. 247 U.S. 251 (1918).
14. 312 U.S. 100 (1941) (reversing *Hammer*). For a discussion of the broad interpretation of the Commerce Clause after 1941, see Herbert A. Johnson, *Gibbons v. Ogden, John Marshall, Steamboats and the Commerce Clause* (2010), 162-164.
15. 379 U.S. 241 (1964) (relying on *Gibbons*). *See also* Ronnie Greene, *Heart of Atlanta, Five Black Pastors and the Supreme Court Victory for Integration* (2022),
16. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (2002), 276.
17. 514 U.S. 549 (1995).
18. 529 U.S. 598 (2000).
19. *See also Gonzales v. Raich*, 545 U.S. 1 (2005) (Congress may criminalize homegrown cannabis even if allowed by states for medicinal purposes) and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (congressional taxing power, not the Commerce Clause, supported the Affordable Care Act).
20. *Howard v. Ill. Centr. R. Co.,* 207 U.S. 463 (1908).
21. Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause,* 97 Va. L. Rev. 1877, 1889 (2011) (pointing out the threat such state tariffs presented to the political union).
22. *See Brown v. Maryland*, 25 U.S. 419 (1827), *Willson v. Black Bird Creek Marsh Co.,* 27 U.S. 245 (1829), the *License Cases*, 46 U.S. 504 (1847), and the *Passenger Cases*, 48 U.S. 283 (1849) (plurality opinion).
23. 53 U.S. 299 (1852).
24. 103 U.S. 344 (1880).
25. 397 U.S. 137 (1970) (holding Arizona could not require high quality cantaloups to be packed for interstate shipping in Arizona where grower could not afford to build packing plant. Such a requirement burdened interstate commerce unnecessarily).
26. In a few cases, the Court has overturned nondiscriminatory state laws which directly impact interstate transit. *See, e.g., Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (mud flaps) and *So. Pac. Co. v. Arizona,* 325 U.S. 761 (1945) (interstate movement of trains).
27. 45 F.4th 542 (1st Cir. 2022).
28. *Variscite NY One v. New York*, 1:22-cv-1013 (GLS/DJS) (N.D.N.Y. Jan. 31, 2023).
29. *Id.*, Settlement Agreement and Stipulation of Dismissal, May 25, 2023. New York reserved the right to enforce the residency requirement in future cases. Meanwhile, a coalition of medical marijuana operators separately sued New York State in state court challenging the roll-out of the state cannabis program as inconsistent with New York's Marijuana Regulation and Taxation Act. *CARSC v. New York State Cannabis Control Board* (Sup. Ct. Albany Co., 2023). This suit and a separate action brought by a group of service-disabled veterans, were settled in December 2023 with the Cannabis Control Board agreeing to issue certain provisional licenses, paving the way to opening more marijuana dispensaries statewide. *Carmine Fiore v. New York State Cannabis Control Board* (Sup. Ct. Albany Co., 2023).
30. *Variscite NY Four v. New York State Cannabis Control Board,* 1:23-cv-01599 (AMN/CFH) (N.D.N.Y. Feb. 2, 2024) (following the reasoning in *Brinkmeyer v. Washington State Liquor and Cannabis Board*, 2023 WL 1798173 (W.D. Wash. Feb. 7, 2023), *appeal dismissed*, 2023 WL 3884102 (9th Cir. Apr. 11, 2023); *Peridot Tree, Inc. v. City of Sacramento*, 2022 WL 10629241 (E.D. Cal. Oct. 18, 2022) and the dissent in *Northeast Patients Group v. Maine*). Other federal district courts have since followed suit. An appeal of *Variscite NY Four* was argued in late December 2024 before the Second Circuit Court of Appeals.
31. *See, e.g.,* California SB-1346 (authorizing interstate cannabis agreements; signed by governor on Sept. 18, 2022).
32. *Nat'l Pork Prods. Council v. Ross*, 598 U.S. 356.
33. Given the Supreme Court's plurality view that future *Pike* claims may be viable, the Ninth Circuit's dire prediction of the demise of the dormant Commerce Clause appears to be premature. *Nat'l Pork Prods. Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021) ("While the dormant Commerce Clause is not yet a dead letter, it is moving in that direction.").
34. See *supra* note 22.
35. Conor Dougherty, "The Long Arm of the Law," *The New York Times Magazine*, June 4, 2023.
36. *See* Johnson, *supra* note 14, at 103, (agreeing with comments on the long-term impact of Emmet and Oakley's argument in G. Edward White, *The Marshall Court & Cultural Change* 1815-1835 (1991), 211, 575).
37. *Id.*



Portrait of Cornelius Vanderbilt, who commissioned the *Lexington*, c. 1844-1860.
Library of Congress, Prints & Photographs Division, LC-USZ62-10988.

THE STEAMBOAT LEXINGTON

and the Shipowners' Limitation of Liability Act of 1851

by Brian E. O'Connor

Brian E. O'Connor was born in Brooklyn, NY, in 1952. He received a B.A. in Government and Politics from St. John's University, graduating *magna cum laude* in 1974. He received a J.D. from St. John's University School of Law in 1977, where he was a member of the Law Review and its Publications Editor. Upon graduating, Brian served as Law Clerk to the Hon. Matthew J. Jasen, Senior Associate Judge of the New York Court of Appeals. In 1979, Brian joined Willkie Farr & Gallagher, LLP as an associate in its Litigation Department, where he specialized in complex commercial litigation. Brian became a member of the firm in 1987, and its General Counsel in 2017.

With the U.S. Supreme Court's landmark decision in *Gibbons v. Ogden* (1824), striking down the exclusive license granted by New York State to Chancellor Robert Livingston to operate boats powered by steam in New York waters, the door to marine competition on Long Island Sound was wide open. To take advantage of this opportunity, Cornelius Vanderbilt commissioned the construction of the steamboat *Lexington* in 1835. Built by Bishop & Simonson, one of New York's premier shipbuilders, the *Lexington* was acclaimed as the fastest steamboat of her day. She measured 205 feet in length, had a 22 -foot beam and weighed 488 tons.

Vanderbilt built the *Lexington* with the cotton trade in mind. In the 1830s, New York City and Boston were not connected by rail. Beginning in 1835, rail service was extended from Boston to Providence, Rhode Island, and, thereafter, to Stonington, Connecticut. Steamboats operated daily between New York City and Providence and Stonington, with connecting service to Boston by rail. The *Lexington* made her maiden voyage on June 5, 1835, making the 210-mile trip from New York City to Providence in twelve hours and twenty-eight minutes.

Competition on the Sound was intense, however, and after several years of cut-throat pricing, Vanderbilt sold the *Lexington* to one of his competitors, the New York Transportation Company (the "Transportation Company"), in January 1839. In August that year, the Transportation Company merged into the New Jersey Steam Navigation Company (the "Company"). The Company overhauled the *Lexington* in the fall of 1839 and placed her back in service for the new year.

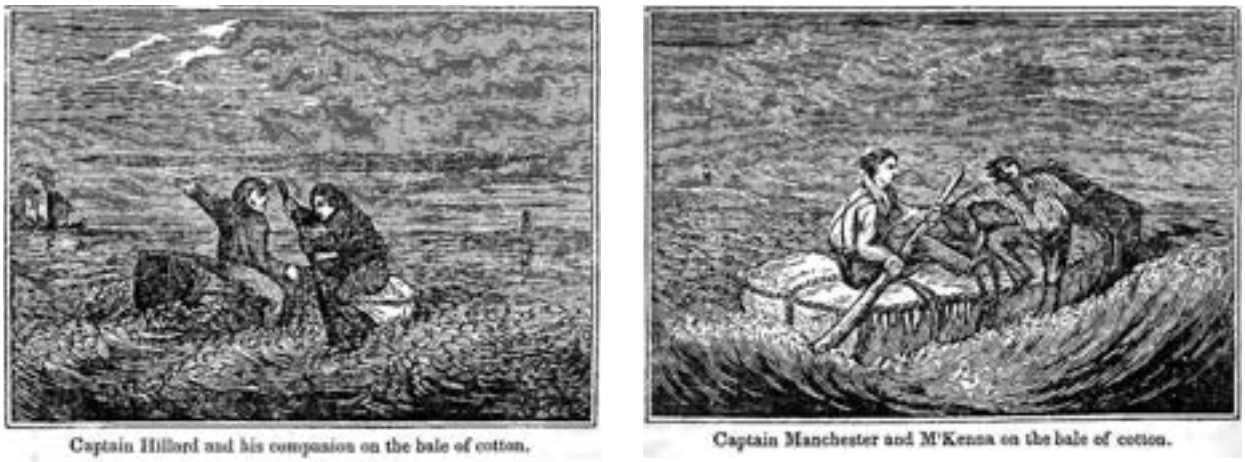
As dawn broke in lower Manhattan on Monday, January 13, 1840, it was a bitterly cold day by New York standards, with the temperature near zero and plummeting rapidly. The winds whipped through the Narrows and across an icy New York Harbor sending frigid air into lower Manhattan. At her wharf on the East River lay the *Lexington*, scheduled to leave for Stonington, Connecticut, at three o'clock that afternoon. An estimated 113 passengers waited patiently in the biting cold to board the *Lexington*. Her crew of thirty-four was busy throughout the day making the ship ready for departure. Coal and wood had been taken on board in copious quantities to fuel the *Lexington's* voracious furnace. Her cargo that day included 150 bales of cotton and a crate owned by the Merchants' Bank of Boston (the "Bank") containing $18,000 in specie and another $20,000 in bills and notes.[1]

Engraving of a group on Pier No. 1 as a steamboat comes to dock on the North River, c. 1849.
The New York Public Library, The Miriam and Ira D. Wallach Division of Art, Prints, and Photographs: Print Collection.

The Bank had entrusted its cargo to William F. Harnden, who had signed a contract with the Company in August 1839, pursuant to which he agreed to pay the Company $250 per month in exchange for the Company's transportation of "one wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown)"[2] daily on its steamboats operating between New York and Providence and Stonington. Harnden's contract with the Company further provided that the crate and its contents were at all times exclusively at Harnden's risk, and that "the New Jersey Steam Navigation Company will not in any event be responsible either to him or his employers for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate or otherwise in any manner in the boats of the said company."[3]

In addition, the contract required Harnden to disclose in any of his advertisements, and in his receipts or bills of lading, a notice providing: "Take notice—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can be attached to, the proprietors of the steamboats in which his crate may be and is transported in respect to it or its contents at any time."[4] Harnden's newspaper advertising included the disclaimer required by his contract with the Company.[5]

At approximately four o'clock in the afternoon on January 13th, the *Lexington* pulled away from her wharf and headed through the ice-encrusted waters of the East River bound for Long Island Sound. The temperature was well below zero and falling precipitously. By seven o'clock, the *Lexington* was approximately four miles northwest of Eaton's Neck on Long Island's north shore. Supper had just concluded when a cry of fire rang throughout the ship. The casing surrounding the boat's steam chimney and the deck adjoining it were on fire. Despite the crew's efforts to extinguish it, the fire spread relentlessly. As the baled cotton stowed on deck ignited, it fueled the raging fire, shooting bright yellow and orange flames towering above the steamboat and illuminating the dark night sky for miles. Ablaze and with her tiller ropes burned through and her engine dying, the *Lexington* drifted aimlessly with the prevailing wind and current further into the Sound away from Eaton's Neck.



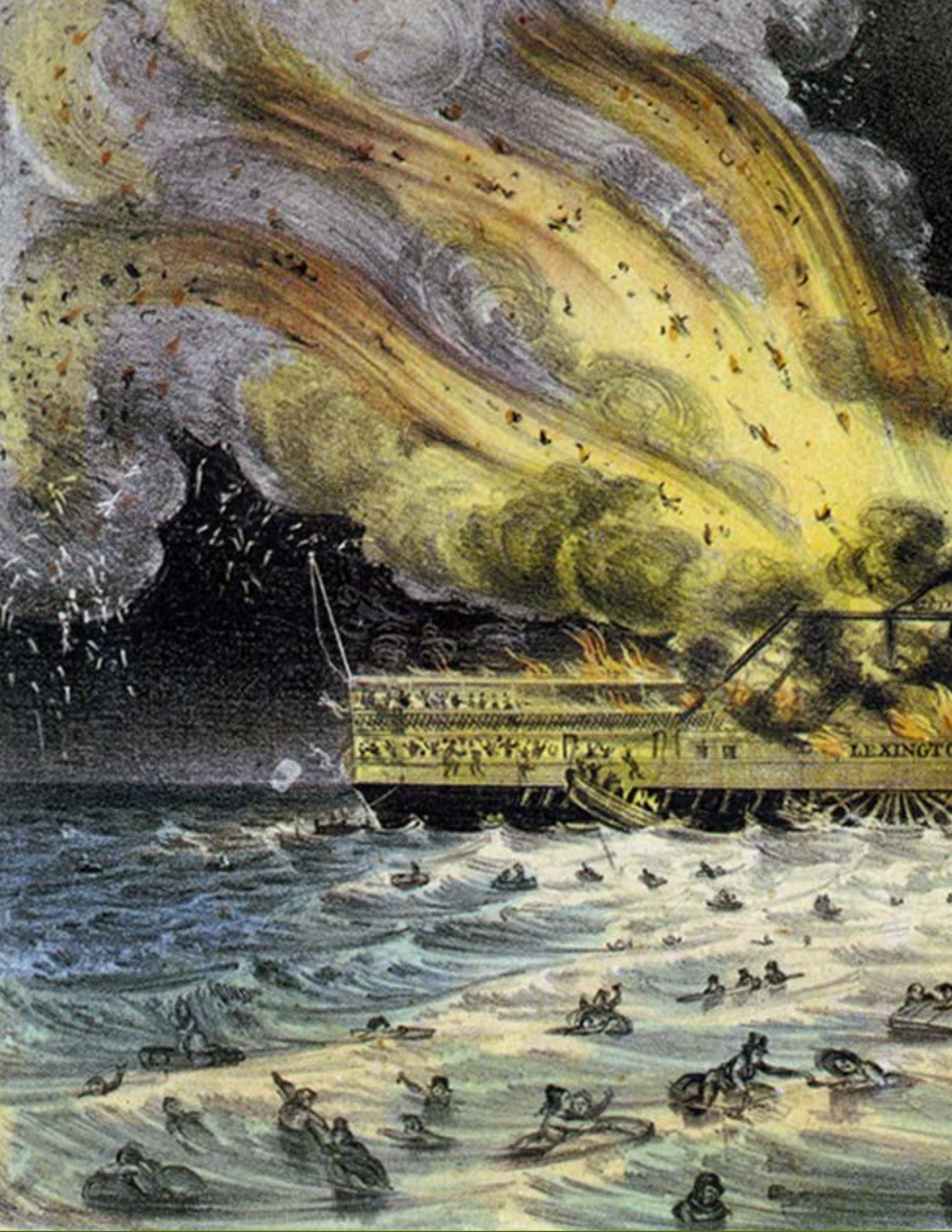
Engravings of the aftermath of the *Lexington* disaster, in which survivors attempted to navigate the waters on bales of cotton. Originally published in *Steamboat Disasters and Railroad Accidents in the United States* (Worcester, Published by Warren Lazell, 1846).

As time passed and the conflagration became utterly intolerable, only one stark option remained for those on board: one-by-one, men, women, and children plunged into the Sound frantically trying to climb atop a bale of cotton or other flotsam in the vain hope that a rescue ship might appear in time to save them. None did, however, and at three o'clock in the morning the *Lexington's* charred hulk slipped beneath the waves. For all but a precious few, the grisly ordeal was over. Of the estimated 143 passengers and crew on board, only one passenger and three crew members survived.

In February 1842, the Bank filed an action in admiralty against the Company in the United States District Court for the District of Rhode Island to recover for its lost cargo.[6] After the Circuit Court for the District of Rhode Island granted judgment for the Bank in the amount of $22,224, plus the costs of the action,[7] the Company sought review in the U.S. Supreme Court. In the case, *New Jersey Steam Navigation Co. v. Merchants' Bank* (1848), the Court ruled six to two to affirm the Circuit Court's judgment in favor of the Bank.[8] Justice Nelson wrote the majority opinion, in which Chief Justice Taney and Justices McLean and Wayne concurred. The Court addressed two principal issues: first, whether the freight contract giving rise to the action was a cognizable subject of the Court's admiralty jurisdiction, and second, if so, whether the contract between the Company and Harnden exempted the Company from any liability to the Bank for the loss of its cargo.

After concluding that it had jurisdiction to hear the appeal under its admiralty jurisdiction, the Court turned to the rights of the parties under the contract, characterizing the Company as a common carrier. Under the common law, absent a special agreement to the contrary, a common carrier was liable as an insurer for any damage or loss of goods transported, unless it arose from an act of God or the public enemy. The Court then posed the question whether the contract between Harnden and the Company modified the Company's common law liability as a common carrier. In answering that question, the Court noted that a carrier has the right to limit its liability for the shipment of goods by contract and that the burden is on the carrier to prove that an express agreement, either oral or written, discharged it from its common law duties.[9]

Although finding that the exculpatory language in the contract between the Company and Harnden was very broad and might be construed to comprehend every risk incident to the shipment of goods, the Court reasoned it would be going too far to conclude that the parties had intended to exculpate the carrier from "willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands."[10] The Court went on to reason that, although a common carrier could limit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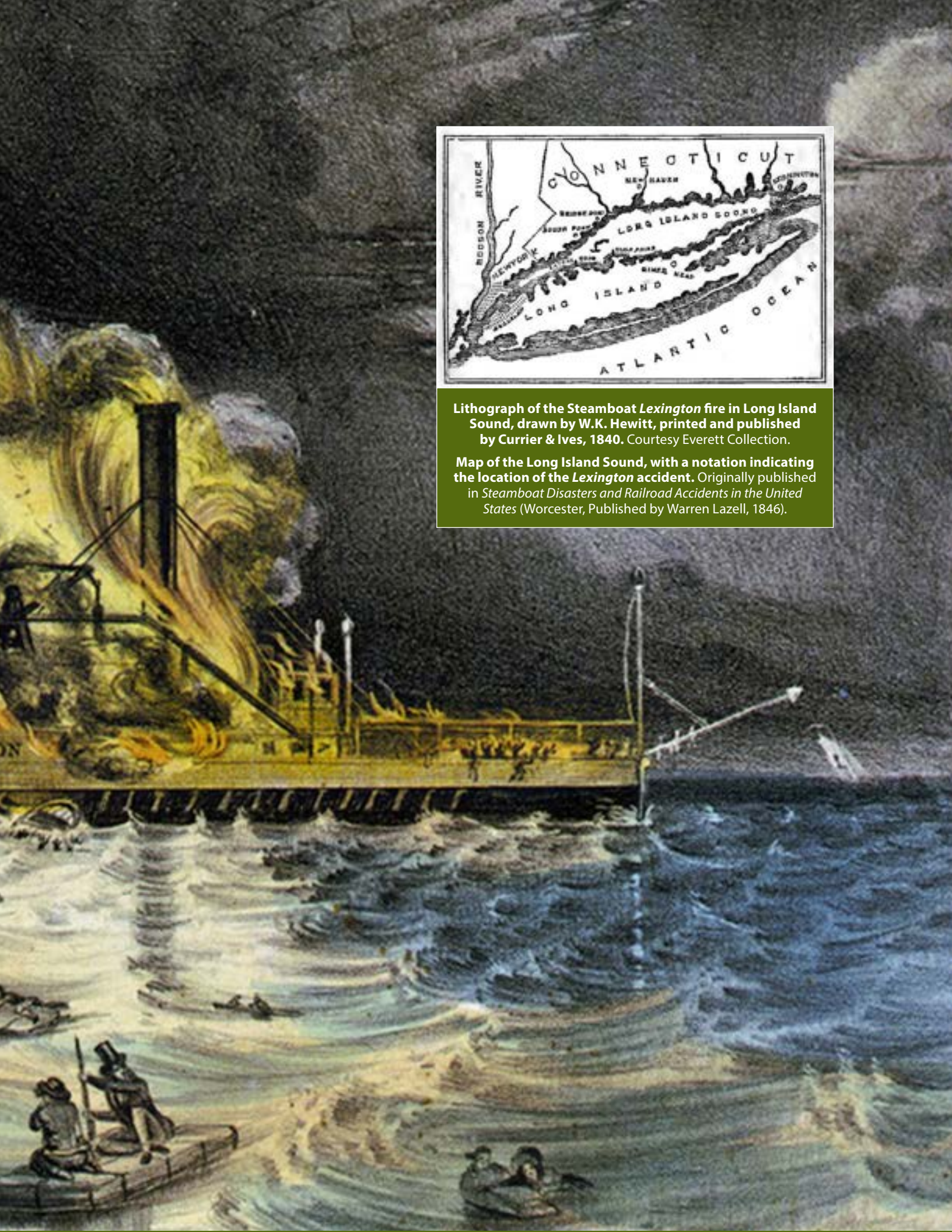

Lithograph of the Steamboat *Lexington* fire in Long Island Sound, drawn by W.K. Hewitt, printed and published by Currier & Ives, 1840. Courtesy Everett Collection.

Map of the Long Island Sound, with a notation indicating the location of the *Lexington* accident. Originally published in *Steamboat Disasters and Railroad Accidents in the United States* (Worcester, Published by Warren Lazell, 1846).

liability for losses arising from events and accidents for which it was a kind of insurer, it was deemed to have incurred the same degree of responsibility for carrying goods that attached to a private person casually in the same occupation: it was bound to use ordinary care in the custody and delivery of the goods and to provide proper vehicles for their transportation.

Applying these principles to the case before it, the Court found that the Company had limited its common law liability in its contract with Harnden and, therefore, the burden of proof rested with the Bank to demonstrate that the loss of its cargo was occasioned by gross negligence or a want of due care. Reviewing the factual record, the Court concluded that the Bank had satisfied its burden. The Court stated: "We think there was a great want of care, and which amounted to gross negligence, on the part of the [Company] in the stowage of the cotton, especially regarding its exposure to fire from the condition of the covering of the boiler deck, and the casing of the steam chimney."[11] The Court also found that the *Lexington's* fire engine had been stowed improperly, making it inaccessible and useless to extinguish the fire, that only two or three water buckets could be located, and that, as a consequence, the crate in which the Bank's specie had been placed was emptied and used to carry water. Based on those findings, the Court reasoned that the Company had failed to comply with the Steamboat Act of 1838, which required that a working fire engine be maintained on board steamboats,[12] as well as with "the most prudential considerations."

Overall, the Court concluded: "It is difficult, on studying the facts, to resist the conclusion that if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested."[13] Notwithstanding the special contract pursuant to which the specie was shipped, the Court held the Company liable to the Bank for its loss.

Alarmed by the prospect of the massive liabilities shipowners might incur based on the U.S. Supreme Court's decision, the shipbuilding industry quickly turned to Congress for relief. The common law rule holding a common carrier strictly liable for the loss or damage to cargo, but for an act of God or the public enemy, had its roots in Roman law. The rule originated during times when transportation over land and water was extremely hazardous, with substantial risk of theft on land and piracy at sea.

A rule of law holding an owner liable in an indefinite amount for the acts of his ship's master posed a huge deterrent to investment, however. To mitigate that deterrent, some European maritime powers opted to limit shipowners' liability. Holland, for example, never adopted Roman law, choosing instead to limit a shipowner's liability to the value of the ship and its freight—that is, the amount paid to the owner by shippers and passengers for transport.[14] France similarly limited a shipowner's liability, holding the owner responsible for the acts of the ship's master, but discharging the owner on his abandonment of the ship and its freight.[15]

In England, the issue came to a head in the eighteenth century. In 1734, an English court held shipowners personally liable for a cargo of gold and silver embezzled by the ship's master.[16] Alarmed by the court's holding, London merchants petitioned Parliament to modify the common-law rule, arguing that it subjected owners to ruinous liability and discouraged investment. They urged Parliament to put shipowners in England on the same footing as owners on the continent. In 1734, Parliament acted, passing legislation "to settle how far owners of ships shall be answerable for the acts of the masters or mariners; and for giving further relief to the owners of ships." The act provided that shipowners shall not be liable for embezzlement, or any other act of the master or mariners done without privity or knowledge of the owner, beyond the value of the owner's interest in the ship and her appurtenances and the freight due for the voyage.[17]

Independent of Parliament's legislative limitation of shipowners' common-law liability by statute, English courts also mitigated the common-law's rule of strict liability by permitting common carriers to limit their liability for lost or damaged goods by contract. If common carriers were to be deemed insurers, the English courts reasoned, they ought to be permitted to modify their contract of insurance by placing limitations in the terms of shipment, such as in the bill of lading or in a receipt for acceptance of a merchant's goods for shipment. To obtain the benefit of its bargain, the carrier was generally required to

show that it had informed the shipper of the limitation of liability and the terms of carriage.

Courts in the United States were more reluctant than courts in England, however, to permit common carriers to modify their common law liability by contract. At the time of the *Lexington's* sinking, state courts continued to hold common carriers to the strict liability of an insurer, refusing to recognize a carrier's right to limit its liability by contract. That reluctance was demonstrated in the very case of the *Lexington's* sinking.

In *Hale v. The New Jersey Steam Navigation Company*, 15 Conn. 539 (1843), the plaintiff sued the Company in Connecticut state court to recover the value of two carriages lost on the *Lexington*.[18] The plaintiff argued that they were not destroyed by an act of God or by the public enemy and that, therefore, the Company was liable for their loss as a common carrier. The Company responded by asserting, among other defenses, that it had given public notice by advertisement and in its bills of lading that it would not be liable for losses except those caused by a want of care or negligence on the part of its servants and that it had limited its liability for losses from fire to those occasioned by negligence. To that argument, the plaintiff countered that he had not been given a bill of lading for his carriages. The jury rendered a verdict for the plaintiff, which was affirmed on appeal by the Connecticut Supreme Court of Errors, which reasoned: "If the carrier is subjected for the loss of goods burnt on land, where he was in no fault, we see no reason for exempting the carrier at sea, under similar circumstances."[19]

After *Hale*, any remaining hope the shipbuilding industry had to limit its liability in the courts was dashed in 1848 when the U.S. Supreme Court issued its opinion in the *Lexington* holding the Company liable to the Bank for its lost specie. Then, a year later, the industry was jolted again by another judicial decision. In September 1849, the packet ship *Henry Clay* was lying at a wharf in New York, completing her lading for a trip to Europe, when she caught fire and burned. Owners of cargo having a value of as much as $500,000 brought an action against the *Henry Clay's* owners to recover the value of the destroyed cargo. Despite the plaintiffs' inability to prove that the fire had been caused by actual fault or the negligence of

THE NEW JERSEY STEAM NAVIGATION COMPANY, RESPONDENTS AND APPELLANTS, v. THE MERCHANTS' BANK OF BOSTON, LIBELLANTS.

A decree of the Circuit Court of Rhode Island affirmed, which was a judgment upon a libel in personam against a steamboat company for the loss of specie carried in their boat by one of the persons called "express carriers," and lost by fire in Long Island Sound.

THIS was an appeal from the Circuit Court of the United States for the District of Rhode Island, in the exercise of admiralty jurisdiction.

In February, 1839, the State of New Jersey chartered a company by the name of the New Jersey Steam Navigation Company, with a capital of five hundred thousand dollars, for the purpose of purchasing, building, repairing, and altering any vessel or vessels propelled by steam, and in the navigation of the same, &c., &c., under which charter they became proprietors of the steamboat Lexington.

On the 1st of August, 1839, the following agreement was made —

"This agreement, made and entered into this 1st day of August, A. D. 1839, in the city of New York, by William F Harnden, of Boston, Massachusetts, on the one part, and Ch. Overing Handy, President of the New Jersey Steam Navigation Company, of the other part, witnesseth

"That the said William F Harnden, for and in consideration of the sum of two hundred and fifty dollars per month, to be paid monthly to the said New Jersey Steam Navigation Company, is to have the privilege of transporting in the steamers of said company, between New York and Providence, via Newport and Stonington, not to exceed once on each day, from New York and from Providence, and as less frequently as the boats may run between and from said places, one wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown), until the 31st of December, A. D. 1839, and from this date.

***New Jersey Steam Navigation Company v. Merchants' Bank*, 47 U.S. (6 How.) 344, 1848.**
Originally published in U.S. Reports, Vol. 47 (1848).

the owners or their employees, the owners were held liable for the cargo owners' losses.[20]

Reeling in panic, shipowners turned to Congress for relief. On January 28, 1851, Senator Hannibal Hamlin of Maine, chair of the Senate Commerce Committee, introduced S. 251: "A Bill to limit the liability of ship owners and other purposes." Senators Hamlin and John Davis of Massachusetts, each representing states in which the shipbuilding industry was vital to his state's economy, argued that the need for the bill had arisen only recently from the *Lexington* and the *Henry Clay* judicial decisions.[21]

S. 251 proposed to change the law by putting the liability of U.S. shipowners on the same footing as the liability of foreign carriers in their own countries. It was largely predicated on the English statutes enacted by Parliament that limited shipowners' liability for fire and other acts of a ship's master and mariners committed without the owner's privity. Senator Davis

characterized the bill as adopting English law with certain modifications tailored to the affairs of the United States. He urged his colleagues to pass the bill, characterizing it as "simply placing our mercantile marine upon the same footing as that of Great Britain. We are carriers side by side with that nation, in competition with them, and we cannot afford very well to give them any great advantage over us without affecting our interest very seriously."[22]

Not everyone was convinced; senators from other areas of the country asked how the bill benefitted their constituents. Senator Joseph R. Underwood of Kentucky acknowledged the bill's benefit for the country's mercantile interests but wanted to know what effect it would have on the "great agricultural interest of the country."[23] He asked, could it be shown that shipping rates would come down as a result? Senator Andrew Butler of South Carolina also voiced concern about the wisdom of modifying the common law rule, which he praised as a wise one. As for modeling the bill after English law, he described England as an island of shipowners, noting that "of all countries on earth, I suppose Great Britain has more interest in relieving itself from liabilities upon the ocean than any other; and I suppose that portion of the United States represented by [Senator Hamlin] may be in the same situation."[24]

Senators also questioned Congress's authority under the Constitution to enact legislation limiting shipowners' liability. Senator Underwood framed the issue: "Is this a commercial regulation that we are making now? Is it a commercial regulation to regulate commerce between ourselves and foreign nations? Or is it a commercial regulation to regulate the commerce between the different States of this Union? I very much doubt whether it is either."[25] Instead, Senator Underwood contended, the legislation would prevent people from making their contracts as they think proper and would interfere with the rights of the States to regulate contracts and determine what shall be illegal, immoral, and improper in their jurisdictions. In short, for Senator Underwood, the authority to legislate shipowners' liability did not belong to Congress under the Commerce Clause, but rather had been reserved to the States under their Tenth Amendment police powers.

Despite these sectional and constitutional concerns, the bill was ultimately passed by the Senate and the House and signed by President Zachary Taylor on March 3, 1851. It was entitled "[a]n Act to limit the Liability of Ship-Owners, and for other Purposes. (b)."[26] The "(b)" in the title refers to a footnote that reads: "(b) See the case of New Jersey Steam Navigation Co. v. Merchants Bank, 6 Howard, R. 344," leaving no doubt that the U.S. Supreme Court's decision in the *Lexington* case was the driving force behind the legislation.

The Shipowners' Limitation of Liability Act modified the common-law liability of shipowners in three principal respects. First, it relieved shipowners of liability for any loss or damage to goods occasioned by fire, unless the fire was caused by the design or neglect of the owner. Second, it relieved shipowners of liability for loss or damage to "platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones" unless the shipper provided the owner, master, or his agent with a note in writing at the time of lading disclosing the "true character and value" of the goods and that value was entered on the bill of lading. Third, it limited the liability of shipowners for any embezzlement, loss, or destruction of "property, goods or merchandize" by the "master, officers, mariners, passengers, or any other person," including loss or damage by "collision, or for any act, matter, or thing," that occurred without the "privity or knowledge" of the owner, to a maximum of the value of the ship and the freight paid.[27]

Of import, the statute limited shipowners' liability only for loss or damage to goods shipped. It had no applicability to their liability for injury to passengers. Given the statute's purpose—to modify the common law strict liability of common carriers as insurers of goods shipped—the absence of a comparable limitation of liability for passenger injury made sense, as passengers were required to demonstrate negligence to recover from shipowners for their injuries. Moreover, at common law, the right to sue to recover damages for a tort, such as negligence, died with the victim—*actio personalis moritur cum persona*. No action for wrongful death existed at the time.

That peculiarity of the common law began to change in 1840, when on March 12, fewer than

two months after the sinking of the *Lexington*, Massachusetts passed a resolution providing that, whenever a life shall be lost by neglect and misconduct of steamboat proprietors, or by persons in their employ, the proprietors shall forfeit for every life lost "a suitable sum, to be recovered by indictment, for the benefit of the widow and heirs."[28] It was not until 1847, however, that New York became the first state to enact a wrongful death statute, giving the personal representative of a decedent's estate the right to recover damages for wrongful death. Thus, at the time of the *Lexington's* sinking, no civil remedy existed for the loss of the lives of those who perished.

Ironically, despite the tragic loss of life on the *Lexington*, Congress first acted to limit shipowners' liability arising from the loss of a ship. It was not until one year later that Congress enacted the Steamboat Act of 1852, overhauling the safety requirements contained in the Steamboat Act of 1838.

ENDNOTES

* Reprinted, by permission, from *Death by Fire and Ice: The Steamboat Lexington Calamity,* by Brian E. O'Connor (Annapolis, MD: Naval Institute Press, © 2022).

1. *A Full and Particular Account,* "List of Passengers &c of the Lexington (As near as could be ascertained)," 4. Accounts of the number of passengers and crew on board vary, with some newspaper articles claiming as many as two hundred. Accounts of the amount of specie vary as well, with some claiming that the *Lexington* carried as much as sixty thousand dollars in specie that day.
2. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344 (1848).
3. *New Jersey Steam Navigation*, at 345.
4. *New Jersey Steam Navigation*, at 345.
5. The Company also published a notice to all shippers and consignees providing that shipment of property on the Company's steamboats was at the risk of the property's owner. Its receipts or bills of lading further provided that no package received for transport on the Company's steamboats, if lost, injured, or stolen, would be deemed of greater value than $200 and that the Company shall be held responsible for ordinary care and diligence only in the transportation of merchandise and other property shipped or put on board its boats.
6. The Bank's claim for damages was based on $14,000 in gold coin and $11,000 in silver coin having been allegedly lost. *New Jersey Steam Navigation,* at 350. The *Full and Particular Account of the Lexington's* loss had put the loss at $38,000—comprised of $18,000 in specie and $20,000 in bank notes. The record does not explain the discrepancy or why the Bank apparently did not seek to recover any damages for the loss of the bank notes.
7. *New Jersey Steam Navigation*, at 353-54.
8. Justice McKinley did not participate in the case.
9. *New Jersey Steam Navigation*, at 385-92. Because the contract between the Company and Harnden was to be performed substantially on the high seas, the U.S. Supreme Court held it fell within the federal courts' admiralty jurisdiction.
10. *New Jersey Steam Navigation*, at 383.
11. *New Jersey Steam Navigation*, at 385.
12. Act of July 7, 1838, 5 Stat. 304 (1838).
13. *New Jersey Steam Navigation*, at 385.
14. Grotius, book 2, ch. 11, sec. 13, entitled: *"How far the Master of a Ship, and Factors, are obliged by the Law of Nature; where also is observed the Error of the Roman Law."*
15. Ordonnance de la Marine, codified 1681.
16. *Boucher v. Lawson*, (1734) 95 Eng. Rep. 53 (K.B.).
17. 7 Geo. II c. 15 (1734). Parliament further expanded the limitation of liability in 1786 (26 Geo. III c. 86 (1786) and in 1813 (56 Geo. III c. 159 (1813).
18. *Hale v. New Jersey Steam Navigation Company,* 15 Conn. 539 (1843).
19. *Hale,* at 539, par. 28. In New York, it was held as late as 1842 that common carriers could not limit their liability or evade the consequences of a breach of their duty either by an express agreement or the special acceptance of goods for shipment. *Gould v. Hill,* 2 Hill. and Den. 623 (1842). Gould was later overruled, as the New York Court of Appeals noted, in *Dorr v. The New Jersey Steam Navigation Company,* 11 N.Y. 485 (1854), after the U.S. Supreme Court's decision in *New Jersey Steam Navigation Company v. Merchants' Bank*, 47 U.S. (6 How.) 344 (1848).
20. Although the *Henry Clay* decision is not officially reported, the facts and holding are summarized in *Wright v. Norwich & N.Y. Transp. Co.,* 30 F. Cas. 685, 687 (C.C.D. Conn. 1870), aff'd, 80 U.S. 104 (1872).
21. Cong. Globe, 31st Cong., 2d Sess. 714 (1851).
22. Cong. Globe, 31st Cong., 2d Sess. 714 (1851).
23. Cong. Globe, 31st Cong., 2d Sess. 716 (1851).
24. Cong. Globe, 31st Cong., 2d Sess. 715–16 (1851).
25. Cong. Globe, 31st Cong., 2d Sess. 719 (1851).
26. Act of March 3, 1851, 9 Stat. 635 (1851). It was passed by the Senate on February 27, 1851, Cong. Globe, 31st Cong., 2d Sess. 738 (1851), by the House on March 3, 1851, Cong. Globe, 31st Cong., 2d Sess. 777 (1851), and signed into law that day by President Taylor.
27. Act of March 3, 1851, 9 Stat. 635, ch. 43, secs. 1, 2, 3 (1851).
28. *Resolves Concerning Steamboats*, Acts and Resolves Passed by the Legislature of Massachusetts for the Years 1839, 1840, 1841, 1842. Boston: Dutton and Wentworth, 1842, 251.

Portrait of Hon. William Werner, c. 1920.
From the collection of the New York State Court of Appeals.

NEW YORK'S WORKERS' COMPENSATION LAW AND THE COURTS

1910–1917

by Bruce W. Dearstyne

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New York today has one of the nation's strongest state workers' compensation programs dating from the early 20th century.[1] But the new compensation law had a rocky, uncertain odyssey through the courts during its first decade, 1910-1920. It was during the height of what was referred to as the "Progressive Era" that state governments first enacted substantial laws to protect workers, but these pioneering laws frequently faced challenges to their constitutionality. It often was the courts, particularly the New York Court of Appeals as the preeminent state court in the nation, that were called upon to evaluate these challenges and settle issues of public policy.

1910: The First Workmen's Compensation Law

By the early 20th century, much of New York's economy had shifted from agriculture and small shops and workshops to larger scale companies such as railroads, steel, product manufacturing, building, and tunnel, subway and bridge construction. The work could be dangerous. Modern industry relied on high-speed, fast-paced machinery that could injure or kill in an instant. New York had some factory safety standards, but they were widely ignored and lightly enforced. Exposed gears, drive shafts and belts in factories, shaky scaffolds on construction sites, railroad derailments, collisions, brake failures, and boiler explosions all took their toll on workers. Hundreds of workers were injured or killed each year, but neither they nor their families usually received significant compensation.

Few workers carried accident insurance; it was prohibitively expensive. Some workmen belonged to voluntary "mutual benefit societies" into which they and their employers paid and from which small payments were made to workers involved in accidents. Most employers were "self-insured" or carried limited liability insurance. Injured workers who were dissatisfied with the reimbursement offered by employers or insurance companies, which was often limited, could sue for negligence, but that meant the expense of hiring a lawyer and the delay and uncertainty of a jury trial.[2] Moreover, the courts, in a long series of decisions over the years which constituted the "common law" (sometimes called "judge-made law") had set a high bar for litigants. An injured worker had to prove that the employer had not exercised "due care," that the worker was not at fault ("contributory negligence"), or that the accident was not caused by the

Firefighters work at extinguishing the flames of the burning Asch Building where the Triangle Shirtwaist Factory fire occurred, 1911. Photo courtesy of *Remembering the 1911 Triangle Factory Fire* at Cornell University's School of Industrial and Labor Relations, Kheel Center.

A crowd gathers at the scene of the Triangle Shirtwaist Factory fire in New York City, 1911.
Library of Congress, Prints & Photographs Division, LC-USZ62-91068.

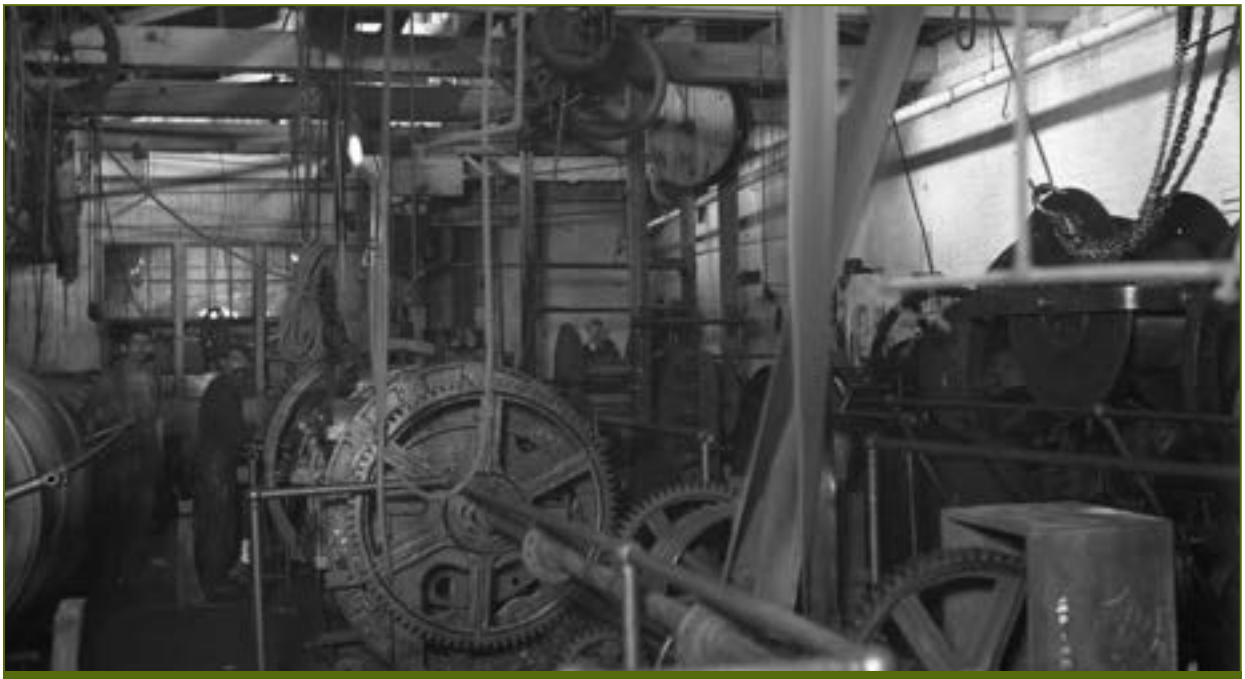
negligence of another employee (the "fellow servant" rule).[3] Litigation often resulted in a small settlement or none at all. On the other hand, employers disliked the system because sometimes juries awarded accident victims exorbitant amounts. It was a haphazard system that no one liked.

New York's political leaders in the new century realized there had to be a better way, but precedents and models were scarce. No state had a compensation law.[4] The federal government had limited compensation laws for federal employees and interstate railroad workers. In 1909, Progressive Republican governor Charles Evans Hughes persuaded the legislature to create a commission to study the issue. It was chaired by Senator J. Mayhew Wainwright, a Progressive Hughes ally. The Wainwright Commission's 1910 report recommended a new program, based in part on one that had been working effectively in Britain for a number of years.[5]

The legislature quickly enacted a law using the Wainwright Commission report's blueprint. Responsibility for accidents was shifted from the employee to the employer and "contributory negligence" and the "fellow servant" rules were curtailed. The law required employers to pay workers for on-the-job injuries (with specific amounts depending on the type of injury) or death. Workers who accepted these payments could not also sue in court. The law would apply only to defined "hazardous" callings that entailed "extraordinary risks to life and limb," including railroad construction and operation, erection and demolition of bridges, work on elevators and scaffolds, and work on "wires, cables, switch-boards, or apparatus charged with electric current." Other companies could voluntarily opt into the system.[6]

1911: The Court of Appeals Says No

Was this constitutional? A test case, *Ives v. South Buffalo Railway Company*, emerged soon after the law went into effect on September 1, 1910. Nine days later, on September 10, Earl Ives, a South Buffalo Railway Company switchman, fell, sprained an ankle, and was "otherwise bruised and injured" in an accident. The railroad refused to pay Ives' claim under the new



Wire rope machinery without protective guards fills a room at the Waterbury Wire Cable Manufacturing Co. in Brooklyn, NY c. 1912. New York State Archives. Factory Investigating Commission. Glass plate negatives and photographic prints of factory and housing conditions. 1911-1912. A3029-78, Box 5, Folder 7.

law, contending it was unconstitutional. It was not authorized by the New York State Constitution and violated the 14th Amendment of the U.S. Constitution prohibiting a state from taking "life, liberty or property without due process of law."

Ives sued to enforce his claim under the new law and succeeded in the state supreme and appellate courts. The company then appealed to the New York Court of Appeals in what had become a high-visibility test case. Ives' attorney cited the Wainwright Commission's report and several recent court decisions in favor of regulatory legislation. Neither the New York Attorney General nor the New York Labor Department, which administered the compensation law, submitted a brief in the case. In those days, state agencies often did not weigh in on cases challenging the constitutionality of state laws, but the Wainwright Commission was still in operation (studying unemployment and other issues), and it submitted a brief as an "intervenor." The law has "a legitimate and proper end, beneficial to the state," said the brief. "[A] n employer must provide for his men a reasonably safe place to work and safe tools for the work."

The New York Court of Appeals issued its ruling on March 24, 1911.[7] The long, rambling decision, written by Associate Judge William Werner, the Court's champion of limiting government authority, was unanimous. Chief Judge Edgar Cullen added a concurring opinion. The Court's decision acknowledged the need for a compensation program. It admitted the legislature's right to change common law precedents and to enact protective legislation. It praised the research behind the Wainwright Commission's report and noted the broad public sentiment for a new system.

The Court also insisted that the law foundered when measured against constitutional protections and was unconstitutional. "The statute, judged by our common-law standards, is plainly revolutionary," said Judge Werner. He wrote it reverses the common law assumptions and provides that "the employer is responsible to the employee for every accident in the course of the employment," even where the employer is not at fault. Werner summarized "three fatal objections:"

A worker stands beside machinery for carding cotton to manufacture men's underwear at a Union Mills plant in Hudson, NY, 1912. Cotton floss covers the floor and machinery; an investigation found that exhaust fans would remove the floss and reduce the risk of fire.
New York State Archives. Factory Investigating Commission. Glass plate negatives and photographic prints of factory and housing conditions. 1911-1912. A3029-78, Box 4, Folder 11.

1. The law violates the State and Federal Constitutions' guarantees against deprivation of life, liberty or property without due process of law.

That was a familiar accusation against regulatory legislation. Werner illustrated it by carefully-selected previous restrictive Court of Appeals' decisions. Shifting all responsibility to employers "is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions."

2. If approved, this law would be an entering wedge for even more drastic regulation. "If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words."

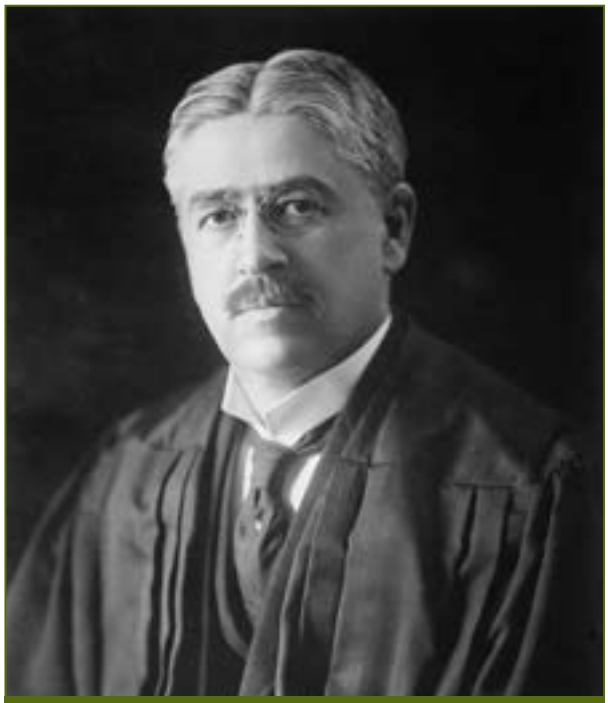
3. It exceeds the state's "police power." That term, referring to states' rights to enact restrictive laws for the public good, lacked a precise definition. For it to apply, Werner asserted, "courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare." Not the case here.

The decision concluded by noting "the absence of any sound legal theory upon which this legislation can be sustained….the statute is therefore void."

1913: A New Workmen's Compensation Law

The story was not over by any means. Proponents, determined to see the *Ives* decision as only a temporary setback, immediately began crafting a law that would pass constitutional muster. By coincidence, on March 25, 1911, the day after the Ives decision, a fire at the Triangle Shirtwaist Factory in New York

Photograph of Governor Martin Glynn, 1914. Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-H261- 3493.



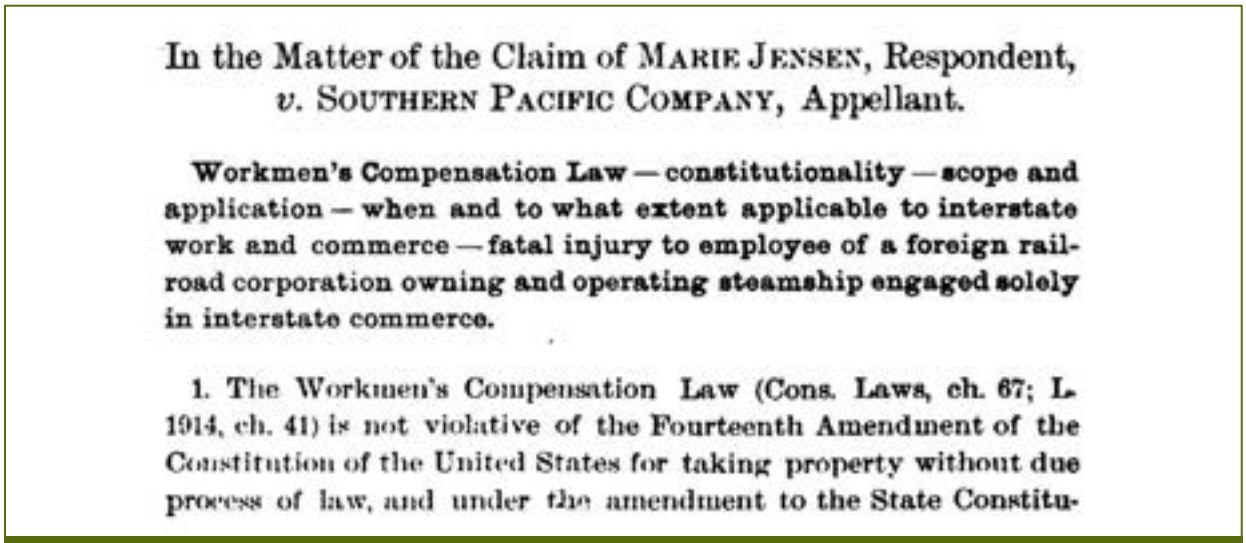
Portrait of Court of Appeals Associate Judge Nathan L. Miller, c. 1915. Miller later served as Governor of New York. Library of Congress, Prints & Photographs Division, LC-DIG-ggbain-31642.

City claimed 146 lives, many young women. With the compensation law invalidated, families of the deceased could not collect the death benefits the law had promised. The tragedy intensified loud public criticism of the Ives decision. The 1910 elections had given the Democrats, who were by then embracing progressive reform, the governorship and a majority in the legislature in New York. Right after the fire, the legislature established a Commission to investigate factory working conditions. Lawmakers enacted a battery of factory safety legislation in the 1911-1914 years based on the Commission's recommendations.

Yet, safety legislation was not enough. The New York Factory Investigating Commission also strongly recommended passing a new workers compensation law, a demand amplified by the media. The state labor department stepped up its reporting on workplace accidents. Labor unions, whose membership and influence were growing rapidly, became vocal in demanding action. New York's 1910 law had been the pioneer among the states, but, by 1913, 21 other states had adopted workmen's compensation laws, which were mostly being sustained by the courts. Now, New York had precedents and models to follow.

The Wainwright Commission, still at work, recommended amending the New York State Constitution to meet at least part of the New York Court of Appeals' objections. Although this would not affect the 14th Amendment argument, the Commission felt it would give the Court confidence to uphold a new law. The strategy was endorsed by the New York Factory Investigating Commission, the governor, legislature, labor unions, the New York State Bar Association and other key groups.

Amending the New York State Constitution required passage by the legislature during two sessions and then approval by the voters at the polls. On November 4, 1913, the voters of New York ratified the amendment that stated as follows: "Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws…for the protection of the lives, health, or safety of employees," said the amendment's sweeping language, [or] "for the payment, either by employers, or by employers and



In the Matter of the Claim of MARIE JENSEN, Respondent,
v. SOUTHERN PACIFIC COMPANY, Appellant.

Workmen's Compensation Law — constitutionality — scope and application — when and to what extent applicable to interstate work and commerce — fatal injury to employee of a foreign railroad corporation owning and operating steamship engaged solely in interstate commerce.

1. The Workmen's Compensation Law (Cons. Laws, ch. 67; L. 1914, ch. 41) is not violative of the Fourteenth Amendment of the Constitution of the United States for taking property without due process of law, and under the amendment to the State Constitu-

First page of the Court of Appeals' decision in *Matter of Jensen v. Southern Pacific Co.* (215 NY 514, 1915).
Originally published in *Reports of the Cases Decided in the Court of Appeals of the State of New York,* 1915.

employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof."[8]

The pro-reform Democrats had been in power since 1911, but their control was limited. They dropped their lackluster governor, John Dix, in 1912 (governors were elected biennially in those days), and nominated and succeeded in electing William Sulzer. Congressman Sulzer proved divisive and contentious, arguing with Tammany Hall, the powerful New York City Democratic organization, and vetoing a compromise compensation bill passed by the legislature in 1913. In October 1913, Sulzer was impeached and removed from office by the legislature for violating campaign finance law regulations.[9]

New York Lieutenant Governor Martin Glynn then assumed leadership of the campaign for workmen's compensation, just in time to urge a "yes" vote on the constitutional amendment and to develop a new version of the compensation law. In that same election, though, New York voters shifted the majority in the Assembly from the Democrats to the Republicans in the session that would convene in January 1914. This political shift was expected to make action on the compensation law much more difficult. Under pressure from Glynn, and strong public sentiment, the legislature passed the new law in December 1913. By then, public demand was so strong that all the Democrats and most Republicans voted for it. Glynn quickly signed it. The legislature also enacted other progressive legislation, including a direct primary law.[10]

The new compensation law was sweeping and comprehensive, establishing a program that is similar to the one in place today.

Broad application. The previous liability law applied to only eight categories of dangerous occupations. The new one applied practically everything except agriculture, domestic labor, and public employment.

Compensation required. All employers subject to the law were required to pay compensation for disability or death of their employees "resulting from an accidental personal injury, sustained by an employee and arising out of and in the course of his employment" without regard to fault of either the employer or employee. The only exceptions were accidents caused by either the willful intent of an employee or intoxication. The 1910 law had provided flat rates for injuries and death from accidents. The new one made weekly wages the basis for compensation and offered expansive definitions of such things as "temporary

partial disability," "permanent partial disability" and "total permanent disability." The law provided for "reasonable funeral expenses, not exceeding $100." If there is "a surviving wife (or dependent husband)," the survivor got 30% of the salary. If a widow remarried, she got two years' worth of benefits and then they stopped. There was also a schedule for payments for dependent children.

"Security for compensation." Employers could secure compensation for their employees in any of three ways: (1) furnishing proof to the Commission of ability to pay (the Commission could require deposit of securities to document that proof); (2) carrying adequate insurance through an authorized stock corporation or mutual association; or (3) paying into a new workmen's compensation fund established by the law and administered by the Commission, which would pay for on-the-job accidents or deaths. Workers who accepted payment from the fund could not also sue in court.

A powerful new commission. The new law would be administered by a five-person Commission, appointed by the governor and confirmed by the senate. The Commission administered the law, operated the State Compensation Fund, and reviewed and decided on all claims. The state attorney general was empowered to enforce Commission decisions and defend them in court.

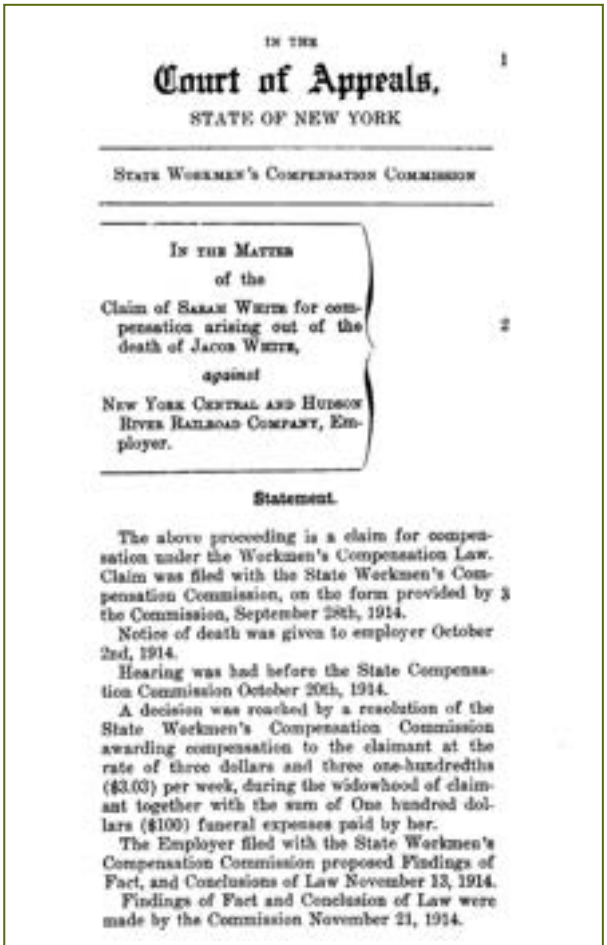
Governor Glynn made strong appointments to the new law's Commission, including Wainwright Commission and labor leader John Mitchell. Paying into the new State Compensation Fund soon became the preferred approach for most companies, in part because of the provision that injured employees who accepted payment from the fund could not also sue in court. The Commission immediately got to work and began processing claims for payment. It held public meetings and publicized its work, particularly awards. The Commission touted "substantial progress and notable accomplishment" in its first report to the legislature.[11] The news media reported on its efficiency and effectiveness. Glynn ran for governor in 1914, citing his progressive achievements, particularly touting the compensation law. During a campaign swing in September, he sat in on a Commission meeting and told reporters afterward that "the one thing that I am the proudest of is the Workmen's Compensation Act, which gives some measure of recompense to our workmen who are injured while earning their daily bread."[12]

Voters blamed Tammany Hall for the Sulzer debacle and also suspected Glynn's subservience to that powerful New York City Democratic organization. Glynn was defeated by Republican Charles Whitman, who campaigned on "competency, efficiency, and economy." In an "economy move" in 1915, Republicans consolidated the Workmen's Compensation Commission with the Labor Department under a new Industrial Commission. Yet, the compensation program remained robust and intact in its new administrative home, and, some years later, the independent Workmen's Compensation Commission was re-established.

1915: The Court of Appeals Says Yes

Was the new law constitutional? A test case, *Matter of Jensen v Southern Pacific Company*, soon appeared. Christen Jensen, a stevedore, died in an accident on August 5, 1914 while unloading freight on a gangway between a steamship owned by the Southern Pacific Company and a pier in New York City. His widow received a death benefit award from the new Workmen's Compensation Fund.

The Southern Pacific Company went to court, objecting to the award. It claimed that the law contravened the U.S. Constitution's 14th Amendment's proscription of taking property without due process of law and the similar clause in the New York State Constitution. Moreover, the U.S. Constitution and federal law assigned interstate commerce and admiralty issues to the federal government, and freight was actually part of interstate commerce (the company's main business was interstate railroads and its ships plied between New York and Galveston, Texas). Jensen's widow should have filed under the federal employers' liability law rather than the state law.



IN THE

Court of Appeals,

STATE OF NEW YORK

STATE WORKMEN'S COMPENSATION COMMISSION

IN THE MATTER
of the
Claim of SARAH WHITE for compensation arising out of the death of JACOB WHITE,
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer.

Statement.

The above proceeding is a claim for compensation under the Workmen's Compensation Law. Claim was filed with the State Workmen's Compensation Commission, on the form provided by the Commission, September 28th, 1914.

Notice of death was given to employer October 2nd, 1914.

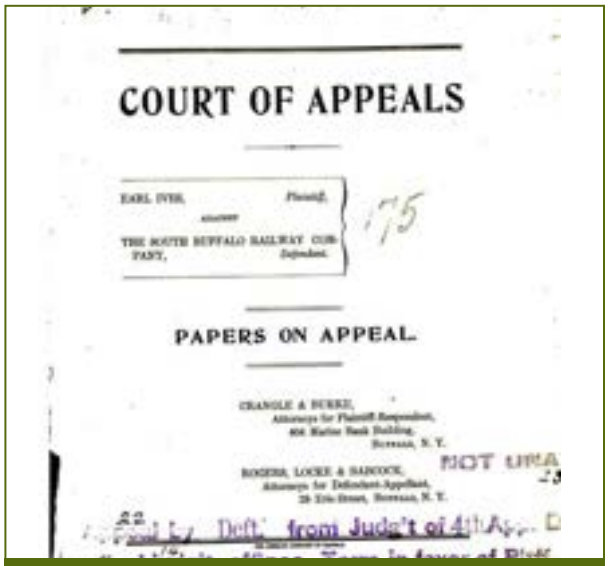
Hearing was had before the State Compensation Commission October 20th, 1914.

A decision was reached by a resolution of the State Workmen's Compensation Commission awarding compensation to the claimant at the rate of three dollars and three one-hundredths ($3.03) per week, during the widowhood of claimant together with the sum of One hundred dollars ($100) funeral expenses paid by her.

The Employer filed with the State Workmen's Compensation Commission proposed Findings of Fact, and Conclusions of Law November 13, 1914.

Findings of Fact and Conclusion of Law were made by the Commission November 21, 1914.

First page of the Court of Appeals' decision in *Matter of White v. NY Central & HR RR Co.* (216 NY 653, 1915).
Originally published in
New York Court of Appeals Records and Briefs, 1915.



COURT OF APPEALS

EARL IVES, Plaintiff,
against
THE SOUTH BUFFALO RAILWAY COMPANY, Defendant.

175

PAPERS ON APPEAL.

CRANGLE & BURKE,
Attorneys for Plaintiff-Respondent,
808 Marine Bank Building,
Buffalo, N. Y.

ROGERS, LOCKE & SAIDOCK,
Attorneys for Defendant-Appellant,
28 Erie Street, Buffalo, N. Y.

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Title page of the Court of Appeals' papers on appeal in *Ives v. the South Buffalo Railway Co.* (201 NY 271, 1911).
Originally published in *Reports and Cases Decided in the Court of Appeals of the State of New York,* 1915.

New York State Attorney General Egburt Woodbury made a strong case for upholding the law, emphasizing that the statute was well within the state's police powers, that the 1913 state constitutional amendment sanctioned the new law, and that the law did not violate the U.S. Constitution. The New York State Supreme Court and Appellate division upheld the Commission's decision in this case, finding the law to be constitutional.

The Southern Pacific Company appealed to the New York Court of Appeals, which rendered a unanimous opinion upholding the law on July 13, 1915 in *Matter of Jensen v. Southern Pacific Company.*[13] The opinion was written by Associate Judge Nathan Miller, a Republican who had a brief tenure on the Court (1913-1915) and went on to serve as an equally brief term as Governor of New York (1921-1923). Judge William Werner had been defeated when he ran for Chief Judge against Democrat Willard Bartlett in 1913, in part because the Ives decision was so unpopular. Bartlett and judges who had joined the Court in the previous few years were more liberal and positive about state regulations than their predecessors. The Jensen decision was unanimous except for Werner, who was still a judge on the Court and was recorded as "not sitting," meaning he did not participate: no explanation was given.

The New York Court of Appeals' opinion was extensive:

> *This is not interstate commerce.* The accident occurred while Jensen was unloading a ship anchored in a New York river via a gangway "connecting the vessel with the pier" in New York. That made it an intrastate issue.
>
> *This is not "taking property without due process of law."* Miller's decision held that the 1913 amendment to the state constitution "amply sustains the act" from the vantage point of that document. But what about the 14th

amendment to the U.S. Constitution? Not a deterrent either, said the court. The 1913 law "protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation in all cases and from the certainty of defeat if unable to establish a case of actionable negligence." It "allows compensation only for loss of earning power, but by the creation of a state insurance fund, or by the substitute methods provided, it insures the prompt receipt by the injured employee or his dependents of a certain sum undiminished by the expenses of litigation."

The law is well within the state's police power. The law is enlightened and practical. "This subject should be viewed in the light of modern conditions, not those under which the common-law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both."

"In summary, [the law is] fundamentally fair to both employer and employee."

The Southern Pacific Company appealed the decision to the U.S. Supreme Court. The Supreme Court reversed the decision on the grounds that the case actually was about interstate commerce and fell within federal maritime law. The ship was in navigable waters, its work part of interstate commerce, and the obligations of the Southern Pacific Company were governed by the rules of the federal maritime law. The Supreme Court held that Jensen's widow should have applied under the federal employers' liability law, just as the railroad had asserted, but the Supreme Court did not question the constitutional validity of the law itself.[14] That left the New York Court of Appeals' pronouncement on the constitutionality of the law intact. The law's champions chalked that up as a victory.

1917: The U.S. Supreme Court Says Yes

Another case proceeded parallel to the Jensen case and confirmed the law's constitutionality definitively. *The Matter of White v. New York Central and Hudson River Railway,* soon began making its way through the courts. On September 12, 1914, Jacob White, a watchman for the New York Central railroad, was killed while guarding tools and materials assembled for use in building a new station and new tracks. His widow applied for and received payment from the Workmen's Compensation Fund. The railroad went to court, claiming that White had been engaged in interstate commerce—the station and trackage would be part of the interstate rail network. White's widow should have filed under the federal employers' liability act and was ineligible for an award under the New York compensation law—essentially the same point that the Southern Pacific Company had made in Jensen. Moreover, said the railroad, the law violated the 14th Amendment to the U.S. Constitution.

The New York State Supreme Court and Appellate division ruled against the railroad. Guarding materials for construction of structures within New York was not interstate commerce, and the law was constitutional, said the courts. The railroad appealed to the New York Court of Appeals, which affirmed the Appellate division's ruling in 1915 without issuing an opinion.[15]

The railroad appealed the decision to the U.S. Supreme Court. The high court was conservative in those days, fond of using the 14th Amendment's "due process" and "liberty of contract" clauses to overturn state regulatory laws. The case did not reach the Supreme Court until 1917. The Supreme Court unanimously affirmed the New York Court of Appeals' 1915 decision and upheld the workmen's compensation law. It called the law "a just settlement of a difficult problem."[16]

State legislatures have the right to contravene the common law. The traditional notion that an employer was not responsible if a fellow employee directly or indirectly contributed to the accident was "the product of…judicial conception." That rule, as well as the "assumption of risk" and the "contributory negligence" rules were "subject to change in the exercise of the sovereign authority of the state."

The law is reasonable and just. This is a modest law, said the court. It "sets aside one body of rules only to establish another" and "is intended as a just settlement of a difficult problem." It is acceptable to ask employers to contribute "in a reasonable amount and according to a reasonable and definite scale" to a system that consistently provides compensation for disability or death on the job. Workers could be "sure of a definite and easily attained compensation." There was no evidence that the New York system was "arbitrary and unreasonable."

It does not undermine freedom of contract. The law was "a reasonable exercise of the police power of the state," not an interference with contract, covering "compensation for human life or limb lost or disability" through accidents, and "…the public has a direct interest in this as affecting the common welfare."

The law is fair and just in other ways. The court dismissed the criticism that the law really does not improve safety; other laws do that. The denial of trial by jury "is not inconsistent with 'due process.'

With the U.S. Supreme Court's *White* decision, the workmen's compensation was solidly embedded as an important part of the state's labor code. New York's program got stronger, with more people covered and more liberal benefits, over the years. "[W]orkers' compensation was an idea whose time had come," notes legal historian G. Edward White. It supported Progressives' push for an "increased role of state government as caretakers of disadvantaged persons and of labor."[17] The story of the beginnings of workers' compensation also demonstrates the pivotal role of the courts, particularly the New York Court of Appeals, in shaping public policy.

ENDNOTES

* This article draws on my book, *The Crucible of Public Policy: New York Courts in the Progressive Era* (2022).

1. The 1910 and 1913 compensation laws, discussed below, both referred to "workmen's" and "he" though they applied to men and women. Some years later, the title was changed to the gender-neutral "workers."
2. Julian Go, "Inventing Industrial Accidents and Their Insurance: Discourse and Workers' Compensation in the United States, 1880s-1910s." *Social Science History* 20, no. 3 (Autumn 1996): 401-38, 415.
3. James Edward Brearton, "Nuisance, Negligence and Contributory Negligence," 9 *Albany Law Review* 1 (1939): 1-9.
4. National Federation of Independent Business, Workers' Compensation Laws – State by State Comparison, NFIB (last visited Mar. 6, 2025), https://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/.
5. *Report to the Legislature of the State of New York by the Commission Appointed Under Chapter 518 of the Laws of 1909 to Inquire Into the Question of Employers Liability and Other Matters* (Albany, 1910).
6. *Laws of New York,* 1910, Ch. 674.
7. *Ives. V. South Buffalo Ry. Company,* 201 NY 271 (1911).
8. Article I, Section 19. "The Constitution of the State of New York," in Edgar L. Murlin, *The New York Red Book* (Albany: J.B. Lyon 1915), 237-238.
9. John Dunne and Michael Balboni, "New York's Impeachment Law and the Trial of Governor Sulzer: A Case for Reform," 15 Fordham *Urban Law Journal* (1987), 567-593.
10. *Laws of 1913,* Ch. 816. The governor signed the bill again on January 8, 1914, due to a technicality—the constitutional amendment passed at 1913 election did not actually take effect until January 1, 1914. The legislature passed an amended version in March 1914 providing that no more than three of the five commissioners could be of the same political party, and the governor signed it.
11. *Annual Report of the State Workmen's Compensation Commission* (Albany: 1915).
12. "Governor Glynn Sees Widow Get Labor Pension," *New York Times,* Sept. 24, 1914.
13. *Matter of Jensen v. Southern Pacific Company,* 215 NY 514 (1915).
14. *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917).
15. *Matter of White v. New York Central and Hudson River Railroad,* 216 NY 263 (1915).
16. *New York Central Railroad v. White,* 243 U.S. 188 (1917).
17. G. Edward White, *Law in American History, Volume 2, From Reconstruction Through the 1920's* (New York: Oxford University Press, 2016), 257-258.

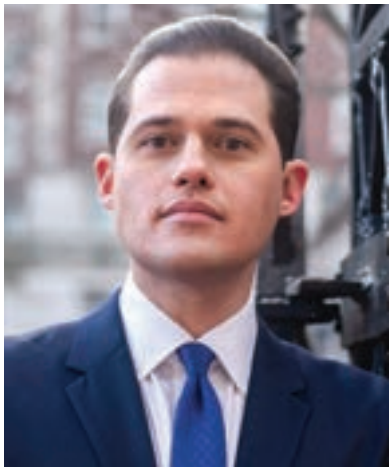
Photograph of a gay rights demonstration in Albany, New York, 1971.

EXCELSIOR

Ever Upward Within The New York State Judiciary[1]

by William N. Eskridge, Jr. and Christopher R. Riano

William N. Eskridge, Jr. is the Alexander M. Bickel Professor of Public Law at Yale Law School.



Christopher R. Riano has been a Lecturer at Columbia University and a Visiting Lecturer at Yale Law School.

New York State's historical motto—"Excelsior," or "ever upward"—enshrines human progress as an ambitious goal of the state government. But while New York's courts have at times served as the protectors of civil and constitutional rights, the history of the state's courts and the interpretation of laws to protect the LGBTQ community is a far more complex story—not quite ever upward, and certainly not uninterrupted. In this short piece, we hope to explore some of the highlights and show that LGBTQ rights are truly defended only when the various branches of government work together as equal partners.

We begin with a brief story about the trial judge who tried to advance New York's recognition of same-sex marriage from the bench. Born in New York City's Chinatown to a seamstress and a laundry worker, Justice Doris Ling-Cohan learned the important role law plays in family life when, at age twelve, she accompanied her mother to a criminal hearing.

After she graduated from law school in 1979, Ling-Cohan dedicated herself to public service, working for various legal services agencies as well as the New York State Attorney General's Office. First elected to the Civil Court of the City of New York in 1995, Justice Ling-Cohan garnered the support of the Manhattan Democratic, Republican, Liberal, and Working Family Parties during her successful run for New York State Supreme Court in 2002.[2]

Justice Ling-Cohan's tenure on the bench will best be remembered by many for her part in the New York State's story of marriage equality. In only her second year on the Supreme Court, and following in the footsteps of Chief Judge Margaret Marshall of the Massachusetts Supreme Judicial Court,[3] Justice Ling-Cohan ruled in *Hernandez v. Robles* that the New York State Constitution's due process and equal protection clauses prohibited the state from discriminating against same-sex couples who wished to enter into marriage: "From the literary references of Shakespeare's Romeo and Juliet, to the anti-miscegenation laws of this country's recent past barring interracial marriage, the freedom to choose whom to marry has consistently been the subject of public outcry and controversy."[4] She credited the plaintiffs' complaint that New York City's domestic partnership regulations gave them few of the rights of marriage, and none of the dignity and social support. As a result, Justice Ling-

Portrait of Hon. Doris Ling-Cohan, NYS Supreme Court Justice. Courtesy of the New York State Unified Court System.

Cohan agreed that their exclusion from the institution of marriage was a constitutional violation.[5]

Justice Ling-Cohan issued a stay of her decision, so the ruling did not go into effect while the case was on appeal. After hearing the case, the Appellate Division of the Supreme Court reversed her judgment: "Deprivation of legislative authority, by judicial fiat, to make important, controversial policy decisions prolongs divisiveness and defers settlement of the issue; it is a miscarriage of the political process involved in considering such a policy change."[6]

Hernandez eventually joined several other marriage equality challenges to be heard by the New York Court of Appeals, with briefs due and oral arguments scheduled for the end of May 2006. The Court at the time had seven active judges, but only six participated in the cases; Judge Albert Rosenblatt, the former District Attorney of Dutchess County and former President of the New York State District Attorneys Association, recused himself without comment. Judge Rosenblatt would have been sympathetic to the constitutional marriage equality claims, but (apparently) a family member was active in this arena, and he properly stepped away.

The May 3 oral arguments in *Hernandez* were quite a spectacle. There were cases from forty-four same-sex couples on appeal, and seventeen lawyers participated in an argument that ran for over two hours. Judges asked 186 questions. Judge Robert S. Smith, a graduate of Stanford University and Columbia Law School who practiced business law from 1968 until 2003 at the law firm of Paul, Weiss in New York City, asked the highest number and most pointed questions from the bench. One of the attorneys who would argue for the couples, Roberta Kaplan, was also a partner at Paul, Weiss, and fondly recalled working with Robert Smith.[7] Observers, including at least one colleague on the Court of Appeals, felt that Judge Smith's questions were intemperate and reflected a determination to uphold the marriage exclusion.

The New York Court of Appeals issued its decision in *Hernandez* on July 6, 2006. Judge Robert Smith, as would be expected given his spirited line of questioning during oral arguments, wrote the plurality opinion and delivered the judgment of a 4-2 Court. Right from the start of his opinion, Judge Smith put into writing what he alluded to during oral argument, leaving no doubt how he felt about judicial involvement in the case:

> *We hold that the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.… Our conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that [the] limitation is valid under the New York Due Process and Equal Protection clauses, and that any expansion of the traditional definition of marriage should come from the Legislature.*

As was expected given the arguments, he was convinced that the State had a rational basis for defining marriage as a legal relationship between opposite-sex couples. Three of his colleagues felt the same way. Judge Victoria Graffeo's concurring opinion noted that the Court's role is "not [to] disturb duly enacted statutes to, in effect, substitute another policy preference for that of the Legislature.…[T]he decision whether or not to do so rests with our elected repre-

Portrait of then-Chief Judge Judith S. Kaye in the Court of Appeals, 2001. Courtesy of the New York Court of Appeals.

sentatives." The decision from the Court of Appeals left little doubt that the debate on marriage would be held for another day, and with a different branch of government.[8]

In a heartfelt, strongly argued dissent, Chief Judge Judith Kaye, joined by Judge Carmen Ciparick, lamented:

> *This state has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition.… Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.… The claim that marriage has always had a single and unalterable meaning is a plain distortion of history. In truth, the common understanding of "marriage" has changed dramatically over the centuries.… I am confident that future generations will look back on today's decision as an unfortunate misstep.*

The dissenters maintained that the exclusions of lesbian and gay couples from civil marriage was both the denial of a fundamental right and an invidious discrimination that did not have a rational basis. Who was helped by denying these couples the right to marry? There are enough marriage licenses for everyone, she quipped.[9]

At the end of her life, Judith Kaye was especially proud of her statement in *Hernandez*, particularly because of the importance of marriage, family, and children in her own life and in the lives of those whom she loved. She saw the question of marriage equality as similar to that of her own struggles as a woman trying to find a job at a law firm after graduation.[10]

After law school, Judge Kaye had worked as an associate at the venerated Sullivan & Cromwell, then for the IBM legal department, before taking a break from practice to start a family. She returned to Olwine, Connelly, Chase, O'Donnell & Weyher, becoming the first female partner at the firm. The longest serving chief judge in recent New York history may have felt a deep connection to the LGBTQ community because of the early rejections she faced in her professional life and the resonance of that experience with the experience of gay and lesbian couples whose life commitments and families rejected by the state.

Hernandez was the end of state court judicial review, at least when it came to the question of marriage equality within the Excelsior State.

The LGBTQ Community and the Courts in New York

The City of New York, in particular, has long been the site of strong collective identity within the LGBTQ community, even when that identity was most often found and forged underground and through subcultures. For example, Harlem's nightclubs in the 1920s and 1930s provided a refuge for thousands of gay men at the famous drag balls, where they could dance freely and without fear of recrimination through the night. These drag balls saw a resurgence in the 1980s in Harlem, and provided a spiritual home and adopted family to black and brown members of the LGBTQ community. Participants in the drag balls competed for trophies by imitating, parodying, and sometimes even perfecting many traits of the dominant heterosexual culture. In other words, these

Photograph of a Drag Ball at Webster Hall in Greenwich Village, c. 1925.
Courtesy of Wikimedia Commons.

drag balls reflected New York's pervasive Excelsior ethos, permeating barriers of race, class, gender, and sexuality.[11]

Famously, one of the seminal moments in LGBTQ rights in the United States happened at the Stonewall Bar and Inn in New York City. For decades, the New York State Alcoholic Beverage Control Laws (ABCL Section 106(6)) made it so, "No person licensed to sell alcoholic beverages… shall suffer or permit such premises to become disorderly." In the 1950s and 1960s, law enforcement officials around the state often included within their interpretation of "disorderly" to include the mere presence of LGBTQ individuals within a licensed premise, determining that to be a violation against public order and morality. As early as the 1940s, New York State courts routinely were ruling that the State Liquor Authority (SLA), and by extension other law enforcement authorities, could legally close down bars and arrest patrons that served "sexual variants," making it permissible for the SLA and law enforcement to target members of the LGBTQ community. Instead of helping the LGBTQ community, in cases like *People v. Arenella,* 139 N.Y.S.2d 186 (N.Y.C. Magistrates Court, Dec. 29, 1954); *People v. Bart's Restaurant Corp,* 42 Misc.2d 1093 (N.Y.C. Criminal Court, May 8, 1964); and *Becker v. New York State Liquor Authority,* 21 N.Y.2d 289 (N.Y., Dec. 29, 1967), the courts of New York were not protective of the community at all—leading to the infamous events at Stonewall on June 28, 1969.

As we can see, it would not necessarily be the New York State courts that would step in and reexamine our state statutes in the late 1960s and 1970s in order to better protect the LGBTQ community in New York, despite a renaissance of LGBTQ activism. And while the New York State Assembly and the New York State Senate chambers introduced the Sexual Orientation Non-Discrimination Act (SONDA) in early 1971, it wouldn't even be passed into law for almost 30 years.

However, while the lower courts of New York were certainly in lock-step when it came to a lack of LGBTQ progress, the New York Court of Appeals surprisingly became the primary government body taking proactive steps in protecting LGBTQ persons. In 1980, only about a decade after Stonewall and two before *Lawrence v. Texas,* the New York Court of

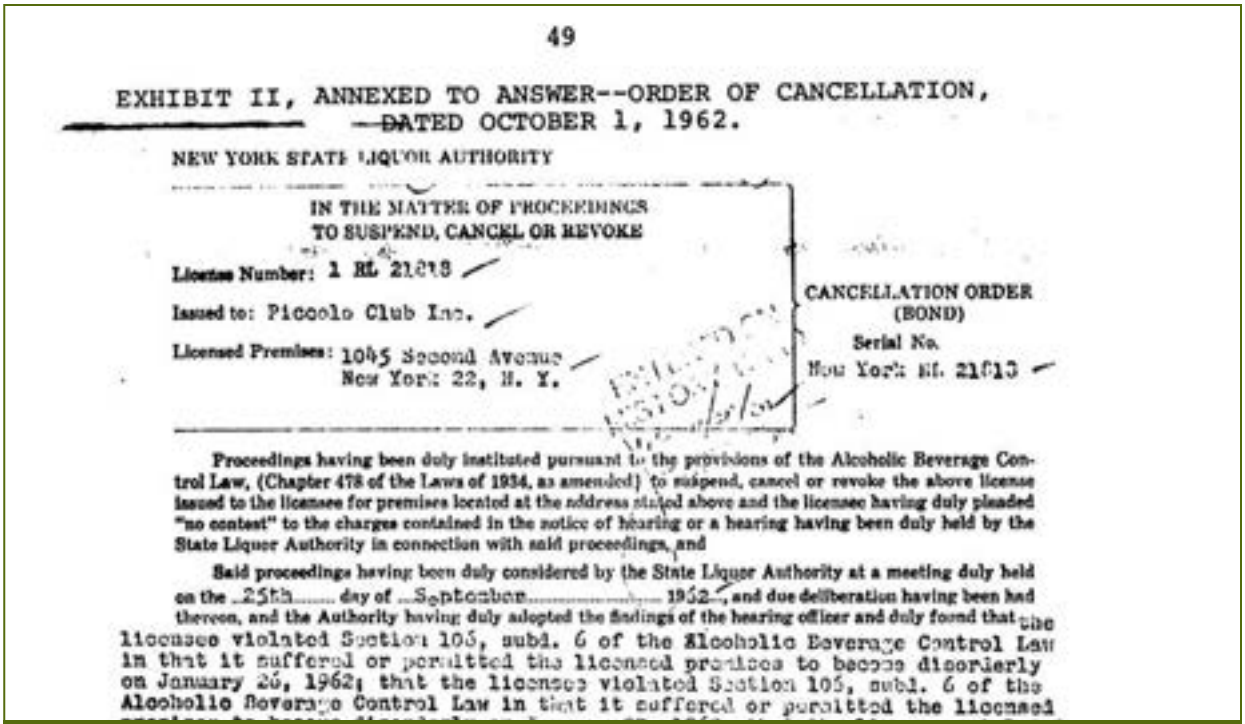


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EXHIBIT II, ANNEXED TO ANSWER--ORDER OF CANCELLATION, ~~DATED~~ OCTOBER 1, 1962.

NEW YORK STATE LIQUOR AUTHORITY

IN THE MATTER OF PROCEEDINGS TO SUSPEND, CANCEL OR REVOKE

License Number: 1 RL 21013

Issued to: Piccolo Club Inc.

Licensed Premises: 1045 Second Avenue New York 22, N. Y.

CANCELLATION ORDER (BOND)

Serial No. New York RL 21013

Proceedings having been duly instituted pursuant to the provisions of the Alcoholic Beverage Control Law, (Chapter 478 of the Laws of 1934, as amended) to suspend, cancel or revoke the above license issued to the licensee for premises located at the address stated above and the licensee having duly pleaded "no contest" to the charges contained in the notice of hearing or a hearing having been duly held by the State Liquor Authority in connection with said proceedings, and

Said proceedings having been duly considered by the State Liquor Authority at a meeting duly held on the 25th day of September 1962, and due deliberation having been had thereon, and the Authority having duly adopted the findings of the hearing officer and duly found that the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law in that it suffered or permitted the licensed premises to become disorderly on January 26, 1962; that the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law in that it suffered or permitted the licensed

Exhibit II, New York State Liquor Authority's Order of Cancellation issued to the Piccolo Club Inc., October 1, 1962. From *Records & Briefs: New York State Appellate Division* 37 AD 2d, *Matter of Savy's Inc. v. State Liq. Auth.*, 37 AD 2d 695 (1971).

Appeals stuck down the 1965 New York law making consensual sodomy a misdemeanor crime. In *People v. Onofre,* reviewing an Onondaga County conviction that had occasioned a lengthy discussion about the United States Constitution by the Appellate Division, the Court of Appeals voted 5-2 that it was not the function of the state's criminal penal laws to proscribe or to dictate moral or religious values onto others. "Because the statutes are broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution."[12]

In 1989, the New York Court of Appeals waded into the waters of legally defining the concept of family under the law. In *Braschi v. Stahl Associates* (1989), the New York Court of Appeals ruled that the rent control laws of New York applied to LGBTQ couples living together in long-term relationships. Miguel Braschi lived with his partner Leslie Blanchard in a rent-controlled apartment for over 10 years. When Blanchard died from the ravages of the AIDS pandemic, the landlord attempted to evict Braschi, arguing that he was not part of Blanchard's "family" as defined by the rent control laws. After hearing oral arguments, a 3-3 Court of Appeals was deadlocked until future Chief Judge Kaye was able to persuade Judge Vito Titone to join the majority in holding that because "family" was not well defined in the law, an expansive interpretation of the word was appropriate in this case.[13]

In 1991, the New York Court of Appeals would again grapple with the legal regulation of intimate family relations. In In the *Matter of Alison D. v. Virginia M.* (1991), the majority opinion was an unsigned, *per curiam* opinion holding that a woman without any biological ties to a child had no legal standing to seek visitation rights.[14] Chief Judge Kaye wrote a sharp dissent—one of her first on the Court, and suggesting the outline of her dissent in *Hernandez* over a decade later. She wrote that the impact of the

New Paltz Mayor Jason West, right, marrying Billiam van Roestenberg and Jeffery S. McGowan, 2004. Published in *The New York Times,* June 19, 2011. Copyright Nicole Bengiveno/*The New York Times.*

decision "falls hardest on the children… the courts' proper role—its tightening of rules that should in visitation petitions, above all, retain the capacity to take the children's interests into account—compels this dissent."[15] Chief Judge Kaye felt strongly that the majority opinion was misguided in its focus on procreation as constitutive of a family unit, and opined that the majority had ignored the best interests of the child when it found that people could be denied such basic rights as the ability to petition to see a child.

The 1990s saw LGBTQ activism at all levels of government—and rebuffs at all levels as well. At the federal level, in 1993 the policy commonly known as "Don't Ask, Don't Tell" supposedly permitted members of the community to serve in the military, but not openly. Similarly, and almost even more damaging to the community, in 1996 Congress passed the "Defense of Marriage Act" defining marriage and its host of federal benefits as only being available between one man and one woman, and federally protecting the right of states to refuse to recognize same-sex marriages of other states. Most states enacting Junior-DOMAs of their own, first in statutes and then (in the new millennium) in their state constitutions. In many parts of America, especially following the devastation of the AIDS pandemic, times were very dark for sexual and gender minorities.

In New York, the leadership of the New York State Senate made it extremely clear that while LGBTQ rights would not specifically advance in the chamber, New York would never pass a state DOMA. Furthermore, with the 1990 election of Deborah Glick as the first openly LGBTQ member to the New York State Assembly, and the creation of broad domestic partnership protections in New York City in 1998, slow legislative progress began what would become transformative success over the next twenty years.

Eliot Spitzer and the Situation in New Paltz

In late 2003, the New York Democratic Committee moved to pass a resolution supporting the right of same-sex civil marriage. Slowly but surely, the New York Democratic party was moving towards equality.

Photograph in the New York State Capitol at the moment of the Marriage Equality Act vote, June 24, 2011.
Photographed by the Celebration Chapel of Kingston NY.

This move began to inspire similar actions that had begun elsewhere in the country, particularly the move by the recently elected Mayor of San Francisco Gavin Newsom to issue marriage licenses in February, 2004. Only days after Mayor Newsom announced his civil-advocacy, Mayor Jason West—a failed candidate for New York State Assembly, but successful candidate for Mayor of New Paltz—seemed determined to make a similar name for himself. On February 26, 2004, the congenial, newly elected, 26-year-old part-time mayor stated that the Village of New Paltz would begin to perform his own, self-authorized "same-sex marriages" the next day.

The reaction was swift, from both sides of the debate. By Tuesday March 2, Mayor West was charged by District Attorney Donald Williams with nineteen misdemeanor counts of solemnizing marriages without a license. The battle lines in the small town were drawn. Attorney General Spitzer realized that while publicly he might need to hedge his bets, privately this was an opportunity.

Pressed between Mayor West's actions and the pending criminal charges issued by the local District Attorney, on Wednesday March 3, 2004 Eliot Spitzer did what all good politicians do who are looking for eventual higher office. Issuing a statement as New York's chief legal officer, Spitzer urged local officials not to preside over same-sex marriages, but also noted that the ambiguity in state laws "raise important constitutional questions that involve the equal protection of the laws." At the same time that Spitzer seemed to throw the question of marriage to the courts, who have the authority to "interpret and apply the law," he was also clear that those marriages performed in other states, such as across the border in Massachusetts, could be recognized in New York.[16]

By Friday, March 5, 2004, the state courts would get their opportunity to weigh in. Robert Hebel, a member of the New Paltz Board of Trustees represented by Liberty Counsel, was determined to put an end to the mayor's "marriages." The case was assigned to long-serving Ulster County State Supreme Court Justice Vincent Bradley. Described by the bench and bar as "a real old-school judge," Justice Bradley fit the unique political mold of an elected New York State judge who was removed from the politics of it

Photograph of gay rights demonstration in Albany, New York, 1971. Copyright The New York Public Library, Diana Davies Photographs.

all. While he was appointed in 1981 by Democratic Governor Huge Carey, he was elected to full 14-year terms in 1981 and 1995 as a registered Democrat who was cross-endorsed each time by the Republican Party. By 2004, Justice Bradley was an institution within the Ulster County legal community. He was not only sympathetic to the mayor, but also a personal supporter of marriage equality. However, he was also keenly aware that the law moves slowly—and the sudden appearance and continuation of so-called marriages by the mayor of New Paltz presented more of a challenge to the rule of law than it might at first appear.

Upon hearing arguments for both sides, Justice Bradley issued a temporary restraining order on March 5, barring Mayor West from continuing to issue his own false affidavits and contracts of marriage. Almost as the news broke, Attorney General Spitzer called Justice Bradley, screaming about his displeasure at the decision. Just the day before, the Attorney General had specifically noted that the courts should be making these decisions—so show some guts and apply the Constitution! Justice Bradley, with a steely backbone after decades on the bench, was unmoved. Brushing aside the incredible attempt by a sitting Attorney General to influence the independent judiciary, Justice Bradley countered the Attorney General's blistering critique calmly and "judiciously" by noting that, as a sitting judge, he had no interest in furthering the aspiring governor's enthusiasm for media attention.[17]

While the drama in New Paltz was in a holding pattern, the rest of the state was living up to the state motto of "ever upward." Over the next few months, *Hernandez* would be filed in New York State Supreme Court in New York County. Buffalo, Rochester, Ithaca, and Nyack noted that they would begin to recognize same-sex marriages performed elsewhere. By June 2004, while Mayor West would no longer be able to perform marriages, the criminal charges against him were dismissed. In late 2004, New York Comptroller Alan Hevesi announced changes to the New York State Employee Retirement System that would recognize same-sex marriages performed outside of New York. Shortly thereafter, New York City Mayor Michael Bloomberg followed suit for the New York City Pension Funds. And alongside these small incremental steps, Justice Ling-Cohan was getting ready to rule on *Hernandez*, so the New York State courts would have their say just as expected by the Attorney General.

As we know based on the Court of Appeals' decision in *Hernandez*, it would be the legislature, not the courts, that would need to take up the mantle of marriage equality in New York. On December 2, 2009, the New York State Assembly passed a marriage equality bill by a margin of 88-51, a thumping majority. All eyes and attention moved to the New York State Senate, where everyone began to gather in order to hear a number of speeches and watch the vote. Governor Paterson even came to the Senate chamber.

The final vote in the Senate was 24-38. It would take until June 23, 2011, under the influence of a new Governor, for the New York State Senate to pass another marriage bill on a final vote of 32-28. The Marriage Equality Act had passed with votes to spare. Legislative marriage equality was a reality in the Excelsior State. The Republican senators who voted for it were defeated in the Republican primary the following year.

Excelsior?

In 2016, Justice Ling-Cohan's re-election was in large part due to the efforts of the LGBTQ Community. Her drive to do what she thought was she believed was right under the New York State Constitution would come back to save her seat, regardless of the decisions of the Court of Appeals.

Furthermore, in recent years the Courts in New York have played a seemingly diminished role in the adjudication of fundamental questions, with the Legislature taking up an increased role in advancing protections for LGBTQ New Yorkers. Examples include the Gender Expression Non-Discrimination Act passed in 2019, which explicitly added gender identity or expression as protected categories under the New York State Human Rights Law. Similarly, the Lorena Borjas Transgender Wellness and Equity Fund passed in 2022, which amended the New York State Public Health Law increasing the capacity of grassroots organizations to serve gender-expansive individuals. While much of the current history of LGBTQ rights in New York may be legislatively driven, never count out the importance of the third branch and its historical role. The national landscape could not be more different, as Federal Courts around the country around the country are dealing with numerous areas related to the LGBTQ community, such as the censorship of LGBTQ expression,[18] free speech exemptions from anti-discrimination laws,[19] and bans on gender affirming care.[20]

The courts of New York have often embodied our state motto, and almost just as often have not been as forward-thinking as other members of our state government. What is remarkable, however, is the multi-sided theater in which they play in their role as a branch among equals. The implications of this ensemble will have increasing relevance as we enter an uncertain new period for LGBTQ rights in the years ahead.

ENDNOTES

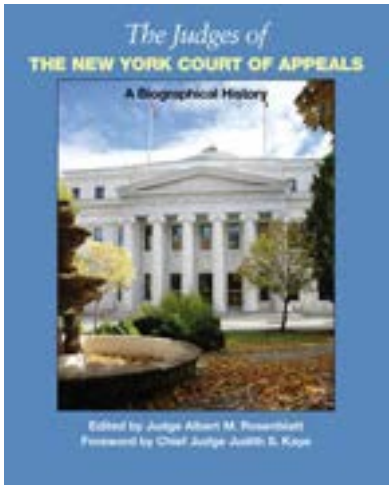
1. The stories told here are outtakes of many of the stories researched and recorded while writing *Marriage Equality: From Outlaws to In-Laws* as published by Yale University Press. For a much longer discussion on the history of equality in New York, please see our book.
2. Background and story on Justice Doris Ling-Cohan are taken from her Distinguished Alumna Award from Brooklyn College, http://www.brooklyn.cuny.edu/bc/spotlite/news/ling-cohan.htm.
3. *See generally Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).
4. *Hernandez v. Robles,* 7 Misc. 3d 459, 460 (Sup. Ct., N.Y. Co. 2005).
5. *Id.* at 495–98.
6. *Hernandez v. Robles,* 26 A.D.3d 98 (1st Dept. 2005).
7. Roberta Kaplan, *Then Comes Marriage* 68–70 (2015).
8. *Hernandez v. Robles,* 7 N.Y.3d 338 (2006). The New York Court of Appeals, a Court with a storied history for setting legal precedent in a number of important legal areas, is a seven-person Court. Accounts of discussions during the deliberations of the case are taken from interviews with Judges on the Court, as well as their law clerks.
9. Thus, Chief Judge Kaye would continue on to foresee, almost ten years before the United States Supreme Court in *Obergefell v. Hodges,* how "the right to due process of law protects certain fundamental liberty interests, including the right to marry."
10. For a longer discussion about the impact of Chief Judge Kaye, see our book *Marriage Equality: From Outlaws to In-Laws* (Yale 2020). We interviewed former Chief Judge Kaye for the book, shortly before her death.
11. George Chauncey, Gay *New York: Gender, Urban Culture, and the Making of the Gay Male World,* 1890–1940, 291–99 (1994).
12. *People v. Onofre,* 51 N.Y.2d 476, 485 (1980) (footnote call omitted).
13. *See Braschi v. Stahl Assocs. Co.,* 74 N.Y.2d 201, 211–14 (1989). One New York trial court had also come to substantially the same conclusion in a decision that, while overturned by the First Department, was spiritually affirmed by *Braschi*. *See Two Assocs. v. Brown,* 131 Misc. 2d 986, 987–90 (Sup. Ct., N.Y. Co. 1986), *rev'd,* 127 A.D.2d 173 (1st Dept. 1987).
14. In the Matter of *Alison D. v. Virginia M.,* 77 N.Y.2d 651, 654–57 (1991) (per curiam). This decision was later overruled by *Brooke S.B. v. Elizabeth A. C.C.,* 28 N.Y.3d 1 (2016).
15. *Alison D.,* 572 N.Y.2d at 658 (Kaye, J., dissenting).
16. https://ag.ny.gov/sites/default/files/opinion/I%202004-1%20pw.pdf
17. Interview with Vincent Bradley, Jr. on June 12, 2018
18. See *Blount Pride, Inc. v. Desmond,* 2023 WL 5662871 (E.D. Tenn. 2023)
19. *See 303 Creative LLC v. Elenis,* 143 S. Ct. 2298 (June 20, 2023)
20. *See U.S. v. Skrmetti* (Docket No. 23-477, Pending at the Supreme Court of the United States as of February 28, 2025).

Portrait of Hon. Stanley Howells Fuld.
Collection of the New York State Court of Appeals.

STANLEY HOWELLS FULD, 1903-2003

Chief Judge of the New York State Court of Appeals, 1967-1973
Associate Judge, 1946-1966

by Sidney H. Stein and Jonathan Goldin



This biography appears in *The Judges of the New York Court of Appeals: A Biographical History*, ed. Hon. Albert M. Rosenblatt (New York: Fordham University Press, 2007). It has not been updated since publication.

During his unsurpassed twenty-seven years and eight months as a member of the Court of Appeals—seven years of that as Chief Judge—Stanley Fuld exhibited a determined yet humble dedication to pursuing justice, preserving common law traditions and serving the people of New York State. A prolific jurisprudential craftsman, Fuld painstakingly produced classically reasoned opinions that cautiously advanced the common law to accommodate modern sensibilities; he labored exhaustively to minimize the logical gap between precedent and novel applications of the law. In recognition of Fuld's common law artistry, he is—and even was throughout his career—regularly compared to Benjamin Cardozo, the early twentieth century common law luminary whose former chambers he occupied in New York City and in Albany.

Justice and Reform

Judge Fuld's career reflected a focused commitment to justice and an unyielding reverence for the law. Stanley Howells Fuld was born in New York City on August 23, 1903. His father was a linotyper and later a proof-reader for *The New York Times;* his mother died of pneumonia when he was twelve. After being educated in New York City public schools, Fuld attended the City College of New York, from which he was graduated cum laude and Phi Beta Kappa. He studied law at Columbia Law School, where he served as an editor of the *Columbia Law Review* and was elected to the Order of the Coif. Following his admission to the New York Bar, Fuld entered private practice. He initially worked at Gilman & Unger, a New York City firm with three partners and two associates, and later moved to another small firm, Aranow & Berlack, where he was invited to partnership.

In 1935, with the encouragement of his friend and law school classmate Professor Milton Handler, Fuld transitioned into public service, accepting a position with the National Recovery Administration (NRA), which was designed to be a cornerstone of Franklin Delano Roosevelt's New Deal. Some three months after Fuld joined the NRA, its existence was called into doubt by *A. L. A. Schechter Poultry Corp. v. United States* (295 US 495 [1935]), a decision in which the Supreme Court invalidated the compulsory code system that the NRA administered. Realizing that

Court of Appeals Bench, 1946-1948: Judges from Left to Right: Dye, Desmond, Lewis, Chief Judge Loughran, Conway, Thacher, Fuld. Collection of the New York State Court of Appeals.

his future did not lie with the NRA, Fuld wrote to Thomas E. Dewey, a law school contemporary whom Governor Herbert H. Lehman had recently named as Special Prosecutor to investigate organized crime in New York County. Dewey was authorized to enlist a staff of twenty, and he made Fuld one of his first appointments in the Office of the Special Prosecutor. Fuld quickly became Dewey's "law man," handling and arguing scores of appeals and participating in the preparation of innumerable motions and briefs. Fuld undertook the herculean project of streamlining the research operation of the office, conceiving of and implementing an exhaustive in-house treatise that catalogued and cross-referenced every criminal law decision of the New York Court of Appeals from 1847 to date. He also wrote or oversaw the creation of over 500 legal memoranda that he comprehensively indexed in order to help the office avoid duplicative research.

Fuld assisted in the drafting of legislation that allowed for multicount indictments. Traditionally, each indictment could only charge one offense. However, the Special Prosecutor sought the power to bring multicount indictments in order to try racketeers together with the henchmen who carried out the racketeers' orders. Common trials for organized crime commanders and soldiers would enable juries to understand how the racketeers managed criminal enterprises from behind the scenes. The legislation that Fuld helped draft became law in 1936, and it facilitated the prosecution of high-ranking organized crime figures.

In 1937, Dewey was elected District Attorney of New York County, and he named Fuld as his Chief of the Indictment Bureau. In that capacity, Fuld reformed indictments by writing them in simple, straightforward language, instead of the archaic, convoluted terms that had been the accepted norm. The Harvard Law Review hailed Fuld's reform as "a significant step towards a more rational criminal procedure."[1] In 1939, Fuld became the Chief of the Appeals Bureau, a position that afforded him the opportunity to argue hundreds of appeals in the Appellate Division of the Supreme Court and the Court of Appeals.

At the District Attorney's Office, Fuld persisted in his dedication to legal reform. He fashioned the concept of "continuing larceny," a doctrine that enabled a series of closely connected petit thefts to be aggregated for prosecution as grand larceny. The Court of Appeals upheld the application of the continuing larceny doctrine in *People v. Cox* (286 N.Y. 137 [1941]). In 1942, Fuld continued his efforts to modernize the law of larceny in New York by drafting a statute that abolished the antiquated distinctions between variations of larceny-such as larceny by trick, false pretenses, and ordinary larceny. Following the enactment of Fuld's statute, guilty thieves no longer were

Court of Appeals Bench, 1973: Judges from Left to Right: H. Jones, Jasen, Burke, Chief Judge Fuld, Breitel, Gabrielli, Wachtler. College of the New York State Court of Appeals.

set free merely because prosecutors had unwittingly charged them pursuant to technically inapposite forms of larceny.

Although Fuld was a zealous advocate for the State in his capacity as an Assistant District Attorney, he perennially exhibited a paramount commitment to fairness and justice. As the Chief of the Appeals Bureau, he would urge reversal of a conviction when he felt that error had tainted it. He also championed the revival of the writ of error coram nobis, a previously mothballed mechanism for correcting injustice by allowing a court to reconsider a conviction in light of facts that had subsequently emerged. As Fuld explained in a heralded *New York Law Journal* essay, the writ provided an "emergency measure enabling a defendant to avoid the effects of a conviction procured by fraud or in violation of his constitutional rights when all other avenues of judicial relief are closed to him."[2]

A Judicial Legend

In 1944, Fuld left the District Attorney's Office to return to private practice as a partner in what became known as Hartman, Craven & Fuld. The other principles of the firm, Sigfried Hartman-Fuld's cousin-and Alex Craven-Fuld's longtime friend-had extensive experience as trial attorneys and advisors to corporate clients. Fuld simultaneously practiced at the firm and served as a Special Assistant Attorney General. These pursuits ended when Dewey, who had been elected governor in 1941, named Fuld to the Court of Appeals on April 25, 1946. Fuld was selected to fill the remainder of the term of Judge George Z. Medalie, who had died. At 42, Fuld was at that time the youngest person ever appointed or elected to the Court of Appeals. He was elected to a full term later in 1946 and then again in 1960. In 1966, he was elected Chief Judge of the Court of Appeals and Chief Judge of the State of New York, positions he held until his retirement at the end of 1973.

During Fuld's lengthy tenure on the Court, he had a breathtaking impact on the development of the law. Some 15,000 cases were decided, and Fuld wrote more than 1,300 opinions. Although it is impossible to set forth a comprehensive catalog of those opinions, a handful of illustrative examples that follows provides a flavor-although hardly a sense of the depth and breadth-of Fuld's impact on contemporary jurisprudence.

In choice of law, Fuld authored leading decisions, such as *Auten v. Auten* (308 NY 155 [1954]), *Babcock v. Jackson* (12 NY2d 473 [1963]) and *Neumeier v. Kuehner* (31 NY2d 121 [1972]), that dispensed with rigid rules relating to what law courts must apply in particular disputes. Fuld's meticulous opinions led a revolution

in choice of law, shifting the focus from formalistic preoccupation with the place of injury or the place of contract to a flexible, practical analysis of the interests of different jurisdictions in applying their laws to particular disputes.

Fuld's labor law jurisprudence demonstrated a commitment to shielding employees from overreaching by employers (see e.g. *Int'l Assoc. of Machinists, Dist No. 15, Local No. 402 v. Cutler-Hammer, Inc.*, 297 NY 519 [1947, Fuld J., dissenting]), while holding unions accountable for remaining open and democratic (see e.g. *Phalen v. Theatrical Protective Union No. 1*, 22 NY2d 34 [1968, Fuld, C.J., concurring]); *Madden v. Atkins*, 4 NY2d 283 [1958]). Fuld maintained the Taylor Law (N.Y. Civ. Serv. L." 200-12), which prohibited strikes by public employees, against constitutional challenge on the grounds that the mitigation of market forces in the public sector and important policy concerns justified the regulation (see City of *New York v. DeLury*, 273 NY2d 175 [1968]). Several of Judge Fuld's most influential labor law opinions were dissents that presaged United States Supreme Court majority opinions.[3]

Fuld also left an enduring imprint on the law of corporations. As exhibited in his celebrated opinions in cases such as *Walkovszky v. Carlton* (18 NY2d 414 [1966]), which preserved the integrity of the corporate veil despite a taxicab company's failure to carry adequate insurance, and *Diamond v. Oreamuno* (24 NY2d 494 [1969]), which safeguarded the ability of shareholders to act as private attorneys general against directors and officers who misuse inside information, Fuld's approach to the law of corporations tended to balance regulatory and permissive instincts. When the New York Legislature enacted the Business Corporation Law (BCL) in 1961, it espoused a similarly balanced approach. The BCL effectively overruled a number of Court of Appeals decisions. Fuld had dissented in most of those cases, and the reasoning of several of his dissents was adopted by the drafters of the BCL.[4]

Fuld's contributions to criminal law are renowned. In *People v. Donovan* (13 NY2d 148 [1963]), he wrote an opinion for the Court holding inadmissible the confession of a suspect whose attorney had requested access to him and been denied. Well before the U.S. Supreme Court decided *Miranda v. Arizona* (384 US 436 [1966]), Donovan demonstrated substantial sensitivity to the dangers of custodial interrogation in the absence of counsel. Fuld's lifelong commitment to the fair rule of law, regardless of the characteristics of the beneficiary in any given circumstance, shined in the opinion. He wrote:

> *The worst criminal, the most culpable individual, is as much entitled to the benefit of the rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade us of a defendant's guilt would but lead to erosion of the rule and endanger the rights of even those who are innocent.*[5]

In *People v. Rosario* (9 NY2d 286 [1961]), Fuld's opinion for the Court expanded the scope of materials that prosecutors are obligated to provide to criminal defendants. He explained that "a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand" (Rosario, 9 NY2d at 289).

In other criminal matters, Fuld failed to carry the Court, but wrote dissents that were ultimately vindicated by the U.S. Supreme Court. In *In re Winship* (397 US 358 [1970]), the Supreme Court reversed the New York Court of Appeals' majority opinion in *W. v. Family Court* (24 NY2d 196 [1969]), and accepted Fuld's dissenting position that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires that adjudications of juvenile delinquency be founded on proof beyond a reasonable doubt. In *O'Brien v. Skinner* (414 US 524 [1974]), the Supreme Court endorsed Fuld's dissenting view that New York's failure to provide pretrial detainees with a means of registering and voting was a denial of equal protection of the laws.

In the area of the First Amendment, Fuld set forth a new method of measuring obscenity in *People v. Richmond* County News, Inc. (9 NY2d 578 [1961])-the "hard-core pornography" test-that gave wide protection to the public's ability to choose what it wanted to read and see. That decision was viewed as a breakthrough by scholars and commentators and was acknowledged by the U.S. Supreme Court (see *Mishkin v. State of N.Y.*, 383 US 502, 506-08 & n.4 [1966]; *Manual Enters., Inc. v. Day*, 370 US 478, 489 [1962]). In *Oliver v. Postel* (30 NY2d 171 [1972]), Fuld offered a ringing defense of the right of reporters to

comment on public trials, a ruling that endeared him to the press despite his general unwillingness to speak with reporters.

Fuld's dissent championing the protection of civil rights in *Dorsey v. Stuyvesant Town Corp.* (299 NY 512 [1949]) is widely credited with anticipating the tectonic *Brown v. Board of Education* (347 US 483 [1954]). Fuld decried distinctions between citizens on the basis of ancestry and explained that "[t]he mandate that there be equal protection of the laws, designed as a basic safeguard for all, binds us . . . to put an end to this discrimination" (Dorsey, 299 NY at 545).

Of course, the smattering of opinions discussed above fails to elucidate the scope or intensity of the impact that Fuld had on the law. Nevertheless, even a sample of Fuld opinions evinces his dedication to securing and reinvigorating legal traditions by infusing them with contemporary pragmatism.

A Labor of Love

None of Stanley Fuld's opinions came easily to him. Tirelessly, he toiled to arrive at final versions, conscientiously uncovering every layer of the case before him. He knew that the correct decision, the fitting turn of phrase, the appropriate means of cabining a holding and the most effective way to make a point come alive and be memorable all came with hard work and patience. He understood that these fine details could not be shaped in the first draft, or even necessarily the fifth or the tenth. Ultimately, however, a score of drafts later, the layers were laid bare, and the path became clear. As Mark Twain said, the "difference between the almost right word and the right word" is the "difference between the lightning-bug and the lightning" (Twain, The Art of Authorship, at 87-88 [George Bainton ed., New York, D. Appleton & Co. 1890]). Fuld bottled lightning and applied it to the printed page decision after decision, year after year, decade after decade.

By the time Fuld had finished working on a draft opinion, it was a virtually indecipherable maze of cross-outs, arrows moving paragraphs around, and inserts all methodically labeled alphabetically from "A" through to double letters. Fuld even continued the editing process after he received the page proofs of opinions from the New York State Reporter, often changing phrases or words. Once an opinion hit the bound volumes, however, Fuld had no regrets. He looked forward and never backward.

Fuld's perfectionism required his clerks to invest considerable sweat equity in drafting each opinion. As compensation for their efforts, the clerks gained priceless experience. They learned how to modernize the law using traditional means, developing the law one case at a time. Many Fuld clerks went on to build distinguished careers—as leaders of the bar, academics, and judges—that were constructed on the training received as apprentices to the master craftsman.

A Humble Giant

For all the attention Judge Fuld's decisions received, he remained an intensely private and humble man. He eschewed public speaking engagements and preferred to communicate to the public through his opinions. Although he was rightfully proud of being the Chief Judge of the State of New York and enjoyed the deference due that office in the courtroom, he nonetheless forewent its trappings in public. As but one example, he never availed himself of the state car and driver to which his position entitled him. Instead, he would travel back and forth between New York City and Albany by Greyhound or Trailways bus, often absorbed in exchanging drafts with his clerks along the way.

Fuld knew beyond peradventure that public servants are surrogates for the people, and he carried himself accordingly. At oral argument, his questions were replete with purpose. Lawyers appearing before Fuld knew that his inquiries were not designed to trap the unwary or score debating points, but rather to help the judge better understand the issues needing resolution.

In his quotidian human interactions, Fuld proved as well attuned to the human condition as he did in his opinions. He was deferential, calm, quiet, and courteous. He always had a kind word to put people at ease. His humor was never barbed; usually it manifested itself in the form of harmless, never acerbic, dry puns.

History will remember Stanley H. Fuld as a consummate jurist on a court of seven equals, all strong-minded, intelligent, at that time, men. As

Chief Judge, Fuld had to be a conciliator, a moderator of opposing views, an ameliorator of conflicts, and an advocate for his own position. He was all of that and more. In conference, he often managed deftly to convince his colleagues of the correctness of his point of view, while addressing their concerns and incorporating them into his opinions. For all his humility and gentleness, he was highly competitive in conference and always hoped to avoid feeling compelled to write in dissent. His first choice was to carry the court and lead the majority, his second was to be a part of it, and only as a last resort would he dissent. Yet he declined to join the majority when he believed that it was adopting the wrong approach.

Just as Fuld refused to follow the majority blindly, he similarly refused to adhere to precedent that led to fundamental injustice. As he noted in *Bing v. Thunig* (2 NY2d 656, 667 [1957]), if "adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive and no principle constrains us to follow it." In those rare instances when Fuld believed that precedent lost its right to survive, he would rigorously ground his departure from it in law and logic.

A Civic Leader and a Family Man

Fuld complemented his professional and personal lives with an abundance of civic involvement. For example, he was Chairman of the Board of Visitors of City College of New York, Chairman of the Board of Directors of the Jewish Theological Seminary of America and Chairman of the Board of Trustees of the Institute for Advanced Studies in the Humanities. He also sat on the boards of Beth Israel Hospital, Central Synagogue, Columbia Law School, the Columbia Law Review Association, Phi Beta Kappa Associates, Cardozo Law School and the Alumni Association of the City College of New York. In addition, he was a fellow of the American Academy of Arts and Sciences and taught at New York University Law School and the Salzburg Seminar in American Studies. He played a central role in organizing the Fair Trial-Free Press Conference, which joined journalists, law enforcement officials, judges, and lawyers in the pursuit of balancing the constitutional rights to a free press and to fair trials. He later served as Chairman of the National News Council, which had a similar mission to the Fair Trial-Free Press Conference.

Fuld was regularly honored with awards for his professional and charitable work. For example, he was the first recipient of the eponymous Stanley H. Fuld Award from the New York State Bar Association for his contributions to commercial litigation. Fuld also received honorary degrees from various institutions, including Columbia University, New York University, Syracuse University, Union College, Hamilton College, The Jewish Theological Seminary of America, Yeshiva University, St. John's University, and the City College of New York.

Despite Fuld's many achievements as a lawyer, a judge, and a civic leader, he was most proud of his family. Visitors to Fuld's chambers were not directed to view the judge's many awards, but rather a particular photograph of the judge on the Court of Appeals bench with a grandchild sitting in each of the other judge's chairs. He took tremendous, loving pride in his daughters, Judy and Hermine, and their families. He was married to his first wife Florence for 45 years. Following her death in 1975, he married Stella Rapaport with whom he shared the remaining 28 years of his life.

Return to Private Life

As the New York Constitution requires, Fuld left the bench on the last day of the year in which he turned 70, December 31, 1973. He joined Kaye, Scholer, Fierman, Hayes & Handler as Special Counsel. The firm accepted Fuld's decision to refrain permanently from appearing before any New York State tribunal. Fuld felt it would be unseemly to do so after having served as the State's Chief Judge.

Even after returning to private practice, Fuld still sought opportunities to serve the public. For instance, by appointment of President Gerald Ford, Fuld was Chairman of the National Commission on New Technological Uses of Copyrighted Works from 1975 until 1978. In 1980, he joined the New York State Court Facilities Task Force and two years later, in 1982, the New York City Charter Revision Commission.

The Fuldian Ethic

As one of the finest common law judges of the 20th century, Fuld felt most at ease working within the confines of specific disputes between particular litigants. He was not comfortable making broad generalizations or developing sweeping theories of how to decide cases. Rather, he was at home reviewing the record before him, content to have the general principles arise from an unerringly accurate analysis of the facts and a conscientious application of the law to the issues at hand.

Occasionally, Fuld applied his brush not to a unique set of facts, but to a broader canvas. When he did, the results enlighten with elegance, even decades later. Here are Fuld's thoughts regarding the administration of the courts on the occasion of his retirement from the Court of Appeals:

> *Apart, however, from the task of keeping the law abreast of the times, the courts, of course, have an urgent responsibility to see to it that the judicial system itself is continually strengthened and streamlined so as to enable it to function with greater efficiency and dispatch, the better to meet the heavy demands made upon it by burgeoning case loads. At the same time, however, the courts must insure that the ideal of equal protection under law shall be more than a hallowed phrase; that the disadvantaged shall not be denied their rights because of lack of adequate representation; and that the aid and protection of the courts shall ever be available on equal terms to one and all, to the poor, the weak and the unpopular as well as to the rich, the strong and the popular, to the non-conformist as well as to the conformist, and to the bigot as well as to the victim of prejudice. In short, in adjusting the machinery of the court system to achieve greater efficiency of operation, the courts must see to it that the quality of adjudication is not sacrificed to speed of disposition.*[6]

Judge Fuld died on July 22, 2003. He committed his 99-year life to the principles of justice, fairness, and equality, and dedicated over a quarter of a century to the New York Court of Appeals. He assiduously applied reason and decency to the record before him, perennially striving to honor tradition by helping it survive in the modern world. His energy and intellectual curiosity are reflected in a body of work that astonishes in its range, its depth and its persistent significance.

Progeny

Judge Fuld and his first wife Florence had two daughters, Hermine (Mrs. Maurice N. Nessen) of New York City and Judy (Mrs. Frank Miller). Judge Fuld is survived by his second wife Stella, his daughter Hermine, six grandchildren, and seven great-grandchildren. The grandchildren are Joshua Fuld Nessen of New York City; Elizabeth Nessen of Brookline, Massachusetts; William Arthur Nessen of Kuala Lampur, Malaysia; Steven Alan Miller of Los Angeles, California; Peter Miller of Orlando, Florida; and Leah Jessica Matuson of Medfield, Massachusetts.

ENDNOTES

1. Note, Streamlining the Indictment, 53 Harv L Rev 122, 122 (1939).
2. Dewey, The Making of a Judge, 71 Colum L Rev 537, 541 (1971), quoting Fuld, The Writ of Error Coram Nobis, NYLJ, June 7, 1947, at 6, col 1 (emphasis in original).
3. See e.g., *Carey v. Westinghouse Elec. Corp.*, 11 NY2d 452 (1962), rev'd, 375 US 261 (1964); compare *Pleasant Valley Packing Co., Inc. v. Talarico*, 5 NY2d 40 (1958), with *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 US 236 (1959), and *Int'l Assoc. of Machinists*, 297 NY 519, with *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 US 564 (1960).
4. Compare *Eisen v. Post*, 3 NY2d 518 (1957), with BCL '909(a), and *Matter of Radom & Neidorff, Inc.*, 307 NY 1 (1954), with BCL" 1104(a)(3), 1111, and *Gordon v. Elliman*, 306 NY 456 (1954), with BCL '627, and *Schwarz v. Gen. Aniline & Film Corp.*, 305 NY 395 (1953), with BCL '723.
5. Donovan, 13 NY2D at 154.
6. Remarks at Ceremony Marking Retirement of Chief Judge Stanley H. Fuld and Judge Adrian P. Burke at Albany, New York, 33 NY2d IX, XII-XIII (1973).

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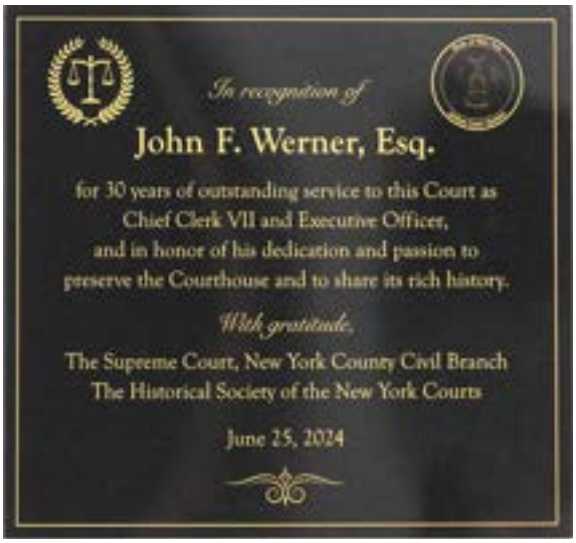

Honoring
John F. Werner, Esq.

On June 25, 2024, the Society partnered with the **NYS Supreme Court, New York County-Civil Branch** for the first Norman Goodman Lecture in memory of the long-serving New York County Clerk and Commissioner of Jurors, who championed the treasures of the New York County Courthouse, its murals and its historical records.

The program **NY County Courthouse WPA Murals: Who Created Them and What Do They Represent?** featured welcome remarks by **Hon. Adam Silvera** and **Allison Morey** and presentations by art historians **Prof. Greta Berman, Prof. Helen Harrison,** and **Prof. Jon Ritter** that focused on the evolution of courthouse art during the New Deal era and Works Progress Administration murals in New York City and, of course, in the courthouse. **John F. Werner** delivered a touching tribute to the former County Clerk.

However, what Mr. Werner did not know was that this program would honor him as much as it honored Mr. Goodman, when a plaque was unveiled that commemorated his service to the Court. The plaque, which now hangs prominently in the rotunda, was dedicated by **Hon. Deborah A. Kaplan** with a letter read by **Joan Levenson**. The Society's President **Hon. Jonathan Lippman** delivered a moving tribute to both Mr. Goodman and Mr. Werner, and Mr. Werner's own brother **Richard Werner,** who helped bring many family members to the courthouse for this momentous occasion, also provided remarks.

At the time of his retirement in 2019, Mr. Werner had served as Chief Clerk VII and Executive Officer for 30 of the 50 years he spent in 60 Centre Street. He became a lifetime member of the Society, interviewed Mr. Goodman for the Society's oral history project, and wrote the article "The Tombs Angel: An Exemplary Life of Service" for *Judicial Notice* Issue 16 with his writing partner **Robert C. Meade, Jr.** The Society's staff and Board of Trustees were pleased to participate in honoring Mr. Werner's service to the Court.

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