INTRODUCTION

The Crucible of Public Policy: New York Courts in the Progressive Era discusses critical public policy issues that were thrashed out in the state's court system, mainly in the New York Court of Appeals, the state's highest court, during the Progressive Era, approximately 1900 to 1920.

Crucible in this context connotes a place of test or trial where forces interact to cause or influence change. The forces were usually private lawyers (representing individuals or corporations) and public lawyers—state attorneys general, district attorneys, and counsel for state agencies (representing the public). The issues at stake involved the force and interpretation of the law, the role of state government, and the liberties of individuals and organizations. The contests were important, some precedent setting, but fought with decorum in quiet courthouses, between lawyers with briefs brimming with legal arguments, appeals to precedents, and exhortations for judges to confirm or knock down state laws and regulations. The court of appeals was often the forum of last resort, the place where issues were finally hashed out and settled.

The stakes were high, for New York and beyond its borders. New York's highest court was arguably the second-most important in the nation, after only the United States Supreme Court. The legal scholar Stewart Sterk contends that during its first 150 years (beginning in 1847), the court of appeals had more impact in more areas of law than even the nation's highest court. "No federal court has exerted influence comparable to the Court of Appeals over the wide range of problems that confront most Americans in their everyday lives: contracts, torts, property trusts, wills, divorce law (to name a few)," he explains. "The leading law school casebooks—the sources that introduce law students into the profession—are

filled with Court of Appeals opinions, most of them chosen because they serve as the best exposition of important legal principles."[1] New York was the state that other states, and sometimes the US Supreme Court, watched to discern which way the judicial winds were blowing.

The Progressive Era was a time for reckoning with social and economic issues that had accumulated in the late nineteenth century as the state (and the nation) grew in population, cities came to dominate society, and complex industries rose to dominate the economy. Progressives went about the business of promoting integrity in politics, subordinating partisan and local interests to the general welfare, and making government more responsive to the people (e.g., fighting political bosses and pushing for direct primaries and other reforms to foster popular control). They were also proponents of using government to reconcile, rationalize, and improve people's lot and at the same time protect their liberty. President (and former New York governor) Theodore Roosevelt said in 1906 that "so far as this movement of agitation throughout the country takes the form of a fierce discontent with evil, of a firm determination to punish the authors of evil, whether in industry or politics, the feeling is to be heartily welcomed as a sign of healthy life."[2] Charles Evans Hughes, New York's great progressive Republican governor, in his 1907 inaugural address, endorsed forward-looking legislative action and "sympathy with every aspiration for the betterment of conditions and a sincere and patient effort to understand every need and to ascertain in the hard light of experience the means best adapted to meet it."[3]

New York was a pioneer in progressive legislation to regulate public health, safety, morals, and welfare. In dealing with businesses, progressives struck a middle course between laissez-faire (leave them undisturbed; they will treat the public and their workers fairly, and the state's economy will prosper) and socialism (government operating some enterprises). The middle course "accepted the existence of threatening businesses but tried to control their behavior. Corporations would be allowed to continue only under the watchful eye of government."[4] How companies treated their employees, e.g., maximum hours, working conditions, and safety measures, became a central governmental concern. The nineteenth century's pattern of industries concerned almost solely with production and profits gave way to a new twentieth-century paradigm of government setting parameters and limits in critical areas. The reformers were committed to addressing social issues and promoting the values of "commitment to community" and "mutualism and compromise" between labor and industry.[5]

New York was one of the first states to approach these issues through legislation. It tried to address the tension between too little state control and too much, the latter of which would contravene personal liberty and corporate autonomy. Therefore, the Empire State was also the place where some of the toughest regulatory and legal issues surfaced first in the courts and where regulatory laws were explored, endorsed, challenged, or bounced back to the legislature because they were deemed to be government overreach or unconstitutional. That stew of New York court cases, public policy, and politics makes the story particularly interesting.

Courts were often the final arbiters of difficult, portentous issues. The legal historian G. Edward White has called this time period "the era of guardian review" by the courts. White's focus is mostly on the US Supreme Court, but his characterization fits the New York Court of Appeals as well. The courts saw their mission as that of constitutional watchdogs, "guardians" of "timeless, foundational principles." This role was a "blend of traditional American conceptions of the functions of judges as interpreters of authoritative legal sources." But this was mixed with a "heightened sense" of the social context in this era of industry, class conflict, and the clash of interest groups. Judges determined the constitutional "right" and "justice" of laws. Guardian review thus projected a "role for judges as savants."[6]

The most contentious disputes about public policy issues in the courts were traceable to "the new conditions incident to the extraordinary industrial development" of modern times, the New York statesman Elihu Root noted in his address as president of the New York State Bar Association in 1912. These conditions "are continuously and progressively demanding the readjustment of the relations between great bodies of men and the establishment of new legal rights and obligations not contemplated when existing laws were passed or existing limitations upon the powers of government were prescribed in our Constitution." Individuals were caught up in vast, complex enterprises: "In place of the old individual independence of life, in which every intelligent and healthy citizen was competent to take care of himself and his family, we have come to a high degree of interdependence, in which the greater part of our people have to rely for all the necessities of life upon the systematized co-operation of a vast number of other men working through complicated industrial and commercial machinery."[7]

Many people were working for industrial companies, "great aggregations of capital in enormous industrial establishments working through vast

agencies of commerce and employing great masses of men in movements of production and transportation and trade so great in the mass that each individual concerned in them is quite helpless by himself."[8]

This, in turn, necessitated the intervention of government with new laws to rebalance the rights of individuals with the power of the new organizations: "The relations between the employer and the employed, between owners of aggregated capital and the units of organized labor, between the small producer, the small trader, the consumer and the great transporting and manufacturing and distributing agencies, all present new questions for the solution of which the old reliance upon the free action of individual wills appears quite inadequate."[9]

It was up to legislators to make these new laws, but it fell to the courts to interpret and enforce them. Courtrooms became forums of last resort for contending parties thrashing out profound public issues, Root explained. He maintained that "it is because in the course of this process of readjustment occasionally a court finds that some new experiments in legislation or in administration contravene some long established limitation upon legislative or executive power, or finds that some crudely drawn statute is inadequate to produce the effect that was expected of it, or enforces some law which has unexpected results, that the present irritation and impatience toward the courts has been created." Courts had a special obligation to protect individual rights and enforce constitutional limits on governors and legislatures. They needed to validate laws that impinged on individual liberty or imposed "occasional inconvenience through their restraint upon our freedom of action." On the other hand, they needed to declare laws invalid when they exceeded those limits.[10]

New York Court of Appeals chief judge Alton B. Parker (1897–1904) understood the court's guardian/savant/arbiter status and what was expected of it. He projected an air of judicial objectivity and wisdom in the courtroom and expected his colleagues on the court to do the same. Parker used his court's visibility and stature to launch a campaign for the presidency on the Democratic ticket in 1904. That could not have happened from any other state's top court.

But Parker, as we shall see in several chapters in this book, also reflected the challenges, tensions, and inconsistencies of the court as it earnestly grappled with thorny issues. He characterized what the courts did as a stressful, high-stakes judicial balancing act. Courts were bound to support valid new laws and regulations approved by the people's elected legislators. "The courts are frequently confronted with the temptation to

substitute their judgment for that of the legislature," Parker wrote in a 1904 court opinion, *People v. Lochner*. "A given statute, though plainly within the legislative power, seems so repugnant to a sound public policy as to strongly tempt the court to set aside the statute, instead of waiting, as the spirit of our institutions require, until the people can compel their representatives to repeal the obnoxious statute."[11]

But they also needed to hold up the state and federal constitutions as buttresses against legislation amounting to "the breaking down of the safeguards [on liberty and property rights] which the people secured by their constitutions." The courts are there to say to governors and legislatures " 'thus far and no farther can you go.' "[12] "We cannot leave our government to the professional politician," Parker explained, though not until several years after he had left the chief judge's post and his own failed presidential campaign was long past. We need "more wise deliberation and less hasty action" in legislatures and "eternal vigilance" to ward off "every assault upon the constitutional foundation of our liberty, prosperity and happiness."[13]

Sometimes, that meant approving a law that aligned with the state and federal constitutions but was obviously imperfect in practice. Other times, it meant declaring a popular law unconstitutional. The role of judicial umpire or traffic cop was essential but also uncomfortable.

It is glaringly apparent in retrospect that the judicial system whose operation this book discusses was a man's world. In fact, it was a white man's world, since attorneys of color were few in number and legislators and judges of color practically nonexistent until years later. There were few women attorneys and no women judges yet in the state court system. Women could not vote until 1917, so they were governed by laws made by men, even when those laws were ostensibly for their protection, such as limited working hours in factories. When they were involved in courts, the cases were defended or prosecuted by men and decided by men judges. But women played major roles in a number of the issues in the book as organizers for change, shapers of legislation, and, particularly in critical labor-reform areas, champions and advocates.

The structure of the state court system in this period had roots in the state's earliest years. It had evolved over the years and was embodied in the most recent version of the New York State Constitution, approved by voters in 1894, and then refined by subsequent amendments and legislative enactments.[14]

The first level, the Supreme Court of the State of New York, was vested with "general jurisdiction in law and equity."[15] Its title implies it

was a single entity, but actually there was generally one state supreme court in each county. *Supreme Court* sounds like the top court, but these were (and still are) the state courts of original jurisdiction for most of the constitutionally significant cases of the sort covered in this book.

There were four regional appellate divisions of the supreme court, whose members were designated by the governor from justices of the supreme court, creating an intermediate appellate court system. The appellate divisions became the courts of final review on appeals on the basis of fact. (The judges on the supreme court and appellate division were officially titled *justices*, but they were commonly referred to as *judges*.)

The role of the court of appeals at the top of the structure was defined in the state constitution:

> The jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The Appellate Division in any department may however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals.[16]

That court consisted of a chief judge and six associate judges (usually just referred to as *judges*), seven in all. Its jurisdiction was refined over subsequent years by constitutional amendment or legislative enactment, mainly to stem the flow of appeals to the highest court, which gave it a chronic backlog. Cases could be appealed to the court of appeals that involved questions of law, where the appellate division had reversed the original court or was itself divided in its decision, where the appellate division felt that the legal issues were so profound or unprecedented that the determination and guidance of the court of appeals were needed, or that were capital cases. The court of appeals could decline to hear an appeal but rarely did so. The court's jurisdiction was refined over the

years through constitutional amendments and legislative enactments, but it remained the pinnacle of the crucible, the place where the most challenging issues were resolved.

The three-tiered structure worked tolerably well. Judges were elected, but the governor filled vacancies, and often the appointees ran for their positions at elections and thereby retained them. But appeals were common, and work piled up toward the top of the structure. Amendments to the constitution in 1899 permitted the governor, on appeal from an appellate division that help was needed, to make temporary additional appointments there and, on appeal from the chief judge of the court of appeals, to temporarily assign additional judges to that court until the calendar was reduced. A 1905 amendment authorized the legislature to increase the number of supreme court judges for any judicial district. It was common for a judge assigned temporarily to the court to later run for and be elected to that court when a vacancy occurred.

That all helped expedite things, but the court of appeals often had a chronic backlog, a reflection of the novelty and number of issues that were being considered in the court system.

Listed below are the chief judges and associate judges who served on the court of appeals in the 1890–1920 era. Party designations are noted, but their significance is limited since judges often ran unopposed, were affiliated with one party but endorsed by the other party (hence the note *Democrat/Republican* or *Republican/Democrat*), or changed political affiliation before joining the court. *Age limited* means they left when they met the mandatory retirement age—at that time, seventy years old (see tables I.1 and I.2).[17]

Table I.1. Chief Judges

Chief Judge	**Years Served**	**Political Party**	**Notes**
Charles Andrews	1881–82 and 1893–97	Republican	Age limited
Alton B. Parker	1898–1904	Democrat	Resigned to run for president
Edgar M. Cullen	1904–13	Democrat/ Republican	Appointed to fill vacancy, then elected, then age limited
Willard Bartlett	1914–16	Democrat	Age limited
Frank H. Hiscock	1917–26	Democrat/ Progressive	Age limited

Table I.2. Associate Judges

Judge	Years Served	Political Party	Comments
William S. Andrews	1917–28	Republican	Son of Chief Judge Charles Andrews
Edward T. Bartlett	1894–1910	Republican	
Willard Bartlett	1906–16	Democrat	Also served as chief judge
Benjamin N. Cardozo	1914–33	Democrat/ Republican	Also served as associate justice of the US Supreme Court
Emory A. Chase	1906–21	Republican	
Frederick Colin	1910–20	Republican	
William H. Cuddeback	1913–19	Democrat/ Independence League	
Edgar M. Cullen	1900–1913	Democrat/ Republican	Also served as chief judge
Robert Earl	1868–94	Democrat	
Abraham Elkus	1919–20	Democrat	
John Clinton Gray	1888–1913	Democrat	
Albert Haight	1895–1912	Republican	
Frank H. Hiscock	1906–26	Democrat/ Progressive	Also served as chief judge
John W. Hogan	1913–23	Democrat	
William B. Hornblower	1914	Democrat	
Celora E. Martin	1896–1904	Republican	

Nathan L. Miller	1913–15	Republican	Also served as governor
Denis O'Brien	1889–1913	Democrat	Also served as New York attorney general
Rufus W. Peckham Jr.	1886–95	Democrat	Also served as associate justice of the US Supreme Court
Cuthbert W. Pound	1915–34	Republican/ Democrat	Also served as chief judge
Samuel Seabury	1914–16	Citizens' Union/ Municipal Ownership League/ Progressive/Democrat	
Irving G. Vann	1895–1912	Republican/Democrat	
William E. Werner	1900–16	Republican/Democrat	

There are many issues and cases of importance in the court of appeals' work in the Progressive Era. This book is necessarily highly selective. The case selection follows these criteria:

- Deals with a key public issue of the era
- Explores important, complex issues of constitutional law
- Recognized as important at the time by the news media and the legal community
- Decision is illustrative of the view of the courts in assessing the validity of public policy and the degree to which policy may affect or restrict the rights and liberty of individuals or corporations
- Sets precedents
- Not explored in depth in historical accounts

Much of the discussion in the book is based on the extensive *Cases and Briefs* filed with the court of appeals by contending attorneys that explore policy and constitutional issues. They are preserved in the Court Records in the State Archives in Albany. Most have not been used by researchers before.

This book has twelve chapters and a conclusion:

Chapter 1, "Monitoring the Expansive State," introduces the role of the court of appeals as arbiter and mediator among the competing rights of the legislature to pass regulatory legislation, of individuals to personal liberty, and of business owners to manage their businesses without government interference.

Chapter 2, "The Right to Privacy," discusses the case of a young woman whose photo was used for advertising without her consent, which the court of appeals approved but the legislature the next year prohibited.

Chapter 3, "The Case That Helped Change Constitutional History and Launch a Quest for the Presidency," describes the 1904 case of *People v. Lochner*, where the court of appeals affirmed state regulatory authority, only to be overturned the next year by the US Supreme Court in the famous case of *Lochner v. New York*. The case brought national prominence to New York's chief judge, Alton B. Parker, helping him launch a presidential campaign in 1904.

Chapter 4, "The Chief Judge Runs for President," covers Chief Judge Alton B. Parker's unsuccessful run for the presidency in 1904.

Chapter 5, "Public Health and Individual Rights," analyzes how the courts handled the contentious issue of compulsory smallpox vaccinations for school students.

Chapter 6, "The Insanity Defense on Trial," analyzes how New York's legal community, its medical jurisprudence community, and its court system wrestled with the plea of insanity as a defense in a famous case and then contended with the claim that the insanity had been cured as a basis for seeking release from state custody.

Chapter 7, "The Debut of the Administrative State," explores the work of the New York State Commission on Gas and Electricity, the prototype of what would come to be called the administrative state, and the challenge to its constitutionality.

Chapter 8, "The Administrative State in Action," analyzes the early years of the state Public Service Commission, successor to the Commission on Gas and Electricity with much broader regulatory powers, created in 1907, and the role of the court in supporting its authority and work but occasionally limiting its power.

Chapter 9, "State Protection Denied for Women Workers," tells the story of New York's first attempt to restrict women from working nights in factories and the court's decision that it was unconstitutional.

Chapter 10, "State Protection Affirmed for Women Workers," is the next part of the story of the state's determination to restrict women's working hours, this time ending with the court approving the restriction.

Chapter 11, "Workers' Compensation Denied," is the story of New York's first law to protect workers injured or killed in workplace accidents, struck down by the court of appeals in 1911.

Chapter 12, "Workers' Compensation Affirmed," is the next part of the story, covering a state constitutional amendment to authorize workers' compensation, a new law, and validation of that law by both the New York Court of Appeals and the US Supreme Court.

The final section closes the story by noting the public's satisfaction with its state's highest court.

Many of the issues in this book reverberate today. The role of New York's highest court is still a challenging one. As Chief Judge Judith Kaye (1993–2008) wrote, "issues . . . that reach a state appeals court cannot be resolved simply by consulting a good dictionary or communing with the statutory text." Those courts decide difficult cases: "state court dockets

comprise the battlefields of first resort in social revolutions." Courts exercise discretionary judgment: "state courts have openly and explicitly balanced considerations of social welfare and have fashioned new causes and action where common sense justice required." They may interpret the meaning of statutes broadly but, in the absence of a statute, courts should not "make law." On the other hand, "given the enormous volume of state court litigation, the unending array of novel fact patterns pushing the law to progress, and the inability of legislatures to react immediately to the many changes in society . . . courts interpreting statutes and filling the gaps have no choice but to 'make law' in circumstances where neither the statutory text nor the 'legislative will' provides a single clear answer."[18] The role of the courts is one of judgment and balance, says Kaye. That was also the case in the Progressive Era.