THE EARLY YEARS OF THE AMERICAN BAR ASSOCIATION, 1878-1928

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ABSTRACT

The American Bar Association was founded by Simeon Baldwin and other members of the legal elite who wished to revitalize their profession. During its earliest years, however, the ABA functioned less as a professional organization than as a genteel social club which met annually at fashionable Saratoga Springs. Only when the Association was challenged by the National Bar Association (1888-1891), an anemic rival organized along representative lines, did the ABA respond by convening in larger cities. Yet even after the Association began to solicit members during the second decade of the twentieth century, it retained certain characteristics of a private club, such as de facto governance by an inner circle, leisurely policy making, and refusal to admit blacks.

For much of its early history the American Bar Association supported conservative reform as a means of restoring the influence of the legal elite to American life. ABA leaders viewed the growth of corporate power with almost as much trepidation as labor violence, and they did not oppose legal evolution so long as it was directed by the judiciary and not by state or federal legislatures. Emulating the medical profession--though with considerably less success--the Association attempted to "raise

standards" by gaining control of professional education, entrance examinations, and ethical codes.

During the second decade of the twentieth century, the mood of the Association grew noticeably more pessimistic as it became clear that the legal elite would be unable to guide progressive tendencies. Dismayed by attempts to institute the recall of judges and judicial decisions, the ABA allowed a reactionary firebrand to direct its successful campaign against the proposals. Association leaders had hoped that World War I would purge the nation's soul of unAmerican accretions, but they ruefully discovered that war only accelerated the spread of revolutionary socialism and the growth of the federal government. To counter these trends, the ABA launched a frenzied but ineffective crusade to promote "Americanization" and the veneration of the Constitution. Thus even before the appearance of the New Deal, the American Bar Association had become a conservative political pressure group.

PREFACE

In October 1974, Professor William Harbaugh, the director of a graduate seminar on the legal profession in which I was enrolled, suggested that I write an exploratory paper based upon ten years of the New York Bar Association's Proceedings. While making a cursory search for the volumes at the University of Virginia law library, my attention was drawn to the American Bar Association Reports available on the shelves. Surely, I reasoned, the fat yearbooks of a national association would prove more interesting and easier to work with than the scanty records of a state organization. Professor Harbaugh approved the substitution and later agreed to become the adviser for this dissertation.

One advantage to such an offhand method of selecting a dissertation topic was that I brought few prejudices or preconceptions to my study. I had had no previous interest in the American Bar Association, and my contacts with the organization have remained minimal because virtually all of its records for the years prior to 1928 have long since been destroyed. I have gained no special faith in the wisdom or impartiality of elite professionals, but neither have I been convinced, as was George Bernard Shaw, that "all professions are conspiracies against the laity." My

goal has been to write as unpretentious a history of the early years of the American Bar Association as it was possible to manage within the framework of a doctoral dissertation--a literary form by nature pretentious. My model has been the urbane and graceful Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870-1970 (1970) by George Martin, a freelance writer and a graduate of the University of Virginia Law School. I am conscious of having only one methodological ax to grind: a belief that prose and people are more important than paradigms. As for the size of the manuscript, I can only proffer the words of Pascal, "Please excuse such a long letter; I don't have time to write a short one."

Time is something I should have had in abundance since it has taken me nearly ten years of sporadic effort to complete this dissertation. I appreciate the patience with which my adviser, my wife, and my parents have endured my leisurely approach to research and writing. Because of the nature of my subject matter, I have made many requests for information by mail and have been gratified by the kind responses that I have received. Ironically, some of the most personal and thoughtful replies have come from librarians whose institutional holdings contained nothing of value for this project. My special thanks are due to

Laura Young and Mary Sidwell, successive interlibrary loan librarians at Bob Jones University, for their persistence in ferreting out obscure materials without the benefit of modern technological aids. Mr. and Mrs. Edward J. Bunker and Dr. and Mrs. Carl Abrams were most amiable hosts while I investigated the resources of Yale University and the Library of Congress respectively.

My adviser, William Harbaugh, and my second reader, Charles W. McCurdy, have been generous in their encouragement. Although Lewis Bateman, Norbert Brockman, Gerald Carson, Daniel J. Flanigan, Joseph Kett, and Edward E. Younger read only small portions of the manuscript (and were sometimes very critical of what they had read), each in his own way also encouraged me to continue. My friend and former fellow student at the University of Virginia, Jeff Hoyt, read the entire dissertation and made extensive suggestions as to both style and content. Rachel Matzko, an English teacher as well as my wife, proofread all of the chapters at least once and discovered a host of punctuation and syntactical errors. I am most indebted, however, to George and Darlene Matzko, my brother and sister-in-law. Darlene typed the manuscript into a word processor while George undertook the care and feeding of the computer. Under trying circumstances, they performed out of kindness a task they would not have done for money.

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CHAPTER 1

"THE BEST MEN OF THE BAR": THE FOUNDING OF THE AMERICAN BAR ASSOCIATION

On a cool but sunny Wednesday morning, August 21, 1878, nearly a hundred lawyers gathered in the narrow courtroom behind the Saratoga Springs town hall to organize the American Bar Association. There was some risk of embarrassment to the elite members of the bar who had lent their names and respectability to the affair; a majority of those who had signed the call for the organizational meeting were not even in attendance. The establishment of a national legal organization might well have seemed premature in an era of weak or non-existent state and local bar associations. In fact, these leading lawyers need not have feared that their halfhearted confidence had been misplaced. During its more than one hundred years of existence, the American Bar Association has become one of the most influential private interest groups in American political life.[1]

Curiously, there has been little scholarly study of the founders and their motives for organizing the Association. The official organizational History of the

American Bar Association (1953) says only that the "proposal to organize a nationwide association of members of the American bar originated with Simeon E. Baldwin of Connecticut."[2] In the absence of such studies, it has been suggested that the ABA was organized in reaction to the movement for liberal reform in the 1870's and as a means of promoting that variety of radical conservatism usually denominated laissez faire. Even a recent ABA president characterized the founders of the Association

> as conservatives very much linked with big business....[The] "good" which the Association was designed to foster throughout the land had a rather specific meaning which had to do with railroads and banks and all the forces which changed our country [into] the mightiest industrial empire on the face of the earth, with all its concomitant rape of the earth, pollution and political corruption.[3]

This theory attracted the noted constitutional historian, Edward S. Corwin, and first appeared in the dissertation of Benjamin Twiss, one of his students.[4] Twiss was somewhat vague about the influence of the ABA in the promotion of laissez-faire economics and contented himself with demonstrating that a number of conservative lawyers were indeed members of the Association. However, Corwin, in the introduction to Twiss's Lawyers and the Constitution, stated flatly that

> the development of American Constitutional law during the period 1875 to 1935 was...the work primarily of a small group of lawyers whose clients were great financial and business

> concerns--in short, of the aristocracy of the American bar, the founders and principal figures of the American Bar Association.[5]

Even before this work appeared, Corwin had developed the thesis further in Constitutional Revolution, Ltd. The ABA, he wrote, "organized in the wake of the decision in Munn v. Illinois,...soon became a sort of juristic sewing circle for mutual education in the gospel of Laissez-Faire."[6] Corwin then cast subtle inference aside in a series of lectures published as Liberty Against Government. Here the birthplace of the ABA became Chicago, "a fact reflecting the animus of some of its founders toward the 'barbarous' decision in Munn v. Illinois."[7] Finally, C. Herman Pritchett, citing Corwin, transformed the theory into textbook certainty: "the Association was founded in Chicago in 1878, and a principal purpose of its organization was to fight the 'barbarous' decision of Munn v. Illinois."[8]

Aside from the difficulty of geography, the most obvious flaw in the Corwin thesis is its anachronism. Corwin's "founders," except for William M. Evarts and Edward J. Phelps, were not, in fact, founders of the American Bar Association, though they were influential turn-of-the-century lawyers.[9] Certainly the belief that the American Bar Association was "from its foundation embarked on a deliberate and persistent campaign of

education designed to reverse the [Supreme] Court's broad conception of legislative power" would have surprised the little band who met behind Saratoga's town hall in 1878.[10] Powerless to control entrance into their own profession, they were hardly in a position to lecture the Supreme Court.

In reality the impetus for organizing a national lawyer's organization sprang more from professional than political or economic motives. Far from opposing the reform spirit of the age, the organization of the American Bar Association was itself a manifestation of that spirit, a spirit to which its founders were highly sympathetic.

During most of the nineteenth century, professional legal organizations had experienced a slow if sporadic decline in both numbers and influence. A number of lawyers' clubs and library societies were snuffed out after the Revolution when the normal unpopularity of lawyers was heightened by their attempts to enforce the repayment of debts and to protect Tory property.[11] Other associations fell before Jacksonian democracy with its distrust of an elite, faith in a natural right to follow any calling, and a fear that a recognition of professionals would create a privileged class.[12]

Across the nation standards for admission to the bar were lowered or abolished altogether. In 1800 a definite

period of preparation for entering the legal profession was required by fourteen of nineteen states; by 1840 such preparation was required by eleven of thirty states; in 1860 only nine of 39 states had any educational requirements. Several states adopted constitutional provisions similar to that of Michigan which permitted "every person of the age of twenty-one years, of good moral character" to practice law.[13] Virtually every legal memoir of the early nineteenth century seems to include a half-humorous illustration of the casual manner in which prospective lawyers were certified to practice in antebellum America. L. E. Chittenden, chairman of a committee on bar admission in Vermont of the 1850's, questioned two young men who wanted to go west:

> Of any branch of the law, they were as ignorant as so many Hottentots....I frankly told them that for them to attempt to practice law would be wicked, dangerous, and would subject them to suits for malpractice. They begged, they prayed, they cried....I, with much self-reproach, consented to sign their certificates, on condition that each would buy a copy of Blackstone, Kent's Commentaries, and Chitty's Pleadings, and immediately emigrate to some Western town.[14]

To Roscoe Pound such instances buttressed a belief that the period between the demise of the Suffolk [Boston] Bar Association in 1836 and the organization of the Association of the Bar of the City of New York in 1870 represented an "Era of Decadence" for the American legal

profession, a decadence from which it was rescued only with difficulty by the elite leadership of resurgent bar associations.[15] However, as Maxwell Bloomfield has pointed out, "this moral drama of light and shadow" places too much emphasis upon "formal organization as the appropriate yardstick by which to measure the strength of professionalism within the bar."[16] In a small community, and especially while riding the judicial circuit, lawyers and judges could more easily and informally discipline a colleague than can the grievance committee of a modern bar association. Furthermore, such notables as Oliver Wendell Holmes, Jr., Charles Francis Adams, Elihu Root, Joseph H. Choate, Salmon P. Chase, and John Peter Altgeld all began their distinguished careers during this period with almost as little legal knowledge as Chittenden's western exiles. Finally, in an era when high geographic and social mobility was combined with the relatively mundane tasks of the frontier lawyer, the old professional standards would have been difficult to maintain with or without bar associations.

> Formal restrictions disappeared; but the market for legal services remained, a harsh and efficient control. It pruned away deadwood; it rewarded the adaptive and the cunning. Jacksonian democracy did not make everyman a lawyer. It did encourage a scrambling bar of shrewd entrepreneurs.[17]

A "scrambling bar" did not encourage strong bar associations, however. Although little research has been done into the records of these organizations, now scattered among state libraries or destroyed by fire and neglect, it seems that far from enforcing an aristocratic monopoly over the legal profession, most antebellum bar associations were ineffective in maintaining even a modicum of ethical and disciplinary standards. Indeed, the enforcement of ethical and disciplinary standards was not often their intention. Many were engaged solely in the establishment of a law library, while others, perhaps the majority, were chiefly social. In some cases their only surviving publications are banquet menus.[18]

Renewed interest in bar associations after the Civil War stemmed from changes both within the profession of law and in American society as a whole. While the cities had grown enormously between 1850 and 1870, the number of urban lawyers had grown even faster. No longer could the elite at the bar expect to maintain their informal and, at least partly successful, control over the profession. Having forsaken the courthouse for the law office, the most affluent lawyers were unlikely even to know the members of the lower caste "policecourt lawyers." Therefore, unlike antebellum societies, the new bar associations generally restricted membership to the "decent part" of the

profession, "primarily well-to-do business lawyers, predominately of old American stock."[19] Where once elite lawyers had controlled admission to the legal profession itself, they now hoped to restrict membership in the bar association in order to distance themselves, in the words of a New York bar leaders, from the men "seen in almost all our courts, slovenly in dress, uncouth in manners and habits, ignorant even of the English language, jostling and crowding and vulgarizing the profession."[20]

It was also clear that while the elite of the bar had gained great wealth by its alliance with corporate capitalism, it had lost much of its traditional influence upon political life.[21] Even in the antebellum period young lawyers had been warned not to leave "the broad highway of an honorable and profitable profession, for the fitful and exciting pursuits, and the unsubstantial rewards of the mere politician."[22] At least in the 1840's, the myth of the office seeking the man might seem possible; by the '70's it was not even lawyerly fiction. The American Law Review complained that a "great democratic flood" had filled "the bench with political partisans, the minor legal offices with political hacks, and the bar with an indiscriminate herd of camp followers" and had "spread its waters over the whole country."[23] Bar associations seemed to be one solution. While the elite of the bar, unable to

"afford the business sacrifice of serving in the General Assembly," might continue to disdain politics, a bar association organized for their "protection and self-preservation" could "secure the results of all the...experience of the entire bar of the State in recommendations for reform in the law."[24]

Some elite lawyers were also concerned with the decline in the status of their profession which was clearly evident in the last decades of the nineteenth century. More than a hundred years before, law had supplanted theology at the apex of public influence. Lawyers were fond of quoting de Tocqueville's famous dictum that the "American aristocracy" was not to be found "among the rich who are bound by no common tie" but among "the judicial bench and bar."[25] By the 1870's, this sentiment rang somewhat hollow. The status of lawyers had obviously eroded in relation to the rich, who had grown vastly richer with the advent of financial capitalism. Where once the lawyer had been an independent policy maker in the public forum, he had now become a wealthy but dependent servant of some corporate chieftain. Furthermore, his former status was also being eroded by the rise of scientifically based professions such as medicine, engineering, and chemistry. "Thus," wrote W. G. Hammond in 1875, "the bar has lost its privileged position, and its members stand on the same

broad social platform with the rest of that great army who earn their bread by the labor of their brains, rather than their hands."[26]

Finally, the organization of bar associations was in part a manifestation of the upsurge in the formation of all types of voluntary associations after the Civil War, professional, humanitarian, and fraternal. This "habit of forming associations" was spurred by improved transportation and communication and especially by the increase in leisure time provided by the success of American capitalism.[27] Bar association leaders represented that segment of the profession which could give attention to the more theoretical aspects of law as the Founders of the Republic had studied government. The more affluent the lawyer, the greater the possibility that he would engage in social activities which had at least an aura of serious purpose about them. And what better way to separate the elite from the "scrambling bar" than by sponsoring an expensive bar association banquet? Lawyers, no less than other groups, understood the value of organizing for purposes which crisscrossed the civic, professional, and social sphere. "If it were for nothing more than to be in the fashion and to protect their class interest," wrote the editor of the Albany Law Journal, "it would be proper for lawyers to formally unite."[28]

The varied motives for organizing bar associations were evident in the formation of the Association of the Bar of the City of New York (1870). Usually credited to a "battle of lawyers against the Tweed Ring,"[29] the Association was actually organized for other reasons as well. In 1868 the leaders of the New York bar had begun a shifting fratricidal struggle on behalf of Cornelius Vanderbilt, Daniel Drew, Jay Gould, and Jim Fish, who were attempting to gain control of the Erie Railroad. When judges, as well as legislators and lawyers, proved to be for sale to the highest bidder, the legal system nearly collapsed into anarchy. Soon after an armed conflict between two hired gangs on the Erie tracks outside Binghamton was halted by the state militia, the call for an organization of the New York City bar began to circulate.

While the Tweed Ring did have some interest in the Erie scandal, the Association of the Bar did not move immediately against either Tweed or Fish, the erstwhile employers of most of its members. Instead, the Association purchased a brownstone building for $43,000 and installed a full-time librarian, rare books, busts of eminent lawyers, and a punch bowl filled with a beverage "brewed according to a special recipe furnished by the nearby Century Club." When the Association did get around to prosecuting Tweed in 1873, one of the most influential lawyers of the city and

maverick member of the Association, David Dudley Field, defended the boss.[30]

The speeches of Association organizers like Dorman Eaton, William Evarts, James Emott, and Henry Nicoll make it clear that the major thrust of the new association was directed at restoring "the honor, integrity, and fame of the profession in its two manifestations of the Bench and Bar." This Nicoll believed could be achieved by gathering together "all that is intelligent, all that is honest, all that is honorable in this Profession."[31](The latter was pretty nearly defined by an entrance fee of $50 and annual dues of $40). "We have become simply a multitude of individuals, engaged in the same business," said Emott. "And the objects and the methods of those engaged in that business are very much dictated by those who employ them....Power is the thing we are first to aim at. The use of it we are to determine afterwards."[32]

But most of the new bar associations of the seventies were not as successful in gaining power as they had hoped. A few were able to have corrupt judges replaced. Others suggested politically inoffensive legal reforms to their state legislatures. Most continued the older social tradition of the antebellum societies. One convened only at funerals--"not much life in our organization," the secretary commented.[33]

The formation of the American Bar Association, then, was not, except in a metaphorical sense, the capstone of a pyramid of state and local bar associations.[34] In 1878 there were probably no more than seven city and eight state bar associations in twelve states. Had the organization of the ABA awaited the formation of bar associations in only half of the United States, it could not have been organized until after the turn of the century.[35]

That it was organized as early as 1878 must be largely credited to the energy and foresight of Simeon Baldwin. But it does his successful effort no injustice to note that others had previously conceived of a national organization of lawyers. Issac Grant Thompson, editor of the Albany Law Journal, had suggested as early as 1875 that the lawyers of the Nation "should be combined in an organic whole."[36] Two years later he published anonymously a letter which proposed a "legal congress of a week's duration," composed of two to four delegates from each state, at which would be discussed

> questions of inter-state commerce and national control of railroads; extradition; naturalization; citizenship; suffrage; uniform divorce laws, etc., etc. I believe the Federalist and Elliott's debates and the like might be put completely in the shade and a mine of legal political wisdom be thus supplied from which half-educated congressmen and legislators might thereafter draw with great profit to themselves and the people.[37]

Gustave Koerner may have antedated both of these gentlemen by suggesting in the Chicago Legal News that the Chicago Bar Association assist the organization of a representative national association.[38]

Ironically, an actual attempt to organize a national bar association in 1876 failed so miserably that it seems doubtful the founders of the American Bar Association were even aware of its putative existence. The movement began among leaders of the "United States Law Association," a lawyer referral service of 2500 members who frequently engaged in the collection of debts on commission.[39] When state legislatures began to discriminate against out-of-state creditors in favor of resident debtors, the lawyers found themselves unable to take the matter to the Supreme Court because of the long delay and prohibitive costs. In May, 1876, the Law Association announced a "Congress of Lawyers" to be convened in Philadelphia on June 20, to discuss "the assimilation or unification of the laws of the several states, especially in those particulars most directly interesting to the commercial world."[40] Leaders of the movement, such as Orlando F. Bump of Baltimore and Charles S. Ullman of New York, clearly hoped to organize a permanent association which would have influence in Washington as well as in state legislatures.

The actual meeting of the "Congress" in the Philadelphia Merchant Exchange was a comedy of errors. The invitations had been mistakenly printed with a July rather than a June date, so that fewer than sixty lawyers arrived for the session. Half of these then wandered off to view the nearly completed Centennial Exhibition. When Bump and Ullman presented their plans for the new organization to the handful of lawyers in attendance, their ideas were immediately labeled "impracticable" and "impossible." Even the elected president of the "Congress," one M. F. Slocum of Boston, was scarcely encouraging, fearing that the "work was of such magnitude that, if the Congress attempted it at all, nothing would be accomplished."[41] So dispirited was Ullman that he moved an adjournment of the assembly until a committee could arrange another meeting "in the early autumn." The Albany Law Journal hailed the United States Law Association as "pioneers in attempting to form a national [bar] association," but the "Congress of Lawyers" nonetheless disappeared without a trace.[42]

The fact of the matter was that the wrong strata of lawyers had been assembled in 1876. As a rule, the elite of the bar did not collect debts on commission, and it was the elite of the bar that was necessary to the success of a national bar association in the late nineteenth century. Even then the establishment of the American Bar Association

might have been delayed many years had it not been for the catalyst of a young Connecticut lawyer, Simeon E. Baldwin (1840-1927).[43]

Baldwin was the youngest and most precocious of nine children born to a prominent New Haven family. One of his great-grandfathers was Roger Sherman, signer of the Declaration of Independence. His grandfather had been an influential Federalist and founder of an anti-slavery society, and his father, who had served both as a senator and governor of Connecticut, argued the famous Amistad slave case in association with John Quincy Adams. Because poor eyesight prohibited service in the Civil War, Baldwin was able to continue the study of law at both Yale and Harvard before returning to New Haven in 1863 to practice in his father's law office. He wisely specialized in corporate practice, gained the New York and New England Railroad as a client, and soon took his place among the most distinguished (and wealthy) members of the Connecticut bar.

Though Baldwin eventually became Chief Justice of the Connecticut Supreme Court and, still later, Governor of the state, his importance lies only partially in a political career studded with as many defeats as successes. Beginning in childhood with the organization of a "corporation" and a secret order called the "Clio Society,"

Baldwin remained throughout life an avid organizer and joiner. Probably no one else in American history has held the presidencies of as many different professional societies. Between 1890 and 1910 he was president of the American Bar Association, the American Historical Association, the American Social Science Association, the International Law Association, the American Political Science Association, and the Association of American Law Schools. Vice-president of a number of other organizations, notably the American Association for the Advancement of Science, Baldwin retained membership in such diverse groups as the YMCA (president, 1884-1886), the New Haven Colony Historical Society (president, 1884-1896), the Board of Park Commissioners of New Haven, the American Economic Association, the New England Tariff Reform League, the Union International de Droit Penal, the General Hospital Society of Connecticut, the Conference of Congregational Churches of Connecticut (moderator, 1881), and the Sons of the American Revolution.

Despite his organizational proclivities, Baldwin was hardly a hail-fellow-well-met. To those outside his immediate family he projected an image of aloof formality. His capacity for work was enormous, a characteristic indicative not only of his personality and patrician upbringing but of tragedy as well. After 1872, when his

wife became completely insane and his oldest daughter died, Baldwin submerged himself in work. "There are those to whom hard work brings its daily blessing as a banisher of sorrow," he once said. "Melancholy is a foe to be expelled at any cost, and preoccupation is often the only thing that avails to shut it out."[44]

In great part Baldwin's consuming energy was directed towards the concerns of Gilded Age reform. Baldwin was, in fact, the epitome of "The Best Men," "the men of breeding and intelligence, of taste and substance," who saw themselves standing between the two extremes in American political life--the robber barons, whose greed for gain seemed to threaten traditional moral principles, and the radicals, whose desire to tamper with basic economic standards threatened American prosperity.[45] On the national level "The Best Men" included such academicians as Mark Hopkins and Charles Eliot Norton; men of letters William Dean Howells and Thomas Wentworth Higginson; influential journalists like E. L. Godkin of the Nation and Horace White of the Chicago Tribune; and politicians of the caliber of Carl Schurz, Samuel J. Tilden, Dorman B. Eaton, George F. Edmonds, Grover Cleveland, and the young Theodore Roosevelt and Henry Cabot Lodge.

"The Best Men" viewed themselves as independents, reformers whose goals would be acceptable to their

colleagues in either party. They sought to purge the political system of its corruption--bosses in the North, carpetbaggers in the South--but they had no desire to make sweeping changes in society. Moderate reform, "safe, careful, and deliberate reform," in the words of Grover Cleveland, was their objective.

> For the abuses that offended them they proposed the simple remedies of "good government," economic orthodoxy and moral rejuvenation. Put "good men" into positions of responsibility and power, they urged, revive the Jeffersonian regard for limited government; respect and defend the tested Christian moral precepts and apply them to everyday affairs, as well as to government; trust in the "natural laws" of political economy to right the economic wrongs of the day.[46]

Throughout his long life Baldwin was able to touch all the conventional bases of Gilded Age reform and some unconventional ones as well. One of his longest and most unsuccessful struggles was an attempt to rid Connecticut of the grossly misapportioned electoral districts that favored rural areas of the state. (Not surprisingly he organized a New Haven County Constitutional Reform Association in attempting to achieve this purpose.) In 1880, Baldwin wrote Senator George Edmunds of Vermont, requesting that crusty New Englander to run for the Republican presidential nomination in order to thwart the ambition of the bête noir of reformers, James G. Blaine. The following year Baldwin mobilized support for the establishment of a civil service system in state government and organized Connecticut's

Civil Service Reform Association. When the Republican Party nominated Blaine in 1884, Baldwin bolted the party, organizing and becoming president of the Connecticut Independent Republicans. Most of these Mugwumps eventually returned to the Republican fold, but Baldwin became a Democrat.

As might be expected, many of Baldwin's reform interests were intimately connected with the law. At twenty-seven he tackled the ambitious task of preparing a digest of Connecticut law, persuaded the legislature to purchase 183 copies of the finished product, and gained an instant reputation when Baldwin's Connecticut Digest became a standard reference work for lawyers of his state. From 1877 to 1879 Baldwin worked with several committees which finally abolished the obsolete distinction between suits at law and suits at equity, and at the end of the nineteenth century he joined penologists in advocating what seems at first glance to be an odd assortment of criminal reforms directed against the penitentiary system: probation, parole, indeterminate sentences, the reintroduction of the whipping post, and castration for rape. Baldwin was also one of the first American lawyers to suggest laws prohibiting the use of heroic measures to prolong the lives of terminally ill patients.[47]

Much of Baldwin's energy was devoted to the improvement of legal education. Improbable as it may seem considering his other activities, Baldwin was a professor at the Yale Law School from 1869 to 1912--including two years when he was also governor of the state. At Yale he successfully advocated the lengthening of the law school course from two to three years and introduced the first graduate law program in the United States. Throughout his life Baldwin remained unenthusiastic about the major contemporary innovation in legal education, the case book method introduced by Christopher C. Langdell at Harvard Law School in 1870. In a sense Baldwin was ahead of his time, for he criticized the pseudo-scientific nature of this pedagogical method on the grounds it ignored "the human element in whatever judges may say or do" and "the power of circumstances to affect their conclusions."[48]

In September, 1877, Baldwin explained both the Yale plan for graduate study in law and the need for a longer course of study for the professional degree to the American Social Science Association (1865-1909). At the time it was the only national organization providing a forum for the discussion of legal topics. The ASSA had been founded by a group of philanthropists and social Don Quixotes whose urge for reform had led them to a quest for knowledge. Believing in an absolute truth, in natural laws which

governed human conduct, and in man's ability to discover these laws by piling up empirical data, society members earnestly hoped that social science would become "the science of the age," that it would produce "an earthly paradise--an enchanted ground."[49] The interest of the Association was divided into four departments: education, public health, social economy, and jurisprudence. To the fourth department was assigned the task of considering

> the absolute science of Right; and second, the Amendment of laws. This department should be the final resort of the other three; for when the laws of Education, of Public Health, and Social Economy are fully ascertained, the law of the land should recognize and define them all.[50]

As time passed, the utopian overtones of the ASSA program seemed less in harmony with the prevailing notions of reform, and the Association collapsed--though not before it had served as the matrix from which emerged such professional organizations as the American Economic Association, the American Political Science Association, the American Historical Association, and the American Bar Association.

After Baldwin read his paper "Graduate Courses in Law Schools" to the ASSA Department of Jurisprudence, a discussion occurred in which three future leaders of the ABA took part. On the motion of Carleton Hunt, dean of the University of Louisiana [Tulane], the assembly adopted a vague resolution commending "the care, future

encouragement, and future development" of law schools "to the members of the legal profession and to the friends of learning in general."[51] A year later, at the opening of the conference which launched the American Bar Association, Baldwin claimed that the idea for such an organization had sprung from a resolution passed by the Department of Jurisprudence. Since no such resolution has been discovered, it is probable that Baldwin conveniently confused the resolution on legal education with an informal conversation in which he had engaged with wealthy Louisiana lawyer, Felix P. Poché.[52]

In any case, Baldwin seems to have considered organizing such a professional group almost immediately following the ASSA convention, for he broached the idea to a former college classmate soon afterward. When his friend responded with an encouraging reply, suggesting that the proposed organization would encourage legal reform, Baldwin began the task of gaining the support of his seniors in the profession.[53] At the annual meeting of the Connecticut State Bar Association in January, 1878, he moved "that a committee of three be appointed to consider the propriety of organizing an association of American lawyers: with power to issue a circular on the subject." The Association--a more active and businesslike organization than most of its counterparts--approved the motion and

appointed Baldwin, Governor Richard D. Hubbard, and William Hamersley as committee members. A favorable assessment by the committee was assured since both the Governor and Hamersley, a personal friend of Baldwin and a founder of the Connecticut Bar Association, were sympathetic to legal reform.[54]

Baldwin then traded on the reputation of the governor to obtain approval of the new association by "a small number of leading lawyers in different parts of the country," who were asked to sign "a circular recommending the matter to the favorable consideration of the profession."[55] On April 29, Baldwin sent a letter requesting such signatures to thirteen prominent attorneys: Judge Charles Devens of Massachusetts, Governor Hubbard of Connecticut, Charles O'Conor of New York, Secretary of State William M. Evarts (New York), S. Teackle Wallis of Maryland, former Senator Charles R. Buckalew of Pennsylvania, Alexander R. Lawton of Georgia, Carleton Hunt of Louisiana, former Senator John B. Henderson of Missouri, former Senator Lyman Trumbull of Illinois, Governor George Hoadly of Ohio, Judge Thomas M. Cooley of Michigan, and Senator Stanley Matthews of Ohio.[56]

When six of these gentlemen--namely Devens, O'Conor, Wallis, Buckalew, Henderson, and Cooley--either refused to permit their names to be used or did not respond, Baldwin

addressed another letter to those who had agreed to sign the call, advising them that the Committee was "inviting a few others to add their names." These included Senator Benjamin Bristow of Kentucky, Henry Hitchcock of Missouri, Richard McMurtrie of Pennsylvania, John K. Porter of New York, Charles Train of Massachusetts, J. Randolph Tucker of Virginia, and Edward J. Phelps of Vermont.[57]

Excepting Evarts and Cooley, these twenty men are remembered today only by specialists. Yet in the late nineteenth century they were prominent members of their respective state bars; fifteen were of sufficient note to warrant a sketch in the Dictionary of American Biography. A composite portrait reveals striking similarities in both the background and viewpoint of these Gilded Age lawyers.

Though nine of the twenty were Democrats, eight were Republicans, and the political affiliation of three is unknown, virtually all were political moderates. Typical of their collective attitudes towards the Civil War are those of Charles Devens and Stanley Matthews, both of whom defended the Fugitive Slave Laws to their political detriment before becoming colonels in the Northern army. On the opposing side were men like Carleton Hunt who, with strong Union sympathies, fought for the Confederacy. After the war the twenty, almost to a man, opposed the Radicals. O'Conor, Tucker, and Hoadly represented Jefferson Davis or

his estate; Trumbull and Henderson were two of the famous seven Republicans who saved Andrew Johnson from conviction at his impeachment trial. Some of the twenty switched from one party to another, an oddity in Gilded Age politics. Henderson and Cooley went from Democrat to Republican, Matthews from Democrat to Republican to Liberal Republican, and Hoadly and Trumbull from Democrat to Republican to Liberal Republican to Democrat.

Unlike most lawyers of the period, fourteen of the twenty had attended college, and a majority had either attended law school (7), or had served an apprenticeship in another lawyer's office (7), or both. Only a few had "read law" privately in the manner of Abraham Lincoln. Significantly, of the six who did not sign the call, only two had attended college, and only one had attended law school.

In 1878, the average age of the twenty was fifty-seven, and fifteen were born between 1816 and 1826. They were at the height of their careers, and most had already served in some state or federal office. As might be expected, the twenty were, on the whole, very prosperous gentlemen doing a substantial amount of corporation work, though none were corporation lawyers in any modern sense of the term.

It is as liberal reformers, however, that they exhibit their most striking similarity. O'Conor and Evarts were the chief prosecutors of Boss Tweed; Wallis was president of the Civil Service Reform Association of Maryland; Buckalew reformed the penal code of Pennsylvania; Hunt became city attorney of New Orleans under a reform administration; Bristow and Henderson investigated and prosecuted the Whiskey Ring; Cooley later became an important member of the Interstate Commerce Commission under Grover Cleveland; Train, as a congressman, served as manager of impeachment proceedings against a corrupt judge; and even McMurtrie, an apolitical legal monomaniac, had one outside interest--hospital reform. John K. Porter, who had defended President Grant's venal private secretary Orville E. Babcock, was something of an exception. Yet he was the president of the newly organized New York State Bar Association and was included on the call at the request of O'Conor, who suggested that his former legal apprentice replace him.[58] Conspicuously absent from the call was the name of that brilliant individualist of the New York bar, David Dudley Field, whose aforementioned defense of Boss Tweed had not endeared him to his professional colleagues already offended by his combative personality and self-righteousness.[59]

Only four of the fourteen who signed the call--Bristow, Hitchcock, Phelps, and Hunt--actually attended the organizational meeting of the American Bar Association. The remainder, except for Randolph Tucker and Alexander Lawton, never played a significant role in the affairs of the ABA. Their places were taken by another similar though slightly younger group which included Baldwin, Luke Poland of Vermont, James Broadhead of Missouri, George Wright of Iowa, John H.B. Latrobe of Maryland, Thomas Jenkins Semmes of Louisiana, William Allen Butler of New York, and Francis Rawle of Pennsylvania.[60]

This "Saratoga clique," which was to direct the Association for at least the first decade "from the hotel porch after lunch," was also reform minded. Broadhead had acted as special counsel for the government in the Whiskey Ring scandal, and Poland was noted for his congressional investigations of the Crédit Mobilier, the carpetbag government of Arkansas, and the Ku Klux Klan. The most significant difference between the gentlemen asked to sign the call and the "Saratoga clique" was the number of legal educators in the latter group. Thus these men might have been expected to emphasize not only the more theoretical aspects of the law but also professional, rather than political reform.[61]

After Baldwin had acquired consent for the use of their names from fourteen bar leaders, he printed the call for organization which had circulated in handwritten form for several months. The call proposed "an informal meeting at Saratoga, N.Y., on Wednesday morning, August 21, 1878, to consider the feasibility and expediency of establishing an AMERICAN BAR ASSOCIATION," and Baldwin represented himself as a secretary who would report the views of the call's recipients to the August meeting.[62]

Baldwin clearly indicated that the call was to be sent only to a selective group of lawyers "whom such a project might interest." Discovering these gentlemen seems to have been fairly difficult in 1878. Baldwin was forced to rely a great deal on personal acquaintance or word of mouth. He kept a large notebook with a record of all lawyers to whom the call had been sent, and of the 607 names listed, one third were residents of Connecticut or the two neighboring states of New York and Massachusetts. Baldwin also sent copies of the call to most of the original sponsors for them to distribute judiciously.[63]

With the call circulating throughout the country, Baldwin made arrangements for group rates at Congress Hall, the largest resort hotel in both Saratoga and the nation. Saratoga Springs was chosen because more wealthy lawyers were likely to vacation at this prestigious spa than at any

other in the country. It was also central to the East, the section from which the ABA was to draw most of its members, and its cool temperatures and race track attracted large numbers of Southerners. More than usual of the latter were residing in Saratoga that summer because of a yellow fever epidemic that had been ravaging the lower Mississippi Valley. It is not surprising, therefore, that Louisiana had the largest representation at the organizational meeting.[64]

The responses which Baldwin had requested in the call were not forthcoming in the numbers he might have hoped. Fully four fifths of the recipients ignored it, sixty-four expressed approval of the organization but said they could not attend the August meeting, and fifty-four replied that they would be present. On the other hand, it seems Baldwin received only one negative reply from a recipient unfriendly to the notion of a national bar association.[65]

These responses to the call for organization as well as the few speeches and resolutions of the Saratoga convention itself provide substantial evidence that the impetus for founding the American Bar Association sprang from a desire to promote professional reform rather than to thwart political or economic reform. In fact, the varied facets of this reform interest may be grouped under the

four purposes adopted by the Saratoga assembly as Article I of its constitution:

> to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among members of the American bar.[66]

Though advancing "the science of jurisprudence" seems a glittering generality in our own day, "in an age which honored science above other sources of wisdom, it became clear that people who established their ability to study...scientifically would command attention and influence the course of events."[67] Judge Koerner, who claimed to have suggested a national bar association in the Chicago Legal News, reflected the mild utopianism of the ASSA in his reply to Baldwin. He hoped--and was undoubtedly disappointed--that the meetings of the bar association would be

> scientific conferences of Jurists, working in sections and preparing at each session material to be discussed at subsequent sessions. Judges, law writers and members of the Bar,...should all participate in such discussion and assist in laying practical measures of reform before the National and State legislatures.[68]

While not of primary importance to the founding of the Association, the first meeting did authorize a committee on Jurisprudence and another on International Law, thus providing a forum for the discussion of the more theoretical aspects of legal practice. Of course, it also

produced a measure of intellectual detachment from the overriding practical concerns of the "scrambling bar."[69]

The promotion of "uniformity of legislation throughout the Union" was, on the other hand, perhaps the greatest concern of Baldwin's correspondents, as it had been for the United States Law Association, a concern which could not be met by local or state bar associations. With the growth of national corporations and the expansion of trade across state boundaries as a result of advances in transportation and communication, lawyers found "the diversity existing in our commercial law" frustrating and inefficient. "Defects of existing statues...might be pointed out and proper remedies suggested," said one correspondent, if lawyers of one state were well acquainted with the legislation and judicial decisions of another.[70] At the first meeting of the Association, a committee on Commercial Law was authorized to examine laws concerning negotiable paper, "Looking toward further uniformity in the law on that subject."[71]

"Uphold[ing] the honor of the profession" was a euphemism for raising standards of legal education and admission to the bar, one of the primary motivations for founding the ABA. A number of Baldwin's correspondents feared that the organization might flounder unless its membership was restricted to those of "high standing in the

profession." Only gentlemen could inaugurate and carry forward "such true reforms as [were] in harmony with the progressive spirit of the age." At the organizational meeting Baldwin and Henry Smith of Albany "argued forcibly" that the new association admit no men who would not be worthy members.[72]

Baldwin hoped to de-emphasize the final objective of the ABA: the establishment of "cordial intercourse among members of the bar." In the constitution and preliminary circular, he listed it last, though in the call itself "comparison of views and friendly intercourse" appeared first. But even sociability could be viewed in a more serious light: the restoration of national harmony after a bitter civil war and Reconstruction. In the words of Gustave Koerner, a national bar association would have

> a most powerful tendency to weaken mutual prejudices, to produce harmonious and fraternal feelings amongst an influential and leading class of men, and would be a means of cementing our Union, so lately disrupted.[73]

The timing of the convention could hardly have been improved, following as it did, the Compromise of 1877 and occurring in the midst of a Southern yellow fever epidemic which brought immediate organized relief efforts from the North and expressions of gratitude from the South.[74] Lawyers as a professional group, moderate in political stance and representing the interests of national economic

development, might have been expected to stand in the vanguard on the "road to reunion," and, indeed, from its inception, the American Bar Association successfully fostered friendly relations among late enemies both at public sessions and privately at the annual banquet.[75]

Perhaps Senator Charles Jones of Florida best summarized the motives of the founders of the American Bar Association in his reply to the call: "[W]hen innovation and change are demanded in every quarter, there ought to be found somewhere in our system a calm conservative power which can expose fallacies, point out abuses, and suggest reforms without violence or shock to our government."[76] That was the objective of the "best men of the bar": safe, conservative reform.

Because of Baldwin's extensive planning, the actual organizational meeting on August 21 proved somewhat dull. There was much convention harmony and little controversy or dissent, although "an animated discussion arose on the point whether all lawyers present should take part in the organization, or only those to whom invitations had been sent." In the end only the latter were considered as the founders of the ABA. A committee to report a constitution returned with a completed draft only hours after its appointment. Baldwin had actually written it during his

summer vacation in the Adirondacks, and it was adopted by the association with only a few minor alterations.[77]

The unanimous election of James O. Broadhead (1819-1898) as the first president of the Association, at the time a largely honorary post, symbolized both the strengths and weaknesses of the new organization. Broadhead was dwarfed intellectually by many men in attendance at the meeting, but he was the epitome of the "best men of the bar." A native of Charlottesville, Virginia, he had gone west to Missouri as a young man. Though he had attended the University of Virginia for only a single session, he later became a lecturer at St. Louis Law School (Washington University). Broadhead was "a rather old-fashioned country practitioner...careless about details, sometimes slipshod in his work," who nevertheless, had successfully represented the railroad interests before the United States Supreme Court. A strong Union man during the Civil War, he was in great part responsible for preventing the fall of Missouri to the Confederacy. Then after the war, disgusted with the "test-oath" act and the "Force Bills," he became a Democrat. He also took a former Confederate officer as a law partner. Broadhead had acquired a reputation as a reformer from his fierce prosecutions of the Whiskey Ring, a notorious Collector of Internal Revenue in St. Louis, and the venal Chief Clerk of the Treasury Department.

"Broadhead was a lion," said one unknown contemporary, "when he was awake."[78]

Baldwin and the other founders of the American Bar Association were not disheartened by the absence of most of the signatories of the call nor by the small attendance. "What they lacked in numbers they made up in quality and that proved to be decisive."[79] The Albany Law Journal reported that the "business in hand was discussed by the best men present, and with an obvious desire to secure the best organization--the best results possible. This we believe has been done."[80] Baldwin returned to New Haven to confide in his journal, "The American Bar Association, which is really my child, was born nicely--full weight, and good prospects."[81]

CHAPTER 2

THE PULL OF INERTIA: 1878-1888

Despite Baldwin's sanguine comments at the birth of the American Bar Association and his optimism thereafter, the continued existence of the organization remained in doubt at least until 1889. One member later wrote that the Chairman of the Executive Committee, Luke Poland, "had a great anxiety" about the Association's final success. "We never came together at the annual meetings, in its early history, without a discussion as to whether the Association could live."[1]

The paucity and comparative impotence of state and local bar associations was hardly an aid to the survival and growth of a national association. Furthermore, the American Bar Association lacked even the kind of immediate practical purpose which had called the state and city associations into existence. The Association of the Bar of the City of New York (1870) arose because of a threat to the profession from political corruption; the burden of the Connecticut State Bar Association (1875) was for an end of confusion in the judicial process of that state; the Kentucky Bar Association (1871) advocated a constitutional

convention, some modifications in the law of evidence, and scale of fees; the Ohio Bar Association (1880) was established to fight for reorganization of the court system.[2] Meanwhile, the American Bar Association had as its constitutional goals advancing the science of jurisprudence, promoting the administration of justice and the uniformity of legislation, upholding the honor of the profession and encouraging cordial intercourse among the members of the bar. All these objectives were worthy--and all were theoretical.

The federal system of government in the United States was a further obstacle to the development of a national bar association. Not only was state law in the nineteenth century vastly more important to the average lawyer's client than federal legislation, but both legislation and "common law" rules of the various states differed widely. Discussions at ABA meetings suggest that lawyers were sometimes more familiar with judicial rulings in England than with those in neighboring states. Therefore, only "lawyers who practiced regularly in federal courts or who had clients doing business in several states could hope to gain in any immediate sense from national bar organization." No other American profession was so hobbled by state lines.[3]

It should not be surprising then that the American Bar Association found it necessary to walk circumspectly during its first decade, that it took no controversial positions nor launched on any public crusades. Henry Hitchcock, one of the early presidents, warned his colleagues that it was "not wise to enter upon debatable questions particularly in view of the fact that we cannot at the utmost do more than merely express an opinion."[4] The proverb of Augustus, festina lente--hasten slowly--was an unofficial motto,[5] and until the Association had established itself, it is difficult to fault the leadership for their conservatism of inertia.

Curiously, the earliest years, despite their record of little practical accomplishment, seem the most colorful. Like the earliest years of great men, which have attracted biographers from Parson Weems to the psychohistorians, they are more intimate, more comprehensible, and closer to one's own personal experience.[6]

It is appropriate, then, that one man, Simeon Baldwin, that slightly austere Yale professor with a thin beard and an unnatural capacity for work, should have conceived the simple constitutional structure which was to serve the American Bar Association with comparatively little change until 1936. Baldwin's constitution provided for a General Council consisting of one member from each state and

territory, theoretically elected by the entire membership, but nominated and effectively chosen by members from each of the states who were present at the annual meeting. The General Council was the nominating committee for Association officers and, as such, quickly became a focus of attention for prospective Association presidents.[7]

Nominations for membership in the Association were made by Local Councils of each state or territory, composed of a vice-president and at least two other members of the Association from the state. The members of the Local Councils were not usually as prominent in the affairs of the ABA as the General Council members and were frequently chosen for their prestige value back home.[8] John Norton Pomeroy learned of his selection as a vice-president from California by reading the newspaper.[9] The Association soon learned not to rely upon the vice-presidents for any serious work. When, in 1883, the Committee on Judicial Administration requested "summaries of the judicial systems in the respective states" from the vice-presidents, it received only one reply in 1884 and only three more in 1885--at which point the Committee gave up.[10]

The actual governing body of the Association was the Executive Committee. Originally consisting of the Secretary and Treasurer of the Association and three other ABA members, it was expanded seven times before 1936 until

it became a committee of fifteen.[11] Since the Association had only one treasurer and two secretaries during the remainder of the nineteenth century and since the elected members also tended to serve for long periods, the Executive Committee remained a stabilizing, if over-cautious, influence in Association affairs. Even the annually elected president and immediate ex-president were not added to the Committee until 1887. From the beginning, the Executive Committee met for a private midwinter session between the annual meetings of the Association, at which time the program of the next meeting was discussed and expenses were approved.[12] When, in 1884, a member of the Association committed the gaffe of asking for a report, the chairman coolly replied that the "various processes and modes by which we arrive at certain ends would not be interesting to hear."[13]

It has been suggested that above the Executive Committee there existed an "inner circle" of intimates who directed the affairs of the early ABA extraconstitutionally.[14] James Grafton Rogers identified the members of this "Saratoga clique" as Simeon Baldwin, James Broadhead of Missouri, Benjamin Bristow of Kentucky and New York, Carleton Hunt of Louisiana, Henry Hitchcock of Missouri, John H. B. Latrobe of Maryland, Edward J. Phelps of Vermont, Luke Poland of Vermont, Alexander Lawton of

Georgia, William Allen Butler of New York, J. Randolph Tucker of Virginia, Thomas J. Semmes of Louisiana, and George Wright of Iowa.[15] "These men," said Rogers,

> gathered each year on the porch of one of the three hotels that made Saratoga a summer center for politics and gossip, had a toddy or two, planned who should be officers and who placed next in succession by virtue of delivering the annual oration.[16]

"Rawle, the Treasurer, and Hinkley, the Secretary, saw the machinery but the sages did the proposing and disposing."[17]

Certainly there is no reason to believe that the "Saratoga clique" was a figment of an historian's imagination. Governing cliques are not unknown in the affairs of fledgling organizations and may in fact be necessary to prevent them from dissolving into squabbling factions.[18] The acerbic editor of the Albany Law Journal, Irving Browne, early complained of a "mutual admiration ring who manage [Association] affairs as childishly as possible."[19] And seven of the first ten presidents were members of the "inner circle" identified by Rogers.

On the other hand, it does not seem that "clique" members felt themselves to be participants in even an informal directing committee. On the contrary, there is some evidence that they were ignorant of decisions which would have been discussed had they met together as a group. For instance, Carleton Hunt once requested from Baldwin "the appointments of the executive committee for the next

season...that is to say, if you feel free to tell them."[20] In any case, the affairs of the Association were rarely settled in toto on any front porch in Saratoga. "Here is June nearly," complained the treasurer in 1884, "& we have no orator."[21] Baldwin, who could be vain in private, had a New Englander's distaste for self-advertisement and handled the matter of decision-making deftly. In all probability he simply asked his older professional colleagues for their advice, either singly or in small groups. Then, as befitted a prudent young man--he was only 38 in 1878--he tried to follow it.[22] However, when Francis Rawle suggested that debate at the meetings be more tightly controlled, Baldwin wisely counseled that the "details should be carefully touched, both to avoid our getting into the position of announced dictators, and to prevent the meetings from becoming too formal."[23]

To those outside the decision-making circle, the most prominent figure of the early American Bar Association seemed to be Luke Poland (1815-1887), Chairman of the Executive Committee from 1878 until his death shortly before the tenth annual meeting. A tall, flinty Vermonter given to fashions from the days of Daniel Webster, Poland radiated industry, honesty, and the spirit of Horatio Alger. Except for this fidelity to the Republican Party (to the extent of swallowing hard and supporting Blaine in

1884), he was typical of the gentlemen reformers of the age. While a member of the House of Representatives he had chaired committees that investigated the Ku Klux Klan, the Crédit Mobilier, and the carpetbag government of Arkansas; and in the Senate he had sponsored national bankruptcy legislation and a revision of the federal statute law. His independence and opposition to the Radicals earned him the admiration of congressional moderates and cost him a long sought federal judgeship.[24] Poland was a felicitous choice as the first Executive Committee chairman. Irving Browne called him "the pole star of the association," and the American Law Review recommended that he be elected president of the organization "whenever he will accept it."[25] Poland's age, his commanding presence, and a touch of dry humor lent to the Saratoga meetings an ambiance similar to that which Benjamin Franklin had provided the Constitutional Convention.

Another happy choice of Baldwin and the American Bar Association was Edward O. Hinkley (1824-1896) as Secretary. Hinkley was not a major figure at the bar. In another era he might have become a professional musician or a Swedenborgian minister. He did hold a few minor public offices in the city of Baltimore and, like other founding members of the ABA, was an active spokesman in behalf of good government and civil service reform. Active in at

least a dozen charitable institutions, Hinkley "devoted an immense amount of labor to the perfection of...organized visitation and relief."[26] He was courteous, diligent, and deferential, willing to let others make the command decisions. The author of his obituary reported that his routine duties as Secretary were a "delight" to him.[27] Every successful organization needs an Edward Hinkley.

To an even greater extent it needs a Francis Rawle. Rawle (1846-1930) was born into a distinguished Philadelphia legal family and graduated from Phillips Exeter, Harvard, and Harvard Law School. He had been a Harvard oarsman, and his tall frame was "kept in trim to the last with systematic exercises." Having had some business correspondence with Baldwin, Rawle wrote to his senior of six years and asked for an invitation to the first Saratoga meeting. Not only was this request granted, but when the American Bar Association was organized, Baldwin suggested Rawle as temporary secretary and, later, treasurer. He held the post for twenty-four years. Even after his term of office as president in 1902-03, Rawle remained influential in Association affairs for another quarter of a century, outliving all the other charter members.[28]

In temperament Rawle was the polar opposite of Hinkley--stiff, overly critical, a worrier over trifles.

To Rawle the sky was always falling; disaster continually lurked around the corner.[29] He and Irving Browne of the Albany Law developed an immediate disliking for one another; Browne attacked him in print as a man "who generally seems not to know his own mind, and when he finds it out seems that it would have been better if he had not discovered it."[30]

Despite this criticism and his official position as Treasurer, Rawle proved himself to be an excellent executive secretary. He assumed what were the two major jobs of the Association in those years, planning the banquet and editing the annual bound volume called the Report. Rawle seems to have had a fine sense of discernment regarding such then important matters as the arrangement of toasts on the banquet program and the persons called upon to respond. Jacob Weart called Rawle's dinner arrangements his "great work," and claimed that "the annual banquets of the Association were not excelled by any in the country."[31]

More importantly, Rawle labored annually editing the speeches and discussions of the Association, reading every word of the shorthand copy and then making critical revisions of the grammar and syntax of the Association's esteemed speakers. The Reports are very well edited. Misspellings and typographical errors are extremely rare.

Unfortunately for the historian, Rawle also excised some of the discussions ("in self defense," he said), either if he thought them "meaningless and badly expressed" or too warm to be representative of the type of gentlemen who were supposedly members of the American Bar Association.[32] Rawle's influence, never inconsequential, continued to grow during his years of service to the Association.

The personality of Francis Rawle was not the only target of Irving Browne's Albany Law Journal. Browne also criticized what he called the Association's "close communion," its restrictive membership policy, which he considered foreign to "the principles and traditions of our profession." Browne predicted that if the Association did not "rub out and commence again," it would

> never command any important influence, nor answer any purpose beyond the advertising of a few commonplace lawyers, whose numbers from internal jealousies [would] rapidly become fewer and fewer until like Artemas Ward's military company there were barely enough to fill the offices.[33]

Predicting the early demise of the ABA was a mistake easily made by a reporter who could only see a fluctuating attendance at the annual meeting of between 75 and 150 gentlemen. Actually the growth of membership during the first eleven years was slow but steady. The American Bar Association had begun its history with 289 members from 29 states. In 1888 the roll stood at 752 or approximately one

percent of American lawyers; and for the first time every state in the Union was represented.[34]

Still, much of the membership was soft. Members proposed the names of their friends back home without their consent--or dues. Hinkley predicted that of the 142 new members admitted in 1881 only a third would continue through the following year because the By-Laws specified that membership ceased if dues were not paid before the annual meeting.[35] Rawle, a railroad attorney, wished to enforce the law to the letter. He was given pause only by the names and numbers of those in arrears, including "a large number of officers & five principal committeemen."[36] Baldwin and Hinkley, taking a more sensible approach, suggested billing the recalcitrant members after the Report had appeared with their names in print. This tactic was successful, and Rawle boasted a few years later that if he "had carried out the rule strictly there would have been no Bar Asso. sometime ago."[37]

Both Baldwin and Rawle were obviously more concerned with quality than with quantity in the Association. Neither they nor the other officers went out into the highways and hedges and compelled new members to come in. Restrictive membership was almost a tenet of faith for the new bar associations of the late nineteenth century, seeking, as they were, to regain control of the legal

profession.[38] Hinkley also feared a growing membership but for the curious reason that the "hall must be larger."

> I do not know how many we can conveniently seat at dinner. One hundred is a good round number, and ordinarily sufficient for social purposes. I suppose the inconvenience arises from the admittance of the younger members of the bar into such bodies a little too soon. Our present rule is that they must have been five years at the bar. If we find that we are increasing too rapidly we might raise the time to seven years--or more.[39]

Another member of the Executive Committee, C. C. Bonney of Chicago, felt that there was "a very great peril" in the "almost unrestrained" admission policy of 1888![40]

He need not have feared. An analysis of all 94 Massachusetts lawyers who were members of the American Bar Association, 1878-1887, reveals that the social status of the members remained uniformly high throughout the decade. At least 56 of the 94 were college educated, including 36 who graduated from Harvard and eight from Yale. Forty-nine had some law school training--virtually all (46) at Harvard--although a majority had also apprenticed in a law office. At least seventeen of the 94 were mayors and other local officials, 24 were state representatives or senators, and eight were congressmen, senators, or cabinet members. They included such notables as Edmund H. Bennett, M. F. Dickinson, William Gaston, Alfred Hemenway, Ebenezer Rockwood Hoar, John D. Long, George O. Shattuck, Moorfield Storey, and James B. Thayer. Their mentors or partners

included nationally known members of the legal profession like Lemuel Shaw, Peleg Chandler, George F. Hoar, Richard Henry Dana, John C. Ropes, and Robert Rantoul. The group of 94 lawyers would be a sociologist's delight, with many ties of birth, education, and business relationship. These gentlemen without question belonged to the elite of the bar.[41]

It was partly to maintain the dominance of this elite group of lawyers that the Association made Saratoga Springs, New York, its exclusive meeting place for the first eleven years of its history. The American Law Review complained that no other national professional association "stow[ed] itself away year after year in a little village in the woods" where the water was "unwholesome" and the "hotel charges extortionate."[42] But that was precisely the point. The American Bar Association was more a private club than a professional association in 1885, and Saratoga, being distant and expensive, well suited its purpose.

That does not mean that there were no attempts to move the meeting place from Saratoga, especially by members outside the "inner circle." The first occurred in 1882, when by a vote of 38 to 27, the Association voted to meet in White Sulphur Springs, West Virginia. "This was merely a change from one comfortable resort and watering place to another, and carried no threat of disturbing the tradition

of pleasant social intercourse and relaxation established at Saratoga Springs."[43] In any case, the proprietors of the Green Brier and Balch's Franklin Square House could not or would not accommodate the Association at the height of the season, and the Executive Committee, which under the constitution had the power to fix the place of meeting, decided to return to Saratoga.[44] Francis Rawle, for one, hoped to steer clear of the South altogether. "I do fear the influence of that Southern element & states rights etc. is disgusting the best northern men....[I]f carried too far it will break up the association practically."[45] The first meeting of the Association held below the Mason-Dixon line did not take place until 1903, ironically during the year of Rawle's presidency.[46]

The next attempt to dislodge the Association from Saratoga came after a heated debate in 1883. C. C. Bonney, at "the suggestion [of] an Eastern member," proposed that the ABA meet in Chicago. The selling point for Chicago was two-fold. First, it would bring the elite of the eastern bench and bar to the "northwest" where they would meet those of their peers who could not afford to travel to Saratoga. Second, the Chicago papers were prepared to publish the proceedings of the ABA in full--something which, to the irritation of many members, the Saratoga papers were unwilling to do.[47]

The objection to Chicago came from those like future U. S. Supreme Court Justice Henry B. Brown who viewed Saratoga as a center for the proper type of vacationer from all over the country. What "would be gained by the presence of western men would be lost by the absence of many eminent eastern men."[48]

After some tortuous parliamentary maneuvering, Bonney withdrew his resolution, and another, urging the Executive Committee to call "subsequent meetings in different sections of the country," was tabled. The sensitive issue was thus delivered back into the hands of the Executive Committee without instruction. The Committee members were so cognizant of the dangers involved in making a unilateral decision that they sponsored a referendum, the first and last until the Association's attempt to garner support for an increase in judicial salaries in 1918.[49] Seventy percent of the membership replied to the rather confusing questionnaire issued by Secretary Hinkley, and the results were construed as a tie of 221 to 221. It is certain more members were in favor of going to Saratoga than to Chicago (250-166), and the Executive Committee again decided for Saratoga.[50]

In Saratoga the annual meetings--always held in August for the first twenty-five years--were composed of three basic parts: the delivery of speeches and papers, the

reports of committees and, when time permitted, general discussion of whatever topics interested those present. By constitutional provision the address of the president both opened the meeting and was required to "communicate the most noteworthy changes in statute law on points of general interest made in the several states, and by Congress during the previous year."[51] In theory, it was the duty of the members of the General Council to provide the president with changes in his state's legislation; in fact, Hinkley and Rawle often performed the task of gathering session laws.[52] Still, the president himself bore the burden of reducing the unwieldy mass of legislation into some kind of order. Baldwins' comment after being taken in his own gin was that "no one who has undertaken the labor which this task involves...will regret that other provision of our constitution which makes the President ineligible for a second term."[53] The American Law Review suggested in 1884 that the ABA publish the "noteworthy changes" as a pamphlet so that they could be discussed by the members at the annual meeting. "A speech upon statute law is the most tedious, out-of-place, and useless thing which could well be imagined. It puts the President of the Association at great disadvantage." However, presidents with some imagination were able to make the presentation less deadly by reading only the most interesting parts of the

compilation, interpolating humorous remarks, or closing the speech with a peroration embodying some idea above the level of the card catalog.[54] In any case, the information contained in the "noteworthy changes" was long unavailable elsewhere, and the ABA continued the tradition, more or less, for thirty-five years.

The program of the annual meeting also contained three to five other speeches. Speakers were chosen by the Executive Committee with attention to geographical balance and often at the suggestion of some member of the "inner circle."[55] In the earliest years before the Association had established itself, speakers of the proper quality; were difficult to enlist for an unrecompensed duty during the vacation months. In 1884, two members accepted the responsibility but then left for Europe! In practice, Rawle and Hinkley often composed a list of possibilities and then wrote invitations until the proper number of acceptances were received.[56]

The major address of the meeting, usually called the "Annual Address" (though this was also the constitutional title of the president's speech), was intended to be an oration in the grand manner. Results were mixed. By all accounts, Edward J. Phelps, the first "orator," delivered such a powerful memorized sermon on the glories of John Marshall and the Constitution that some of his auditors

were moved to tears.[57] On later occasions the effect was less rapturous. Irving Browne said of John Dillon's exertion that "the day was very hot, and for the first twenty minutes the speaker was beguiled into the notion that it was the fourth of July."[58] By the end of the Association's first decade, the Annual Address had already lost most of its patriotic gingerbread, even though it continued to be a speech composed on a higher level of abstraction than the others. As George Hoadly confessed in his own Address of 1888, "the age of forensic eloquence has measurably passed....This is a generation devoted to business, of persuasion by plain statement unassisted by rhetorical decoration."[59]

As for the technical aspects of the other speeches or "papers," they are familiar to anyone who has ever attended the meeting of a professional association or scholarly society. Some of the papers were well written and presented; more, especially in the early years, were poorly constructed, inaudibly read, and/or simply dull. As a notorious example, one Henry E. Young spent a dry hour cataloguing "Sunday laws," beginning with Constantine, running through the Middle Ages, and then listing the blue laws state by state.[60] After the second annual meeting Rawle asked plaintively if Baldwin thought it proper to limit the speakers to a half hour for their presentation:

"I really think it would be best to do so. Very many members expressed that point at the meeting to me."[61] Perhaps they were still expressing it a few years later when Rawle delivered himself of a learned treatise on the law of railroad car trust securities, which lasted more than an hour.[62] In any case, the Executive Committee did feel constrained to make two rules concerning the reading of papers: that they be read by the gentlemen invited to prepare them and that no complimentary resolution be voted to a member for having performed such a service.[63] The first rule was meant to encourage attendance at the annual meetings by the leaders of the bar, and the second was to prevent embarrassment should their views differ markedly from those of the Association.

However, neither Baldwin nor the other founders of the Association believed that the true work of the ABA would be accomplished by listening to speeches. They envisioned that standing committees of five members or less would meet as a group during the year and prepare detailed reports for the action of the Association at the annual meeting. Five standing committees to deal with the five major divisions of professional interest, as Baldwin conceived of them, were provided for in the constitution: Jurisprudence and Law Reform, Judicial Administration and Remedial Procedure, Legal Education and Admission to the Bar, Commercial Law,

and International Law. Three other standing committees relating to the internal affairs of the Association--Publications, Grievances, and Obituaries--were also authorized by the constitution, the latter by amendment in 1881.[64]

Special committees were created from time to time to deal with specific matters of interest to some members. Their method of operation and access to the treasury were identical to those of standing committees, but special committees were usually larger and had to be continued annually by the Association.

> In most instances...the nature and importance of the questions referred to special committees differed in no substantial respect from those referred to the established standing committees, and almost all such questions might with equal propriety have been referred to the latter.[65]

Establishing a special committee provided a sufficient number of members interested in the subject at issue and also avoided disturbing the slumber of the standing committees.

In fact, the whole standing committee system remained ineffective even beyond the first decade. There was an early tendency for the president and his advisors to appoint the "big names" to committee positions without much concern about whether they might make a report, or even appear, at the next meeting. Even conscientious

committeemen had difficulty meeting during the year since, for geographical balance, they were often widely separated. Committee reports were frequently decided upon by correspondence or at a quick conference of two or three members immediately before the annual meeting. Some committees rarely made any report; membership on the Grievance Committee was a purely honorary appointment. Rawle was so annoyed that he suggested that committees be required to meet annually and make a report. Baldwin, with more equanimity, disagreed, "Why, for instance, should that on Grievances [meet] unless there is something to grieve about?"[66]

Association members who sacrificed other responsibilities to committee work must have been disheartened at the reception their efforts often received at the annual meeting. Even when the report was innocuous

> the program was almost invariably too crowded with other things to permit adequate discussion of the committee reports. The proceedings are full of instances where the Association postponed the discussion of important reports to a subsequent session because of lack of time, only to find that the subsequent session was also so crowded with other matters as to make a full discussion impossible.[67]

As a rule, any topic of the least controversial nature was postponed, tabled or referred back to committee at the first opportunity.[68] Perhaps one of the best examples was the treatment given to the report of the

Committee of Legal Education and Admission to the Bar prepared by Carleton Hunt, dean of the law department of the University of Louisiana (Tulane). For an hour and thirty-eight minutes at the annual meeting of 1879, Hunt declaimed his report in "an exceedingly nervous and impassioned manner." He recommended a stiff law school course, necessary for admission to the bar, which was so specific that it described the manner in which the law teacher should organize his lectures.[69] Upon the conclusion of the reading, immediate objection was made to the requirement of a law school education for admission to the bar. "Thereupon," wrote Irving Browne,

> Mr. Hunt gallantly rushed to the fray, raised a point of order, and there was likely to be a scene like that where Sairey Gamp and Betsey Prig fell out after having "nussed off and on together" so long and harmoniously. While I was promising myself a little amusement from this source, some hungry and prosaic lawyer moved to lay the subject on the table. Before Mr. Hunt could consent to this indignity, he demanded...to know how long it would lie there, whereupon the president, with a roguish twinkle of his blue eyes, responded that it would lie until called up. This seemed to satisfy Mr. Hunt and everybody else, for the resolutions were laid on the table with great heartiness and unanimity, "and there," as Webster observed of the bones of our revolutionary fathers, "they will remain forever."[70]

But Hunt had not yet surrendered. The next year he returned with revised recommendations and the prediction that "the resolutions as they stand will receive the unanimous approval of the Association."[71] Instead, they

provoked the heated discussion which Browne had eagerly anticipated the year before. In the end the Association tabled three of Hunt's four proposed resolutions and settled for a watered-down statement which, in effect, allowed that law was worthy of study.[72] Although Hunt reported three inoffensive resolutions in 1881, which were adopted by the Association, he never again played a major role in ABA affairs. Sunderland's official organizational history says, "For some reason, this tremendous burst of committee activity suddenly died, and nothing further was done in the field of legal education for 9 years."[73]

Two proposals concerning criminal law "reform," both from the fertile brain of Simeon Baldwin, met the identical fate of Hunt's report when they reached the floor of the annual meeting. In 1885, the colorful former Confederate general Roger A. Pryor of New York hotly denounced a resolution by E. B. Sherman which would have given Association approval to Baldwin's suggestion of a kind of perpetual probation for criminals who had served more than one imprisonment. Harsh words were spoken on both sides before Pryor dramatically crossed the hall and shook hands with Sherman.[74] A similar tempest occurred when Baldwin proposed that the Association go on record in support of the reintroduction of the whipping post.[75] The motion was finally tabled by a large vote before some wit

could amend it to read: "and...anyone convicted of rape should be burned at the stake."[76]

Edward Hinkley did no better with a proposal that the Association establish a standing committee on Constitutional Law. The idea was roundly condemned by a number of speakers including ABA leaders Henry Hitchcock, Thomas J. Semmes, and Alexander Lawton. The critics feared, probably correctly, that any discussion of the Constitution would be purposeless and would subject the Association to the charge of "usurping an authority which we do not possess, and which it may be well to avoid."[77]

The "lost causes" of Hunt, Baldwin, and Hinkley demonstrate a salient feature of the American Bar Association during its first decade; that is, that in a contest between innovation and inertia, inertia would win hands down, even when the innovation was suggested by a member of the organization's "inner circle." It was this aspect of the Association which received many broadsides from the pen of Irving Browne. For instance, when discussing the "amusing attempt" to constitute the committee on Constitutional Law, Browne wrote that the ABA "finally concluded that there was no necessity for it, or to speak more accurately, no conclusion was reached, which is more in accordance with the habit and traditions of the association."[78]

The American Bar Association had been founded by elite lawyers concerned with the conservative reform of their profession. Some of them were aware of the paradox between rhetoric about making the Association "a Conservative Force in Society" and one of the "voluntary custodians of our American system" on one hand, and the reluctance of its members to approve any change which might divide the organization or reflect on the probity of a national lawyers organization, on the other.[79] Nevertheless, in the first decade of the organization, the most significant debates centered on two topics where neither the conservatism of inertia nor the leadership of the Association could be ranged on one side or the other, namely, in the debates over codification of the law and the relief of the Supreme Court.

The history of the codification movement and its chief American proponent, David Dudley Field, is too complicated to rehearse here.[80] Suffice it to say that a long-standing controversy over whether the traditional judge-made law of English-speaking nations ought to be replaced by a Napoleonic style code lapped over into the American Bar Association from its storm center in the New York bar. Several speakers at the annual meetings had alluded to the question during the first years of the Association's history, but it was Field himself who was responsible for

forcing a debate on this controverted topic.[81] In 1884, during his first year as a member of the ABA, Field slyly proposed a select committee to investigate remedies for "delay and uncertainly in judicial administration." By parliamentary tradition, he became the chairman after the committee was approved; but he invited the Association to balance the membership with codification opponents in the event "that there is anybody who supposes I have special reference to a civil code."[82]

Field did almost all the work of the committee; the chief opponent of codification left for Europe. Field returned the following year with thirteen fairly non-controversial recommendations for the reform of the judicial system, all of which were approved by the Association. However, the fourteenth recommendation was that the "the law itself should be reduced, so far as possible, to the form of a statute"--the word "statute" being deliberately substituted for "code" in deference to the sensibilities of New York lawyers.[83] This time Irving Browne got to enjoy some verbal fireworks, though again to his disappointment, the anti-code members managed to postpone further debate and a vote until the following year on the ground that this was the most important matter ever brought before the Association. ("When, in Heaven's name,

was anything else of importance ever brought before it...?" hooted Browne.)[84]

The debate in 1886 lasted a day and a half, Field performing in his usual abrasive manner.[85] In the end, a compromise resolution was proposed which read: "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute." This was passed 58 to 41 by the Association, although no one could say with certainty what it meant. The newspapers and legal journals gave the palm to Field and the codifiers, but as one contemporary later wrote, "[N]o one did any more codifying or less codifying than before the controversy."[86] In fact, by the time Max Radin wrote a short history of the Association in 1939, even this qualified approval of codification had become nonhistory.[87]

Now it might be thought that the American Bar Association, as a devotee of inertia, would have rejected out of hand the notion that a code could be superior to the wisdom of the ages as "discovered" by judges. In fact, the conservatism of inertia stood on both sides of this debate and cancelled itself out. Support for codification came from the West and South where lawyers practiced under codes, while opposition stemmed from states of the Northeast like Massachusetts, New York, and Pennsylvania which had long embraced common law pleading.[88]

Furthermore, as Lawrence Friedman has pointed out, both codifiers and their opponents distrusted the competence of laymen (i.e. legislators) to make law. The controversy really centered on which professional elite should be entrusted with the law making duty: the judges, on one hand, or the experts in codification--perhaps authorized by a bar association--on the other.[89] Although the leadership of the Association was probably annoyed at Field's co-option of their agenda, they did not stand together against codification of the common law.

The same geographical, rather than ideological, divisions were evident in the American Bar Association debate over a solution to the enormous backlog of litigation on the Supreme Court docket. Only in this case, inertia was not a feasible alternative for either side. It was obvious that the Association, to make any claim to professional responsibility, must recommend a practical solution to Congress with all deliberate speed.

In 1860, 310 cases were pending before the Supreme Court; in 1870, the Court began its term with 636 cases. By 1880, the number was 1212; in 1885, 1340; and "in 1890 they reached the absurd total of 1800."[90] The cause for this staggering increase stemmed partly from the increase in commercial and patent legislation after the Civil War and partly as a by-product of Reconstruction policy.

Congress, in a nationalistic mood, had simplified the procedure for removing cases from state to federal courts; and corporations, which preferred the federal system with its appointed judiciary, soon swamped it.[91]

Various plans for the relief of the Court had been introduced in Congress as early as the Civil War years. They included the creation of intermediate circuit courts of appeals, additional Supreme Court justices, an enlarged Supreme Court sitting in divisions, relief of the Justices from circuit duty (which they did not perform in any case), and limitations upon the jurisdiction of the Court. None of these proposals became law during the Reconstruction period when Congress viewed the Court warily as a possible source of opposition.[92]

By 1881 when the American Bar Association first took notice of the problem four rival schemes of Court relief had been introduced into Congress "with different variants, appearing from time to time under different authorship."[93] After some preliminary discussion, the Association established a nine-member special committee composed of some of its politically most important members to make an investigation and recommend a course of action for the organization.[94] Not surprisingly, the special committee was not attracted by plans which would have curtailed the jurisdiction of federal courts by limiting diversity of

citizenship litigation, the means most often employed by corporations seeking to enter the federal system. But it divided five to four over two other proposals. The minority, all of whom were from the northeast, endorsed the principle of the bill introduced by Senator Manning of Mississippi, which would have divided the Court into three divisions, the justices assembling en banc to consider only constitutional or other very important questions. The majority adopted the plan suggested by former Justice David Davis, Senator from Illinois, which established intermediate circuit courts of appeal.[95]

At the annual meeting of 1882 the majority and minority reports were extensively debated with Henry Hitchcock leading the majority and William Evarts the minority. The discussion began temperately enough with the majority emphasizing the constitutional provision for one Supreme Court and the practical inconvenience of concentrating all federal appeals in Washington. The minority stressed the impolicy of allowing right of appeal to the Supreme Court only when there was more than ten thousand dollars at issue and the certainty of conflicting decisions among nine coordinate tribunals.[96] Eventually the debate turned personal as W. H. H. Russell "convuls[ed] the house with a violent and uproarious tirade against Senator Davis and his bill," charging that Davis had

insulted the American Bar Association on the floor of the Senate.[97] Nevertheless, in the end the majority report prevailed by twelve votes.[98]

Of course the endorsement of the ABA did not enact the Davis bill into law. Despite annual recommendations from the Association, it was nearly impossible for the party holding power in one branch of Congress to grant to a President of the opposite party control of the vast patronage involved in appointing so many new judges.[99] Meanwhile the situation in the federal courts had reached such a nadir that the Justices of the Supreme Court felt constrained to speak out on the matter.[100]

With the election of 1888, Republicans regained control of both houses of Congress as well as the Presidency, and the ABA renewed its petition for the relief of the Court. Although the Association was still divided internally as to the wisdom of intermediate federal courts, the special committee on delay in the Court successfully urged President Harrison to mention the matter in his state of the union address.[101]

Bills similar to the Davis plan were once again introduced into Congress, with William Evarts, now a ranking member of the Judiciary Committee and a convert to the circuit court plan, leading the fight in the Senate.[102] The American Bar Association Committee on Judicial

Administration and Remedial Procedure was even invited by Senator Evarts to consult with a joint subcommittee of the House and Senate Judiciary Committees in fine tuning the proposed legislation.[103] The measure finally received the President's signature on March 3, 1891, and almost at once the number of docketed cases before the Supreme Court dropped.[104]

The passage of the Circuit Courts of Appeal Act of 1891 was the first major legislative victory for the American Bar Association. Though the bill was passed in the Association's thirteenth year, the measure had been debated extensively during its first decade and therefore may rightly be considered the most significant work of the Association during that period. On the other hand, the boost in morale and prestige which the successful effort gave to the ABA may be considered somewhat fortuitous. By the serious nature of the problem, some action would have had to have been taken regardless of the recommendations of the Association. The ABA was simply fortunate enough to have sided with the ultimately successful position and to have had a member as powerful as William Evarts to see the measure through the Senate. It is even arguable that the recommendations of the Supreme Court and the Republican victory of 1888--and the electoral system which made it

possible--played a greater role in passage of the bill than did the actions of the gentlemen at Saratoga.[105]

It is certainly misleading to suggest that the labor of the American Bar Association was intended "directly and primarily in the public interest and against what in the popular mind is assumed to be the interest of the profession....financial gain for lawyers in protracted litigation."[106] Even if the nineteenth century members of the ABA are assumed, like Beard's Founding Fathers, to have had an eye only for the main chance and not for the long-term welfare of their profession, there is still evidence to the contrary. During the first discussion of the court delay problem in 1881, Savannah lawyer George Mercer warned the assembly that in his state cotton merchants were refusing to wait three or four years for court resolution of their legal problems and were referring "almost every question" to the Cotton Exchange for settlement by lay arbitration.[107] The primary concern of the American Bar Association, even in its first decade, was the good of the legal profession. If what was good for the profession was also good for the nation, so much the better.

Even the social unity promoted by the annual banquets and informal gatherings in Saratoga served to strengthen the profession. Indeed, it is difficult to overestimate in the minds of the participants the importance they placed

upon good fellowship and shared professional gossip. The annual banquets of the first decade were completely private affairs, enjoyed more because left unrecorded.[108] Irving Browne, miffed at his exclusion in 1879, grumbled that members simply wanted to "carouse" and tell "broad stories" out of earshot of his readers.[109] In fact, the members probably were concerned that their impromptu remarks of an evening might sound impolitic or indecorous in the sober dress of newsprint the next day.[110] Browne himself was able to repeat a secondhand account of the banquet of 1884. At one point a toast to "the evils of codification" had been proposed and David Dudley Field was called on to respond.[111] On another occasion after the members "had well emptied their wine bottles," Luke Poland was toasted as the father of the Association. Poland demurred saying this honor belonged to another, that he was "simply called in to be its wet nurse." Some gentleman in the rear called out, "Well, Judge, we are all at the bottle still."[112] It was a witty repartee, but it is doubtful that the author would have appreciated an attribution in his local newspaper.

To the elite of the bar, the social side of the Bar Association meetings was more than pleasant relaxation. Making the acquaintance of their peers from across the country gave bar leaders access to an informal

recommendation network useful in the pursuit of federal appointments. It was obviously advantageous for the prospective judge or district attorney "to have a half dozen letters from...friends in other cities to show that he [was] not without honor outside of his own home."[113] Among other leaders of the ABA, Baldwin recommended Henry Hitchcock, Walter B. Hill, Carleton Hunt, J. M. Dickinson, and William Henry Taft for federal judgeships. In turn he discreetly contacted Rawle and others in his own unsuccessful bid to gain nomination to the Supreme Court in 1894.[114]

While informal conversations at Saratoga might eventually lead to political alliances as well, it is clear such contacts were approached circumspectly at the annual meetings themselves. Lawyers, unlike other professionals, were divided not only by state boundaries but by their relationship to the American political system as well. Bar associations emphasized social unity because "political issues, even those primarily professional in character, threatened to force leading lawyers to choose between partisan and professional loyalties."[115] As the Boston Daily Advertiser said in its commendation of the ABA: "To bring lawyers into each other's society, animated by professional and social motives and feelings, is to make

them to see and understand each other otherwise than on their diplomatic and combative sides."[116]

Even by their cautiousness and tendency toward inertia the gentlemen of the American Bar Association strengthened the organization for battles of a later era. "Now it may be said that this Association is a young one," reflected David Dudley Field in 1884. "Very well; it will be older bye-and-bye."[117] Some signs of maturity were already evident at the end of the first decade. The list of toasts proposed at the banquet were removed from the Report, committees began to be reimbursed for their expenses and their reports were printed, the Executive Committee began its gradual expansion, and the topics of the Annual Address changed from flowery memorials to lawyers of days gone by to more straight-forward discourses on current legal problems. Even the heated debates of the later years of the decade and their coverage by the legal press signaled a growing seriousness of purpose within the Association. In 1887 the Central Law Journal recommended that its readers attend the next Saratoga convention because, it said, the American Bar Association, "now in its tenth year, may fairly be said to have passed its period of probation and to have fully established itself as one of the most useful and beneficient institutions of the country."[118] The praise was fulsome; but at least it may be said that the

gentlemen of the American Bar Association had by caution built well enough to insure the organization's survival when faced by a rival association.

CHAPTER 3

CHALLENGE AND RESPONSE: THE NATIONAL BAR ASSOCIATION, 1888-1891

One of the curious aspects of the rise of the American Bar Association to a position more nearly congruent with the comprehensive promise of its name is that it has had only two serious rivals in the more than one hundred years of its history. A feeble remnant of one of these, the National Lawyers' Guild, founded in 1937, still exists. The other, the National Bar Association (1888-1891), has almost disappeared even from memory.[1] That the American Bar Association should have so quickly and decisively commanded the field is difficult to explain, especially since the Association represented only a minuscule proportion of American lawyers in its earliest years. In 1888, for instance, the ABA had just 752 members, or less than one percent of the lawyers in the United States.[2]

The most serious, though short-lived, challenge to the continued growth, if not existence, of the ABA was raised by the Bar Association of the District of Columbia. The idea for a new "national legal body" had been suggested by certain of influential members at its meeting on January

11, 1887; and preliminary circulars were sent out by the Board of Directors "to such bar associations as it had knowledge of"--including the ABA--in May of the same year. The actual call, dated December 31, 1887, announced an organizational meeting for May 22, 1888, in Washington.[3] Delegates from thirty bar associations attended this meeting, which organized the National Bar Association and elected as its first president, James O. Broadhead, an erstwhile leader of the ABA and that association's first president as well.

The exact motivation for the founding of this new national association of lawyers remains uncertain. The founders themselves most often spoke of the contemporary professional concern with legal diversity in commercial matters. In the opening speech of the organizational meeting, A. S. Worthington, president of the District Bar Association, advocated "uniformity in the laws of the several states" in order to check "great and growing evils" which had become an "inconvenience" to both businessmen and the legal profession.[4] James Broadhead followed with an elaboration on this theme, emphasizing the necessity for professional direction in the drafting and passage of these proposed uniform laws so "that commerce may be protected, that individual rights may be protected."[5] Of course, uniformity of commercial law had been the objective of the

abortive "Congress of Lawyers" more than a decade before, but it is clear that Broadhead and the District Bar Association represented a higher stratum of the legal profession than had the "United States Law Association" and its assortment of collection lawyers.[6]

Furthermore, unlike the ABA, the National Bar Association was organized as a federal body. According to its constitution, membership was to be "purely representative," composed of delegates elected by state and local bar associations; and the number of representatives as well as the amount of dues was to be proportional to the membership of the local associations, three representatives being authorized for each fifty members.[7] There had been previous calls for the American Bar Association to organize (or reorganize) itself along similar lines, but the leadership was understandably cool to the idea.[8] While ABA by-laws gave temporary "privileges of membership" to delegates from state bar associations and to local bar associations in jurisdictions without state-wide bodies, there had been little interest in exercising these courtesy rights.[9] Broadhead and Worthington argued that the representative nature of the National Bar Association would unite the local associations behind future attempts to construct and pass uniform laws in the state legislatures.[10]

Despite an explicit denial by the National Bar Association of any desire to "supersede, oppose or interfere with the American Bar Association," there was also considerable suspicion that an organization so similar in name and objectives must have been formed with just such a purpose.[11] The NBA, throughout its short career, made repeated protests of its good will towards the ABA, but the new association was never able to quash the rumor that its rivalry with the older body was more than friendly competition.[12] From Ohio to Georgia, members of local bar associations noted the "ill-feeling" between the two national organizations and cautioned against haste in joining an unproved upstart.[13] The most extreme recorded charge against the NBA was made by ABA member John J. Hall of Akron at a meeting of the Ohio State Bar Association in 1890. Hall asserted that the "only reason" for the organization of the NBA was "for the express purpose of doing all the damage that it could to the American Bar Association."

> It grew out of a little trouble that was had in the American Bar Association--a discussion between David Dudley Field and some young gentlemen in Washington. These young fellows notified David Dudley Field--who was one of the originators of the American Bar Association, and who has given more time to it than any other man in America--on that night, "We will break up your American Bar Association, and we will start a new Association."[14]

At best, Hall was overstating his case. Certainly Francis Rawle and Simeon Baldwin would not have been amused at the status given Field. But it does seem likely that there was some truth to Hall's story. The ABA's recent codification controversy combined with Field's less than irenic temperament might easily have sparked a reasonably similar scene. Even if Hall's story was only a base rumor, its public repetition by a respected member of the bar illustrates the suspicion engendered by the founding of the new association.

In its inaugural year of 1888, the National Bar Association actually held two meetings, the organizational convention in May and its first annual meeting in August. Neither meeting was exceptionally productive. Like the American Bar Association, the National Bar Association adopted a previously written constitution, appointed members to a similar slate of committees, listened to a speech or two and then embarked on the recreational trip by water which, for some reason, was almost obligatory for a national bar association meeting of this period.[15]

There was, however, an aura of anticipation about these first two meetings which was never duplicated again. Reporters noted the planning which had obviously preceded the gatherings, the tone of the assembly and the social standing of the delegates. The Washington Star commented

upon Mr. Justice Harlan, who had braved the rain to visit the group, and upon the efficient manner in which a delegate's ticket was "numbered to correspond with the number of his register."[16] The Weekly Law Bulletin seemed impressed with the "tasteful and appropriate" selection of "palms and other exotics" which adorned the platform in August.[17] The attention of a Washington Post reporter was captured by the diamond tie pin of the secretary, which "with every move that he made flashed its bright light over the convention."[18]

The organizers of and delegates to the new association, though not of the same eminence as the leaders of the ABA, were at least generally men of local reputation. Perhaps the most noteworthy of the organizers was R. Ross Perry (1846-1915) of Washington, D. C., who as much as anyone deserves the title of founder of the National Bar Association and who was secretary of the organization for most of its existence. Perry enjoyed a large private practice, was a director of Riggs National Bank as well as a number of charitable institutions, and later wrote a well-known text, Common Law Pleading (1897). Perry was no Simeon Baldwin either in ancestry, education, or grim diligence; but there were certain similarities between the men. The Indianapolis News described Perry as

> one of that kind of men who are always needed to push the business of a public meeting along with-

> out unnecessary delay....quick, accurate...full to overflowing of all kinds of information, and able on the instant to tell any other officer what to do next if he doesn't know.[19]

Perry and the other "Washington men" eventually hoped to establish a permanent headquarters for the new association in their home city; but to avoid the charge of parochialism and to tap interest in other parts of the country, they decided for the time being to hold the annual meetings of the National Bar Association in a different location each year.[20] In the short run, this policy was successful. The American Bar Association, despite several close votes, had refused to budge from Saratoga, and this resistance to change had received considerable unfavorable comment outside the organization.[21] The Weekly Law Bulletin pronounced its approval upon the choice of Cleveland as the site for the first annual meeting and stated that, regardless of the similarities between the two national bar associations, "the meeting at Cleveland will be much more important and influential than any of the meetings of the American Bar Association has been or can be."[22]

Even the leaders of the American Bar Association were aware that recent meetings of their association had been somewhat less than successful. Luke Poland, a guiding hand in the Association, had died six weeks before the meeting of 1887, and neither Baldwin nor Rawle (nor David Dudley

Field, for that matter) were in attendance that year.[23] C. C. Bonney, a member of the Executive Committee, informed Rawle that there had been "considerable haphazard debate...on non-important questions" during the sessions, and Rawle complained to Baldwin about all the "stuff" which he would have to excise from the minutes before the Report could be printed. Apparently the meeting of 1888 was not much better. A Wall Street lawyer, Daniel H. Chamberlain, thought it his duty to inform Baldwin of the "growing deterioration in the tone and ability of the discussion and miscellaneous exercises" of the Association, and he urged the leadership to appoint privately speakers who would "monopolize or at least give tone and character to" the discussions.[24] Officially the registered attendance for the 1888 meeting was 121; but the American Law Review reported that it had "dwindled down to about sixty."[25]

There was no panic among the leadership of the American Bar Association, but the threat of the new association was clearly appreciated. Having received the call for the organization of the National Bar Association in January, 1888, Francis Rawle expressed to Baldwin his hope that the organizers "would fail, as I think they will, in forming such a body....[T]hey can do nothing that we cannot, and...[i]f they succeed they will injure us....However, I do not see that we can do anything."[26]

What especially aroused Rawle's ire was the attendance at the NBA organizational meeting of James Broadhead and ABA secretary Edward O. Hinkley, who, in Rawle's words, "was unwise enough to attend their meeting in a somewhat representative capacity, though he disclaimed acting in such."[27] It is difficult to determine what Broadhead had in mind, but Hinkley believed himself to be a sort of spy for the ABA. He even encouraged Broadhead to accept the presidency of the National Bar Association "as a matter of policy"--though Baldwin commented dryly, "I think I should have inclined the other way."[28] Hinkley was not a very effective observer. He passed on the misinformation that a majority in attendance at the meeting were also members of the ABA when, in fact, only twelve of 87 were enrolled on his own books.[29]

Hinkley did propose a program to counter the National Bar Association, a movement which he recognized as one demanding "serious consideration." He suggested sending a "circular letter" to all state and local bar associations telling them that the ABA would "be glad to have delegates" who would be accorded "all the privileges of the meeting." He also hoped to work out reduced fares with the railroad in order to increase attendance at Saratoga.[30] Rawle felt the circular letter might be viewed by some as unseemly competition for patronage; but Baldwin gave his approval.[31]

The two organizations competed for support in August. Over the objection of James Lyon of Richmond, an ABA member, the date for the first annual meeting of the NBA was set for August 8, exactly a week before the ABA meeting.[32] Though the scheduling might have been interpreted as a direct challenge to the ABA, the National Bar Association nevertheless had the confidence to send a "committee" of three--the word "delegation" having been deliberately avoided--including Broadhead and Perry, to speak soothing words of mutual cooperation at Saratoga.[33] "Now, I can assure the gentlemen present," said Broadhead, "that nothing is farther from the purpose of the National Bar Association than to antagonize this Association."[34]

The ABA adopted a resolution which "received with much gratification the communication of the National Bar Association" and welcomed "its aid and cooperation."[35] As for the NBA request that the ABA send delegates to its next meeting, the Saratoga assembly was almost evenly divided. The ABA came within one vote of granting this equivalent to diplomatic recognition before tabling the enabling motion.[36]

The leadership of the American Bar Association did more than breathe a sigh of relief. It countered with a less-than-subtle attempt to undermine its competitor. First, President George Wright announced that it had been

"thought advisable and...courteous" that the secretary be instructed to "call the roll of the gentlemen present representing state and local associations."[37] Then Baldwin proposed the amendment of a bylaw which forbade representation by city and county bar associations in a jurisdiction where a state bar association had been organized. Baldwin's amendment would have allowed two delegates from any local association regardless of the existence of a state organization.[38] Since most of the support for the National Bar Association came from local rather than state bar associations and since delegates to the NBA would pay dues while those accredited to the ABA would be guests, the change in the bylaw might have sparked open competition between the two national bodies.

This scheme was a little too obvious for the gentlemen of the American Bar Association, and the debate on the change was long and heated. A member from Delaware with a good imagination believed that the ploy of the Executive Committee was too clever by half. In his view, local bar associations might unite against the ABA, send enough delegates to swamp the individual members, take control of the Association, and disburse the treasury![39] More realistically, Skipwith Wilmer of Pennsylvania suggested that the bylaw change would not "further good feeling" and that conflict between the two associations might weaken

both rather than strengthening either.[40] Walter George Smith of Philadelphia agreed. Let the National Bar Association go its own way; "if there is good to be found in the plan of a representative body...let us wish it God-speed....But for us it would be unwise in view of our past success to attempt to trench upon the field it has discovered."[41]

Secretary Hinkley disingenuously announced that the bylaw change "had nothing to do with" the National Bar Association, though he allowed that the Executive Committee was "not ignorant of the fact that there had been an Association formed under the name of the National Bar Association."[42] The assembly, however, felt otherwise and finally voted to recommit the matter to the Executive Committee.[43] At the next annual meeting Hinkley stated that the recommendation had been withdrawn due to "the great diversity of opinion shown on that subject."[44]

Another heated discussion ensued when George A. Mercer, a charter member of the organization from Savannah, Georgia, proposed that the Executive Committee be requested to select a location other than Saratoga for the next annual meeting of the Association.[45] One S. W. Williams of Little Rock commented that in his state the ABA was viewed as "decidedly an eastern affair...and unless we put it on wheels and hold our meetings in the west it will grow more

and more so."[46] Baldwin concurred: "It seems to me that eleven years meeting in one place is enough, and so far as convenience is concerned, Saratoga is far north and far east of our constituency, and it is going westward every year."[47] Former president Thomas J. Semmes argued further that in Saratoga the "races fill a greater space in the newspapers" than the meetings of the ABA. "Now, our object," said Semmes, "is to reach the profession throughout the United States by having our proceedings published so that they may see what we have done and what we propose to do."[48]

Saratoga did not lack defenders, but they were reduced to weak and unconvincing responses. It is doubtful that H. W. Palmer impressed the wavering with his argument that the meeting of the Association afforded "a very convenient excuse to come to Saratoga."[49] In the end the assembly voted 44 to 33 in favor of meeting elsewhere, and the Executive Committee designated Chicago as the site of the twelfth annual meeting in 1889. Thereafter Saratoga alternated with other cities until 1902 when a final break with the birthplace of the Association was made.[50]

The change in the location of the annual meeting was much more important for the survival and future success of the American Bar Association than the change in any bylaw could have been. Growth in ABA membership had virtually

ceased at Saratoga. From 1882 to 1887 the Association had increased by about fifty members a year. In 1888, the year the National Bar Association was organized, the membership rose from 751 to 752--a gain of precisely one. The next year in Chicago the ABA admitted 279 new members.[51] Moving to Chicago struck a telling blow at the National Bar Association whose constituency was located chiefly in the South and West.

Further, by holding an annual meeting away from Saratoga, the Association, wittingly or unwittingly, broadened its membership. Only a certain kind of lawyer could enjoy Saratoga, "a place of summer resort...where everybody seems to be reaching out their hands for...money," said the American Law Review.[52] Though it is difficult to prove empirically, the Association would seem to have gained more practical and business-like professionals as members when it became at least semi-detached from the old-fashioned "watering place."

One of these practical business lawyers admitted in 1889 was Adolph Moses (1837-1905), a native of Speyer, Germany and a resident of Chicago. Moses was a highly successful commercial lawyer and founder of the National Corporation Reporter, a weekly legal newspaper. Adolph Moses was also a Jew and a Jew proud of his heritage.[53] During the decade of the 1880's, Saratoga had become a

"battleground" between those hotels which totally excluded Jews and others which catered to a Jewish clientele exclusively. It is said that discrimination was so blatant that placards appeared in hotel windows reading: "No Jews or Dogs Admitted Here."[54] Although by the latter years of the decade the ABA was holding its meetings in "Putnam Music Hall," rather than in a hotel, the atmosphere around Saratoga was obviously poisoned. It would have been difficult, if not impossible, for a Jewish member to have found welcome in the social activities which were so much a part of the ABA meetings during those years. In Chicago, Moses was admitted without recorded protest.[55]

Though the Chicago meeting strengthened the ABA, the machinations of the Saratoga clique were hardly to be credited with the downfall of the National Bar Association. It had enough weaknesses of its own. In July, even before the annual meeting of 1888, Simeon Baldwin had written to President Wright of the impending session of the NBA:

> I don't believe they can maintain their venture this year; at least with any real superior strength. The organization seems to me too unwieldy, too unmanageable, their constituency too various, and their committees too large. It is certainly a tribute to our success to have a mime ready to take our work and almost our name, but there is not room for us both, and I think we have the best movement.[56]

His comments proved to be perceptive. Once forced to deal

with the stated purpose of its organization, the National Bar Association slowly disintegrated.

Unlike the American Bar Association, the National Bar Association could not afford to hold convivial gatherings with glittering generalities as vague objectives and high-toned recreation as the true purpose. The new association had been formed, at least in part, in reaction to just those aspects of the ABA. Whenever it could be obliquely mentioned, the leaders of the NBA suggested that the older body was incapable of spearheading serious legal reform because of its club-like organizational structure.[57] The existence of the National Bar Association was predicated upon the belief that uniformity of state laws could be achieved most speedily by a federal organization representing state and local bar associations.

Superficially the accomplishment of its goal did not seem impossibly difficult. In the opening address of the organizational meeting, A. S. Worthington reminded the assembly of the power and influence of the legal profession. The bar, he said, had "absolute control" of the judiciary of every state. In the executive branch, lawyers were to be found "everywhere." Legislatures were composed mostly of lawyers, and even when they were in the minority, they "absolutely direct[ed] everything" in regard to "matters of this kind, which relate largely to form and

legal procedure." A representative national assembly of lawyers "reported to and aided by local associations in all states" would surely influence state officials throughout the country and thus direct the process of legal change.[58]

This grand and pleasing theory proved to be a delusion. In the first place, there were no more than fifteen state bar associations in existence in 1888, and some of these were moribund.[59] Secondly, for all the lawyers who were government officials, few were interested in legal reform of even the most benign and modest sort. As John H. Doyle, the second president of the NBA, himself said,

> The lawyer becomes wedded to the forms and practice in which he is educated and under which his professional life has grown. He dislikes innovations and change. He shrinks from starting at the beginning of new things when he has mastered the old ones. He is conservative in all matters of reform, when the reform strikes at his favorite system. It is, therefore, difficult to obtain from him or from local Bar Associations, made up from such as he, any effort at reform in those matters that are of common public concern.[60]

Finally, as the National Bar Association delegates soon discovered, even their own interest in legal uniformity did not necessarily translate into any sudden consensus about the nature of the model laws to be endorsed by the Association. Discussions about proposed legislation had a tendency to degenerate into petty squabbling which

sometimes resulted in nothing more consequential than the referral of the subject back to committee.[61] Before the Association went out of existence it was able to recommend only five short pieces of uniform legislation to the states.[62] More significantly, these model laws were ignored by the state bar associations as well as by the state legislatures.[63] As early as 1889, John Doyle was warning the Association not to be disappointed that "the citadel of useless conflict of laws" was not to be carried by "a bayonet charge or a strategem." The work, he said, would be "slow and tedious" and "sometimes imperceptible." Though bar associations might be unable "to secure immediate and visible results from their meetings, discussions or recommendations," they were "sowing a seed" which would "not all fall upon stony ground."[64] Despite these brave words, it must have been obvious to other delegates that if the National Bar Association was unable to register any timely gains in its chosen area of specialization, and, further, was ignored by the supposed sponsors of its activity, the organization was bound to disappear into the shadow of its older and more prestigious rival.

One reason why the work of the Association was necessarily "slow and tedious" was the difficulty under which its committees were forced to operate. As in the ABA, committee members were selected largely for geographical

balance. The distance that separated them made meeting other than at the annual assemblies nearly impossible.[65] (At least in the eastern-dominated and more cosmopolitan ABA, a few committees were able to meet between sessions.) Furthermore, as Baldwin had noted, the National Bar Association committees were too large to be effective. The smallest committee in 1889 had nine members and the largest nineteen. What was everyone's responsibility became no one's responsibility. Some chairmen reported their personal views to the Association; others never reported at all. A resolution passed at the annual meeting of 1889 required the Secretary to transmit to all bar associations entitled to representation in the organization copies of proposed laws which were to be presented for consideration at the next annual meeting. The following year Ross Perry complained that not only was he unable to comply with this resolution, he was unable to procure copies of these proposals himself.[66]

Although the National Bar Association needed more effective leadership than the ABA in order to achieve timely results and thus survive as an organization, its leaders were actually much less effective than that of the older association. To some extent this ineffectiveness was the result of the inability of the NBA to attract any members from the legal stratosphere to direct it. (That

the ABA was led by, and even to some degree composed of, the elite of the bar was common knowledge and acknowledged in passing even within the NBA.)[67] True, the NBA had elected James Broadhead as its first president, but at the next annual meeting, when no one of similar stature in the profession could be found to replace him, the delegates reelected him to a second term over his own objection and in violation of a constitutional provision which expressly forbade it.[68]

Broadhead did not appear at the meeting of 1890, and the chairman for that session, John H. Doyle, was elected president for the following year. Doyle, the son of an Irish immigrant, was a pillar of the Toledo bar, a former judge of the Ohio Supreme Court who had "interests in many industrial and financial concerns." His proclivity for local history, international travel, and exclusive clubs would have made him a typical member of the ABA in the 1880's, but he was certainly not of the caliber to have been elected president of that body.[69]

By 1890 the National Bar Association was reduced to selecting a nonentity as its president, one Charles Marshall of Maryland. Marshall, a judge of a Baltimore appellate court, had been a member of Robert E. Lee's staff during the Civil War; but his chief claim to fame was as the grandnephew of Chief Justice John Marshall.[70] The

reasoning of the NBA seemed to be that if no member of the contemporary legal elite were available to hold office, then a link with a member of a past elite would be the best alternative.

As important as was the selection of a president with high professional status, the serious work of the Association fell to the secretary and treasurer. R. Ross Perry seems to have been an exceptionally conscientious secretary; but after two years of attempting to sweep back a sea of indifference and even hostility to the NBA on the part of state and local bar associations, he refused to be renominated for the position in 1890 despite the anxious entreaties of the nominating committee that he continue to serve. His last Secretary's report breathes weariness and discouragement.[71]

The clerical-looking Lewis B. Gunckel, a two-term Congressman from Dayton, Ohio, performed his duties as treasurer competently and with the dignity befitting his age. However, he too refused renomination in 1890 and was replaced by Lewis H. Pike of Toledo.[72] The selection of Pike is adequate evidence that the National Bar Association had touched bottom in its search for officers. Not only had Pike made a reputation for himself by stirring up tempests in the teapots of the annual meetings, but he had recently questioned continued membership in the NBA at a

meeting of the Ohio State Bar Association. Just a few minutes after his election as treasurer, Pike behaved in a boorish fashion during a speech by the venerable Byron K. Elliot, a justice of the Indiana Supreme Court. According to the Indianapolis News, Pike (in a gathering of fewer than fifty) casually unfolded a newspaper to its full size and calmly read it, "holding it up at arm's length so as to attract attention, and at the same time shut off the view of several gentlemen so unfortunate as to be sitting behind him."[73]

With officers such as Pike and Marshall, it is not surprising that few of the rank-and-file delegates were noteworthy outside their own localities. One exception was Christopher G. Tiedeman, writer of influential legal treatises and textbooks. But there was plenty of ballast at the other end. For some reason the National Bar Association attracted gadflies like H. H. Ingersoll of Knoxville and William A. Ketcham of Indianapolis who, after the collapse of the NBA, buzzed about the meetings of the American Bar Association well into the next century.[74]

Minutes of the NBA meetings, less revealing than those of the ABA, were less inspiring as well. External reports of the gatherings were even more discouraging. For instance, the Indianapolis News revealed that delegates to the 1890 meeting "came in slowly, the hospitality of the

Columbia Club last night apparently having caused a reluctance to stir out early."[75] The next day, the same paper noted that the number of delegates present "was rather small."

> Members were scattered in groups, chatting unconcernedly or smoking cigars meditatively, while a few of the faithful carried on the business. Occasionally the attention became general long enough to take a vote upon some resolution or question, then lapsed into lagging and only partial interest again.[76]

Since this "lagging and partial interest" was being paid for by the treasuries of the state and local bar associations rather than by the dues of the "laggers," it is understandable that support for the National Bar Association dropped rapidly. In 1888, 25 bar associations had contributed $815 to the treasury, and in 1889, 24 associations had paid in $1,190. By 1890, however, 18 bar associations provided only $654 for the expenses of the NBA.[77]

The Ohio State Bar Association itself paid $105 of this total, more than twice as much as any other bar association and 20% of its own income.[78] At the OSBA meeting of 1891, Lewis Pike, now treasurer of both organizations, suggested that Ohio pay only for delegates who actually attended the NBA meetings and not for all 21 who were appointed annually. An Executive Committee member, Samuel F. Hunt, then moved that no further

delegates be appointed to NBA meetings. A more strongly worded substitute motion requiring the Ohio Association to "now withdraw and sever its connection with the National Bar Association" was finally passed, though only after a discussion so heated that the assembly took the unusual step of ordering it stricken from the minutes.[79]

By the summer of 1891, the National Bar Association was moribund. The 1890 assembly had unwisely chosen a location in the Boston area for the next annual meeting, and this proved the penultimate blow to the survival of the Association. Previously the NBA had met in Washington (1888), Cleveland (1888), White Sulphur Springs, VA (1889), and Indianapolis (1890). Each of these meeting places had been located in areas of at least lukewarm support for the fledgling association, although, as Secretary William Reynolds confessed, "at every meeting we had fewer delegates and less enthusiasm."[80] But the NBA did not have a single delegate from New England in attendance at the 1890 convention, and to meet there in 1891 without even the promise of hospitality from a local bar association was to sustain a self-inflicted wound. As Reynolds put it, the Association "stranded on Nantasket Beach without a quorum."[81]

Rather than concede defeat, those in attendance decided that the Association's feebleness was the result of

its "peripatetic system of going around the country." They adjourned the meeting until December, where at Washington they believed that "the National Bar Association, in the language of the immortal Webster, should 'Fall at last, if fall it must, surrounded by the monuments of its own glory, and upon the very spot of its origin.'"[82]

The "Washington men," suddenly reinvigorated by the prospect of a second opportunity to achieve their original design of a national bar association with a permanent home in the nation's capital, moved swiftly and with purpose to make the December meeting a success. Supreme Court Justice John Harlan was convinced to make a welcoming address. Words from national dignitaries like Justice Blatchford, Senator Thomas Bayard, and Supreme Court Reporter J. C. B. Davis persuaded the bar associations of Boston, New York State, Delaware, and Kentucky to appoint--though not necessarily to send--delegates to the meeting. A ten-course banquet at the Arlington Hotel was arranged with short speeches by Justice Horace Gray, Senator George Gray of Delaware, and James C. Carter, the acknowledged leader of the New York bar.[83]

Despite the intensive planning, the business meeting of 1891 was as poorly attended as those of previous years. An assembly of, at most, twenty-five gentlemen gathered in a lecture hall of the Columbian University to listen to the

excuses of non-attenders and the grandiose schemes of the District of Columbia bar.[84] Chief among them was the construction of a permanent home for the Association, which was to include a law library, portraits of bar leaders, a museum for "interesting professional relics," and a "National Lawyers' Club"[85] The "Washington men" also hoped to acquire a Congressional charter for their Association. Ross Perry, having learned a lesson about elitism at the bar, proposed the appointment of a permanent body within the organization to be known as the "senate." This was to be composed of the most eminent members of the profession and, as Perry said frankly, "would enlist the interest of leading lawyers in the association."[86] A similar concern with the appearance of support from the professional elite was evident in the selection of James C. Carter as the new president of the Association and the choice of Representative Sherman Hoar of Massachusetts, ex-Senator George Edmunds of Vermont, Senator Thomas Bayard of Delaware, and Senator John G. Carlisle of Kentucky as vice-presidents. Neither Carter, nor apparently any of the other worthies, were consulted beforehand about the "honor."[87]

Letters from both Justice Bradley and Justice Brewer more-or-less endorsing the proposals of the District Bar Association were read to the assembled delegates, but the

latter were not swept off their feet. The decision to establish a permanent home in Washington was sharply criticized by Congressman Thomas R. Stockdale of Mississippi because he believed that Washington lawyers were out of touch with the public sentiment of the nation. John W. Davis of West Virginia, the future Presidential candidate and leader of the American bar, argued that if the annual meetings were held in Washington, other "attractions," such as the Supreme Court, would destroy the Association--"No one would come to attend the sessions inside of ten years."[88]

On the other hand, the NBA seems to have changed the date of its annual meeting from August to January without dissent. Ironically, the ABA had discussed a similar proposal only a few years before, and Egbert Whittaker of New York had warned that if lawyers were called upon "to meet outside of the months of July and August, in my judgment this Association will die a natural death."[89] Had the NBA actually held their planned meeting in Washington during the second week of January, 1893, the delegates would have had to brave a heavy snowstorm in order to appear at the convention.

The most successful aspect of the last meeting of the National Bar Association was the lavish banquet held on the evening of December 10, 1891. Masses of roses decorated

the tables at which sat six Supreme Court Justices and seven Senators, as well as numerous congressmen and other dignitaries. After feasting upon saddle of mutton, terrapin, and boiled pheasants, the ninety diners were regaled with old pleasantries about the importance and dignity of the bench and bar. Most of the speakers betrayed only a vague familiarity with the nature and objects of the National Bar Association, but all were gentlemanly enough to predict a great and growing success for the organization. Ironically, the last toast on the program was offered to the American Bar Association, "the most distinguished Organization of lawyers in the United States, which has already done a great work, and which we hope may continue to do a great work."[90] So with the praises of the American Bar Association ringing in their ears, the guests departed into the night, and the National Bar Association disappeared into history.

The immediate cause for its demise is unknown, but since the minutes of the fourth annual meeting were never published, it may be assumed that the organization became extinct long before the proposed fifth meeting in 1893. The cost of the grand banquet itself may have provided the coup de grace.

The underlying causes of the Association's failure seem obvious from the perspective of nearly a century. In

the first place, state and local bar associations were simply too weak to support a national representative body such as the National Bar Association. Most were social in emphasis, and even the strongest were professional organizations only in a narrow, parochial sense.[91] The belief that the NBA might rely upon these precarious building blocks for moral and financial support was quickly proved erroneous.

Furthermore, while many lawyers of the period had a genuine interest in promoting uniformity in state laws, it made little practical difference to most of them. Even among the growing number of lawyers who practiced across state lines, most grossly underestimated the commitment in time, effort, and money which would be needed to effect what were in reality small, technical changes in statute law. When it was discovered that conflicts of laws were not to be overcome by "bayonet charge or strategem," initial enthusiasm for the National Bar Association cooled rapidly. Besides, as both Norbert Brockman and Wayne Hobson have suggested, "those lawyers interested in bar associations were interested for a wide diversity of reasons."[92] The problems of bar admission and legal education, for instance, were at least as important to the profession as the conflicts between the states' commercial

laws, yet the National Bar Association hardly addressed these questions.[93]

Most importantly the National Bar Association was severely handicapped by its inability to attract dedicated leaders from the highest stratum of the legal profession. This deficiency was more than a matter of prestige, although doubtless the status of ABA members helped pull that association through the most difficult of its early years. It was lawyers of the urban elite who had the leisure to contribute most to bar associations, to take long trips to distant meetings, to interest themselves in professional problems more theoretical than the fixing of fee schedules. For one reason or another, the National Bar Association was unable to find a "Saratoga clique" to guide the affairs of the organization. The desperate attempt at "name dropping" in its final days was only a belated recognition of this deficiency.

Finally, the National Bar Association could not shake its image as an upstart antagonist of what was considered to be, in even 1888, the "first and foremost" national association of lawyers.[94] Perhaps if the new association had been founded earlier, before the ABA had become established, or later when it could have been more fairly supported by state bar associations, it might have survived longer. In fact, it reached its nadir just as the ABA was

receiving credit for the passage of the Davis Bill, which broke a logjam of cases in the Supreme Court.[95] The socially conscious and complacent gentlemen's club of Saratoga easily shook off the threat from a new logically organized and representative professional society but not before it proved itself flexible enough to broaden its membership at the hint of serious competition.[96]

CHAPTER 4

THE "NOISELESS, UNOBTRUSIVE WAY": INTERNAL AFFAIRS 1891-1911

The demise of the National Bar Association occurred fittingly in the year in which the American Bar Association began a new era in its development. The middle two decades of its first half century were a period of almost imperceptible transition from the tiny Saratoga banquet and oration society of the eighties to the political pressure group of the early twentieth century--the reactionary ABA that the modern Association finds satisfaction in disparaging. During this transition period, the ABA grew in membership and prestige, hesitantly addressed the concerns of the legal elite, and became recognized as the spokesman for the legal profession in the United States. Yet for all that, the American Bar Association remained largely a social organization, shunning with all its considerable powers of gentlemanly cunctation any political controversy which might alienate even a small segment of its constituency. As George R. Peck said rather proudly in his presidential address of 1906, the American Bar Association conducted its affairs in a "noiseless,

unobtrusive way, not joining very conspicuously in the clash of opinions, or fighting in the battle lines of real or imaginary issues."[1]

Appropriately, this transitional period opened with a final appearance by David Dudley Field, starring in a comic-opera role unwittingly created for him by Simeon Baldwin. From the earliest years of the Association, Baldwin had wanted to confer some kind of award upon a member of the legal profession who was the "framer of a good law, the author of a good book, the originator of a good reform." When he proposed the creation of such an award to the Executive Committee early in the 1880's, he was politely rebuffed. Old Edward Hinkley, the Secretary, muttered "apple of discord, apple of discord."[2] However, in 1890, the year of Baldwin's election to the presidency, an annual award of a gold medal was approved by both the Committee and the Association; and the Executive Committee, "out of motives of delicacy," prudently turned over the nomination of recipients to Baldwin and the living ex-presidents of the Association.[3]

Baldwin, who had organized the Association and written its constitution, now turned to doodling designs for its official medal, conferring with Francis Rawle about the details.[4] On the more important question of the first award, Baldwin spoke with his friend and fellow New England

Democrat, ex-ABA president Edward J. Phelps. Phelps, who had recently served as Cleveland's minister to Great Britain, suggested that the first medal be presented to Sir Roundell Palmer, Lord Selborne, author of the English Judicature Act of 1873.[5] Baldwin strongly agreed and wrote to a number of the Association's ex-presidents requesting their opinion. James Broadhead, William Allen Butler, Thomas J. Semmes, Alexander R. Lawton, Henry Hitchcock, and George G. Wright approved Selborne as a good choice, although Hitchcock said that he preferred "a countryman of our own for the first recipient."[6]

Whether Baldwin wrote to ex-president David Dudley Field is unknown. In any case, Field soon discovered the intent of the award committee and decided to lobby for a worthier candidate than Lord Selborne--himself. Field was never known for his lack of determination or the use of half measures once he had settled upon some objective, and he quickly marshalled friends, relatives, and retainers to speak in his behalf. The letters which bombarded the ex-presidents in July, 1891, came from his brother, religious publisher Henry Field; his nephew, Justice David Brewer; his private secretary, Howard Payson Wilds; and ABA leader John F. Dillon, counsel for Cyrus Field and "a friend of the family."[7] On Supreme Court stationery, Brewer briefly and formally avowed that his uncle rather than Lord

Selborne was the "proper recipient" of the medal. "I do not think relationship has blinded my judgment," he added.[8] Henry Field, taking a less lofty approach, told Baldwin that his brother regarded him "as one of his best friends. Therefore I feel sure that you will sympathize fully in the feeling...that any attempt to honor an Englishman to the disparagement of one of our countrymen, could have little encouragement from you."[9] The letter writers also testified that Field, at 86, was in such poor health that the award "must come this year or never."[10]

The "eleventh hour canvass," as Baldwin called it, was modestly successful. Ex-president Cortlandt Parker endorsed Field, and Butler, Semmes, Wright, and Hitchcock at least wavered in their earlier commitment to Selborne.[11] Baldwin and Phelps were chagrined. Phelps saw a technical impediment to the Field candidacy in that Field was a titular member of the awards committee; but Phelps' real objection stemmed from his belief that the awarding of a medal to Field would be tantamount to endorsing codification, a subject upon which the profession was sharply divided. Most importantly, as gentlemen of the old school, Baldwin and Phelps were appalled that their private medal could become "the subject of solicitation and canvass." To Baldwin this was simply "out of place."[12]

Appreciating the possible damage that might be done to Association prestige by a public controversy, Baldwin wrote a carefully worded letter to Field arguing that it was too late for the other committee members to reconsider their previous action, and that, in any case, they might be criticized for awarding the medal to a member of the committee. Baldwin ventured that if Field were to resign at the next Association meeting, the committee "could then take up your name without embarrassment, and from your long held position as the first and ablest of American law reformers...I feel assured that an unanimous nomination would be the result."[13] There was no reply from Field.

An Association bylaw required a report containing any recommendation for action by the ABA to be printed and distributed to the membership fifteen days before the annual meeting. Accordingly, within a few weeks of writing to Field and after receiving the approval of a majority of ex-presidents in support of Selborne, Baldwin issued the report of the committee without so much as acknowledging the existence of the "Field boomers." The report "roused a storm of indignation" at the Boston meeting. "Why should the American Bar Association decorate a foreigner?" asked the rank-and-file.[14] While 1891 was not the worst year of the decade to nominate a British lawyer for an American award, it was not the best year either. The Bering Sea

dispute with Great Britain was still simmering despite a modus vivendi between the two nations, and there remained sufficient anti-British sentiment in the United States during this jingoistic period to have aroused a controversy at the annual meeting even without the machinations of the Field supporters. It is clear that many ABA members believed that to support Field was to support "the American cause."[15]

Field's supporters arrived on the scene with a printed brief in Field's behalf written anonymously by Assistant Secretary of State and future judge of the World Court, John Bassett Moore.[16] While Edward Hinkley was able to prevent its general circulation, he could do nothing to quiet the heated debate which erupted in Boston's Horticultural Hall on August 28. Baldwin, in the chair as president, tried to prevent the Field nomination from being brought before the Association, but he was embarrassingly overruled by the assembly.[17]

Finally, after "several long and torrid hours" of discussion, ex-president Alexander R. Lawton, a former Confederate general, "saved a tense situation" by quoting from the classics, "deprecating an unseemly controversy over a 'lump of gold.'"[18] A compromise was reached whereby two medals were awarded in 1891. The Association voted to strike the debate from the Report, the bylaw authorizing

the award of a medal was repealed, and no more awards were made by the American Bar Association until 1929.[19]

The incident of the medal would have been little more than an amusing triviality had it not been perceived as a defeat for the "Saratoga clique" and thus marked the beginning of its decline in Association affairs. Significantly, Baldwin's letter of June asking for approval of Selborne was sent only to those ex-presidents whom James Grafton Rogers identifies as members of the inner circle.[20] Ex-president Cortlandt Parker, who fully supported Field in 1891, was in this sense an "outsider." Obviously the members of the "Saratoga clique" assumed that the annual meeting would rubber-stamp their nominee for the award. Instead, "[t]hey discovered that this child of theirs had outgrown their control. It had a membership of a thousand, and that membership was no longer in the old group."[21]

Baldwin, who had both the long view and a host of other interests, understood and did not dispute this trend. After serving a final term on the Executive Committee as immediate past president, he put any formal direction of Association affairs behind him. On the day after his return from Saratoga in 1892, he wrote in his diary that he felt

> both relieved and half regretful at parting with all active control of the Bar Association, in ceasing to be a member of the Executive Committee, but I believe I shall enjoy its

> meetings the more, and that the organization is now so complete, and the traditions so established, that it will get along as well, if not better, without me.[22]

As for the other members of the leadership group, they were mostly in their sixties and seventies by 1891. After that year, only two members of the old inner circle served as president, and by 1904, only Baldwin, Rawle, and Carleton Hunt were still alive.[23]

Still, the break with the old order was gradual. Baldwin was in frequent attendance at ABA meetings and was, in his own words, "treated with great respect."[24] Francis Rawle continued to consult with him regarding Association affairs and even urged him to rejoin the Executive Committee.[25] The position of Secretary was passed from Edward Hinkley to his son and assistant, John Hinkley, before the father's death; and John Hinkley served as a member of the Executive Committee until 1912. Likewise, Francis Rawle served as Treasurer and unofficial editor of the Reports until 1902 and provided advice--asked and unasked for--to Association leaders well into the 1920's.[26]

Changes in the American Bar Association between 1891 and 1911 occurred (when they occurred at all) either directly or indirectly as a result of the growth in Association membership. Membership in the Association rose slowly from 1102 in 1891 to 1720 in 1901. Then between 1901 and 1911, it nearly tripled to 4701.[27] Approval by

the local council of an applicant's state continued to be necessary for admission to the Association, but as Baldwin admitted as early as 1891, this approval had become a "matter of form"--at least for the proper sort of lawyer.[28]

Before 1911, membership growth depended more upon the location of the annual meeting than upon any other factor. In the years 1889-1902, when the ABA alternated its meeting sites between Saratoga Springs and other cities, membership actually declined slightly after four of the seven Saratoga conventions. Membership grew consistently when the Association met elsewhere. Not all Association members were pleased with this development, and an attempt to abandon Saratoga after 1895 was effectively blocked. Henry Wise Garnett deprecated the notion that the Association could "strengthen itself by traveling over the country in order that it may bring itself to the convenience of those who have not seen fit to join it."[29] John H. Hamline of Illinois argued that the Association did not need "more members on our rolls, but a fuller representation of the active American Bar...discussing questions that press upon the profession."[30] Since the registered attendance at the non-Saratoga meetings was also generally higher than those at Saratoga, it is probable that Hamline actually desired the attendance of the professional elite who might be expected to come to the Saratoga meetings.

The alternate meetings at Saratoga seem to have been discontinued at least as much for extraneous reasons as to encourage growth in the Association. Saratoga had long since passed its prime as a fashionable resort; the race tracks and "other local entertainments" diminished attendance at the meetings; and its Convention Hall now seemed "inconvenient, uncomfortable and unpleasant."[31] In 1904, St. Louis was selected as the site of the annual meeting even though the session for that year should have been held in Saratoga. Several years before, the Association had virtually committed itself to meet concurrently with an "International Congress of Lawyers and Jurists" at the Louisiana Purchase Exposition in St. Louis. When the exposition was postponed from 1903 to 1904, it was not difficult to bypass Saratoga for a year, especially since the 1903 meeting had been held at another watering place, Hot Springs, Virginia. There seems to have been no protest on this occasion even though the meeting was scheduled for the last week of September rather than for August as had been the custom.[32] In 1905, the Association tried the more fashionable resort town of Narragansett Pier, Rhode Island. Here membership increased only slightly while registered attendance dropped to 277 from the 451 members who had come to St. Louis. The following year at St. Paul, Minnesota, the Association grew by 557

members or 27%, the largest percentage of increase in ABA history except for 1879 when the total number of members was only 524. After Narragansett, the Association never returned to a vacation resort for its annual meeting except for the war year of 1917, its fortieth anniversary, when it met for a final time at Saratoga. Presumably the decision to abandon resort towns reflected not only an interest in encouraging growth within the Association but also the inability of most popular vacation spots to provide enough first-class accommodations and a suitable meeting place for several hundred lawyers during the peak of the season.[33]

Since the vast majority of the Association's members lived in the major metropolitan areas of the northeast and the upper midwest, most of the annual meetings during the Association's first fifty years were held in these regions. As William Howard Taft put it, the "further you go from the East, after you get beyond Chicago, the smaller the meeting you are likely to have."[34] On the other hand, the far west could not be totally ignored, especially when the Association began to think of itself in truly national terms.[35] During its first half century, the ABA held meetings in Denver (1901, 1926), Seattle (1908), Salt Lake City (1915), and San Francisco (1922). Ironically, the Denver meeting of 1926 registered the largest number of members (2116) of any meeting in the period. Unlike the far west, however,

the South could be graciously avoided on account of its summer climate. Meetings were held in Hot Springs, Virginia (1903), and Chattanooga, Tennessee (1916), but as a more general measure of compensation for the infrequency of conventions in the region, the Executive Committee traditionally held its midwinter session in the South.[36]

The location of the annual meeting soon became an important question of internal politics. The basic factors were those of geographical balance and availability of hotel accommodations, but there were other considerations as well. It was regarded as essential that the local bar association issue an invitation to the ABA. The preferred city needed some "attractions"--but not so many that the Association meetings would be ignored. And a cool climate was helpful. For example, Salt Lake City was chosen as the site for the 1915 meeting because the Association needed to go west that year, had received no invitation from the Portland bar, could not return to Seattle so quickly after meeting there in 1908, and because Salt Lake City was farther east than Los Angeles, thus better accommodating the eastern members. Interestingly, the Executive Committee also preferred Salt Lake City to San Francisco because the California city was hosting an exposition in 1915. After a negative experience with the circus-like atmosphere of St. Louis in 1904, the leadership clearly chose to accept a

smaller attendance at Salt Lake City rather than compete with the diversions of a much cooler San Francisco.[37]

Of course, moving the annual meeting from city to city was no guarantee of growth, as the history of the National Bar Association had amply demonstrated. The American Bar Association grew dramatically in the years 1891-1911, in part because of the perception that the Association did indeed speak for the elite of the legal profession. Among laymen this perception was enhanced by the favorable and generally uncritical publicity which the ABA garnered in its perambulation around the country. For example, the Boston Globe of August 27, 1891, proclaimed the annual meeting in that city to be "a brilliant aggregation of legal luminaries," "grave, dignified, intellectual-looking men" whose "intellectual brilliancy...was such as to render incandescent lights superfluous." And this was the meeting where these gentlemen of intellectual substance squabbled over the award of a gold medal! Not all reporters were so extravagantly awestruck; but the comments may be taken as an extreme example of the respectful manner with which the Association was treated by the turn-of-the-century press.

Potential members of the Association were probably less impressed with the purple prose of contemporary journalists than by the prestigious officers and speakers whom the Association was able to attract during those

years. Nationally known lawyers such as Thomas Cooley, James C. Carter, Moorfield Storey, Joseph Choate, and Alton Parker served as presidents of the Association, and the annual banquets were frequently enlivened by facile after-dinner speakers or by comments from the politically powerful. In 1897, for instance, newly-inducted ABA member and President of the United States, William McKinley, was induced to say a few words to those attending the dinner at which he, Senator Mark Hanna, and Secretary of War Russell Alger were guests of honor.[39]

The prime acquisitions for program planners during the transitional era were influential representatives of the British legal profession such as Sir Frederick Pollock (1903) and James Bryce (1906). However, the first Englishman to address the ABA, Lord Russell of Killowen, the Lord Chief Justice, was probably the most significant because his visit occurred at the beginning of the modern period of amicable relations between Great Britain and the United States. The idea of inviting Russell was Francis Rawle's; and the Treasurer carried off the scheme with a flourish, meeting the Lord Chief Justice in New York harbor on a tugboat and then seeing "him through a round of entertainment furnished by Henry Villard, the elder Pierpont Morgan, the Canadian bar, James Coolidge Carter and the President, Moorfield Storey." When Russell's party

arrived at Convention Hall, Saratoga, they were greeted by "general cheering" from an audience of nearly two thousand, "a large number of whom were ladies." The meeting of 1896 was the last assembly in Saratoga to attract any appreciable number of new members. More importantly, the visit by a Lord Chief Justice of England, the birthplace of the common law, "established the international prestige" of the American Bar Association and, in so doing, increased its domestic reputation as well.[40]

Growth in the membership of the American Bar Association insured change in at least the style, if not the substance, of Association affairs. The first evidence of this change came even before the medal fiasco made the decline of the "Saratoga clique" a matter of record. In the organization's first decade, ABA presidents were chosen annually by the inner circle "on the hotel porch after lunch."[41] Then, according to tradition, David Dudley Field announced himself to be a candidate for the presidency. Colonel Broadhead is supposed to have stopped Field in a Saratoga hotel and said,

> Mr. Field, I came down here in favor of you for President of the American Bar Association. I thought we had to recognize you. But there is one rule that we agreed upon long ago on the porch in Saratoga, and that is that a man who seeks to be President of the American Bar Association cannot be President.[42]

The significance of the remark lies not only in the hauteur of Broadhead, who at the time held no office in the Association, but in Field's success at securing the presidency for himself anyway in 1888.

By the time Simeon Baldwin became president in 1890, the office could no longer be obtained by fiat of the inner circle, even for the founder of the Association. The clique was forced to go "on the Council to secure it."[43] That is, the inner circle had to pressure the General Council, the organization's nominating committee composed of one member from each state, in order to assure Baldwin's election. Some of the old tradition continued into the 1890's because the member selected to deliver the prestigious "Annual Address" was considered the putative choice of the Executive Committee for president in the following year.[44] But less heed was paid to this "suggestion" as the new century approached. Geographical considerations began to play a larger role, and the presidency was rotated more or less among the Northeast, the Midwest, and the South. Then, too, a man of national distinction might be passed over in order to reward a member who had labored diligently for the Association. Certainly, as Norbert Brockman has said, "by 1895, no one could have become president of the American Bar Association without actively seeking the position."[45] After the turn

of the century, elections were definitely contested (though not openly by the candidates), and votes on the General Council were occasionally close enough to have absent Council members deposed in favor of their brethren in attendance.[46]

A larger attendance at the annual meetings began to change their character as well. In the earlier years a great deal of time had been spent in free-wheeling discussions of the papers that had been read. The minutes of the Association sometimes suggest more a meeting of a literary society than a professional organization. By the mid-1890's,however, papers of even a strong ideological bent were allowed to pass without comment from the floor. E. B. Sherman, a past president of the Illinois State Bar Association, criticized this trend as early as 1893; he longed for the ABA meetings of "years ago, when the floor was sought by dozens of men at a time, and there was thrown out upon the questions a fervor and an illumination that we have not witnessed in latter days."[47] The simple fact of the matter was that with an attendance of several hundred and an agenda filled with all sorts of routine business, the possibilities for general discussion at the annual meeting had become increasingly limited.

A more dangerous possibility from the point of view of the Association leadership was that irrelevant or

embarrassing resolutions might be introduced on the floor by members with some ideological ax to grind, or worse, that Association policy might be dictated by a small group of the rank-and-file (especially those living in the immediate area of the convention site) in the waning hours of the business meeting. The Association experienced a taste of this kind of embarrassment the first time it met away from Saratoga. When it was time to adopt the usual formal resolution thanking the host city for its hospitality at the conclusion of the 1889 meeting in Chicago, one W. H. H. Russell tried to insert an endorsement of the city as the site for the holding of the Columbian Exposition of 1892-93. After objections by several members including President David Dudley Field, Russell sarcastically implied that Field wanted New York to have the exposition. Field coolly answered that the Association had "nothing to do with a fair in New York or elsewhere. We have to do with the affairs of the American Bar Association, and nothing else."[48]

But there were other members who hoped to use the Association as a means of gaining attention for a personal cause. For instance, in 1893, resolutions were offered to the annual meeting which endorsed publicly funded law libraries in the meeting places of the circuit courts, criticized capital punishment, and advocated higher

inheritance taxes in order to lighten "the burdens of taxation upon the poorer classes."[49] Usually controversial resolutions could be shunted into one committee or another where they would rest in peace; but to prevent the possibility of debate on emotional issues, the Executive Committee brought in a new bylaw in 1906, which stated that no legislation could be endorsed by the Association unless it had passed through the potential graveyard of a committee, and then only if such legislation were approved by a 2/3 vote of the annual meeting.[50]

The following year the leadership was reminded that embarrassment for the Association was not necessarily limited to proposed legislation. One Henry S. Dewey of Massachusetts tried to have the Association consider seven "articles of faith" including the propositions that "the ever living God is the supreme judge of the world" and that "the unwritten law, so called, is the Word of God." The Association could hardly dispose of this topic fast enough, but Dewey seems to have been well pleased that his "articles of faith" would be printed in the minutes of the next Report.[51] A much more serious episode occurred when George Whitelock of Baltimore presented to the same meeting in Portland, Maine, a resolution criticizing President Theodore Roosevelt's censure of a judge in the 1906 Beef Trust case. Whitelock was not an obscure crank. Just two

years later he was elected Secretary of the Association and became an ex officio member of the Executive Committee. Debate on the resolution was heated and continued for over an hour. Especially embarrassing was the fact that the man whom Roosevelt had defeated in the election of 1904, Alton B. Parker, was occupying the chair as president of the Association. Parker could find no technical grounds on which to rule Whitelock's resolution out of order, but he repeatedly and unsuccessfully requested Whitelock to withdraw it. Finally, it was tabled.[52] In 1908, another bylaw was added which insured that in the future such resolutions would be referred to committee without reading, debate, or being printed in the Report.[53]

The business side of the ABA meetings began to settle into an agreeable conventionality bordering on dullness. There was, though, a price to be paid for this desired illusion of stability and consensus. Increasingly, Association affairs were committed into the hands of another inner circle, a group whom Roscoe Pound partially identified as Moorfield Storey, Alfred Hemenway, Simeon Baldwin, Jacob M. Dickinson, Frederick W. Lehmann, James Hagerman, Alton B. Parker, George R. Peck, Everett P. Wheeler, and Henry D. Estabrook.[54] This new group, composed mainly of former presidents and executive committee members, was more fluid than the old Saratoga

clique and by necessity shared its guidance of the Association with current officeholders, especially the secretaries, treasurers, and the chairmen of the more important committees.

The life of the Association gradually passed from the business sessions of the annual meeting to the smaller forums provided by the ABA conventions--the "Sections" and the associated bodies, such as the Conference of Commissioners on Uniform State Laws. The "sections" were another product of Simeon Baldwin's organizational proclivities. In August 1892, a year after the medal controversy, Baldwin met informally at Saratoga with "a number of gentlemen interested in legal education." They decided to call a general meeting for those interested in the topic to be held during the ABA convention of the following year, at which time a new society would be organized. Initially, it was uncertain whether or not this new legal education society would have any organic relationship with the American Bar Association. The idea for organizing the group as a "section" of the ABA came from Baltimore attorney George M. Sharp, a former law student and sometimes colleague of Baldwin's at Yale Law School. Sharp's father had been a doctor, and Sharp was reminded of the "sections" in medical societies for the various medical specialties. He suggested to Baldwin that

the institution of similar sections in the ABA would "enable more work to be done, make the meetings more interesting and probably larger, and be in line with the specialization which now exists in all professions."[55] Baldwin agreed and set about to ensure the success of the inaugural meeting. He wrote to James B. Thayer, noted professor at Harvard Law School, asking for subjects to consider and advising him to mention "informally to two or three gentlemen what will be brought up" so that they could intelligently support the proposals of their elite colleagues.[56]

At the next ABA meeting, Baldwin moved the adoption of the bylaw which authorized the creation of a Section of Legal Education, suggesting that the new society would "serve as an important feeder to the Association" and would permit interested members "to discuss this particular subject with more fulness than might always be agreeable for the Association to entertain at is open meetings."[57] In fact, the Section of Legal Education did just that. By 1894, the New York Times reported that the meeting of the Section had "attracted nearly as much attention as the session of the Association itself."[58] Speakers included Baldwin of Yale, William A. Keener of Columbia, Woodrow Wilson of Princeton, and John H. Wigmore and Henry Wade Rogers of Northwestern. Attendance was so great that the

assembly had to be moved to a larger hall. Membership in the Association also increased even though the meeting was held in Saratoga that year. At the same meeting Baldwin successfully moved the adoption of a bylaw creating a second section, the Section of Patent Law.[59]

Unlike committees of the Association, which were usually small and appointed by the president with the assistance of the inner circle, sections were nearly autonomous professional societies. They were dependent upon the Association for such things as the choice of a meeting site and the printing of their proceedings, but otherwise they were separate, specialized organizations, electing their own officers, adopting their own bylaws, and scheduling their own programs. As a more recent ABA officer has said,

> The principle underlying section organization is that a circus can get so big that the show cannot all be contained in one ring, and a three-ring circus is simply a circus with section organization. Each section is a miniature association specializing in some particular topic...giving each member the opportunity to listen to and participate in whatever is of particular interest to him.[60]

In other words, the sections restored some of the club-like atmosphere of the original Association meetings, and yet their narrower focus promised greater effectiveness as deliberative bodies.

Nevertheless, many Association members grew uneasy at the success of the Section of Legal Education and were even more wary of the Section of Patent Law, dedicated as it was to a subject considered arcane by the profession. The Section of Legal Education had been required to make recommendations for action to the Committee on Legal Education, which would then make recommendations to the full Association for its approval--a process guaranteeing years of delay for any substantive proposals. On the other hand, the Patent Law Section was allowed to "take such action as they may deem wise in regard to any legislation concerning patent laws in Congress" so long as they proposed no new laws without Association approval. In effect the Section was precluded from promoting any legislation but was left free to defeat any it disliked, all in the name of the Association. Former president John F. Dillon termed the delegation of this power "entirely wrong and ill-advised."[61]

When in 1896 Executive Committee member William Wirt Howe presented a resolution that would have created a Section of Insurance, opposition surfaced immediately. While there seemed to be little sentiment for abolishing the Section of Legal Education since its aims were "general...in the broadest sense," the Section of Patent Law as well as the proposed Insurance Section came under

attack. Some members, including former president James C. Carter, feared that creating another section would be "a step in the line of disintegrating this entire body and dividing it up into a number of small useless bodies." One member even suggested that large insurance companies might formulate legislation in their interest at Section meetings in order to "receive the sanction" of the Association. The resolution to establish a Section of Insurance Law was defeated, and no more sections were organized until 1913.[62] When Baldwin next felt the organizational urge in 1907, he proposed the creation of a Comparative Law Bureau, "an auxiliary body of the Association" whose object would be the "discussion of methods whereby important laws of foreign nations...may be brought to the attention of American lawyers." It was a section in all but name but so academic in purpose that it was easily approved by the Association.[63]

Only the American Bar Association's renewed interest in legal education was of greater significance to the profession than the organization's nearly simultaneous attempt to give practical meaning to its stated concern with the uniformity of state legislation. For various reasons, the "conflicts of laws" among the states, especially in commercial matters, seemed more glaring than ever in the last decades of the nineteenth century. The

most significant contributing factors were, of course, the improvements in transportation and communication and the rise in finance capitalism which made the legal boundaries of the states an obvious nuisance to interstate commerce. Annoyance with minor but potentially hazardous differences in detail among state laws also sprang from the belief that such differences were unscientific and inefficient in a society which prided itself on efficiency and a scientific spirit. Finally, it is possible, as Grant Gilmore has suggested, that "the nationalizing principle of Swift v. Tyson," which had produced solutions to such conflicts in the past, was breaking down because of the increasing number of state judges who "took the stare decisis business seriously."[64]

In any case, the Association erred in its first decade in believing that disharmony in state laws could be addressed by various committees as a problem incidental to their primary assignments.[65] The failure of this approach was amply demonstrated by the organization of the National Bar Association in 1888. In the following year, the ABA established a Committee on Uniform State Laws consisting of forty-three members, one from each state. Two attempts to call a meeting of this unwieldy body resulted in respective attendances of ten and seven members. Although "disposed to give up consideration of the subject," the seven

discovered that New York had recently enacted a law creating a board of "Commissioners for the Promotion of Uniformity of Legislation in the United States," apparently at the instigation of state legislators who were members of the ABA. The committeemen recommended that the Association endorse such legislation in other states, and this proposal was so immediately fruitful that by 1892 it was possible to organize at the Saratoga meeting a National Conference of Commissioners on Uniform State Laws (NCCUSL) with commissioners representing nine jurisdictions.[66] It is interesting to speculate about what might have happened had members of the National Bar Association instigated this movement that apparently needed so little encouragement.

Although technically a separate organization, the Conference of Commissioners maintained such an intimate relationship with the American Bar Association that ABA members had to be reminded occasionally of the distinction. Meetings of the NCCUSL were held just prior to the annual meetings and in the same city, the proceedings of the Conference were published for a time in the Report, and gradually the members of the Association's Committee on Uniform State Laws became nearly identical with the State Commissioners. Furthermore, since active members of the Conference were likely to be active members of the Association as well, the tie between the two organizations

was actually stronger than between the Association as a whole and some of its sections. James Grafton Rogers described the Conference as "the main axis of the social life of the American Bar Association," and it soon grew influential in the internal political affairs of the Association as well.[67]

In preparing a uniform act, the Conference generally employed an expert to make a preliminary draft. The draft was printed and discussed, first in committee and then before the entire Conference. After amendment and approval by the latter, the proposed act was presented to the Association's Committee on Uniform State Laws which submitted it to the Association for its endorsement. The process frequently took years and could be delayed in the final stage by objections from the floor of the ABA convention. On the grounds that the Association did not have time during the few days of its convention to consider long acts section by section, the Executive Committee, in 1911, required that objections to uniform acts be submitted in writing to the NCCUSL and be considered at the annual meeting only if the criticism was overruled in the Conference.[68] Insignificant in itself (and considering the burgeoning membership, probably necessary), the rule may be seen as another illustration of the reduction of ABA

conventions to bland assemblies where leadership decisions were formally endorsed.

Although every state was not represented in the NCCUSL until 1912 and although the Conference has continued to the present, its most important work was probably done in the first twenty years of its existence. In fact, the first uniform act drafted by the NCCUSL, the Negotiable Instruments Act or N. I. L. of 1896, was more successful in terms of legislative adoptions than any which followed. Its draftsman, John J. Crawford, based it on the British Bills of Exchange Act (1882) with some unpublicized borrowings from the California code inspired by David Dudley Field.

> The act, in general, did not pretend to bring about any real innovations. Its sections were short, clean, and polished. Most of its rules were already commonly accepted, either as businessmen's norms or as established courtroom doctrine. It cleaned the facade of the law of commercial paper, without much real change underneath. Still, no one demanded anything more.[69]

By 1908, thirty-two jurisdictions had adopted the N. I. L., and by 1928 it had been passed, with minor modifications, in all the states and territories. Other commercial statutes followed, including those covering sales (1906), warehouse receipts (1906), bills of lading (1909), and the transfer of stock share certificates (1909). While less successful in terms of adoptions than the N. I. L., they

were generally received by the states with more enthusiasm than the non-commercial uniform acts promulgated concurrently by the NCCUSL.[70]

Clearly, laws relating to interstate business practice, especially those regulating the transfer of commercial paper, were in genuine need of codification (although the word "code" could no more be used in the 1890's than the word "saloon" in the 1930's). Even extreme opponents of codification admitted as much. The legal elite was sensitive to the needs of the business community in this regard and, indeed, in many respects was actually a part of that community. Opposition to uniform laws of commerce continued but usually as a rearguard action, frequently more a product of lawyerly particularism than true antagonism. For instance, when Chief Justice Charles Doe of New Hampshire, a generally progressive-minded judge, was asked if he supported more uniformity, he replied, "Yes...Just let all the other states copy our New Hampshire laws and thing is done."[71]

On the other hand, it is not obvious that there was either a great need or a great "market" for many of the non-commercial uniform acts approved by the American Bar Association. While the ABA and the NCCUSL were gratified by state adoptions of their uniform acts, they did not canvass the citizenry before beginning work on the Uniform

Flag Act, the Uniform Marriage and Marriage License Act, or the Uniform Extradition of Persons of Unsound Mind Act. As Lawrence Friedman has well said, this kind of "technical law reform, whether or not it fills any general social needs, fills an important need of the profession; and in this lies its magic."[72] The interest of the American Bar Association in legal uniformity was not primarily "to aid the large corporations" (as one recent commentator would have it) but to satisfy a professional desire for legal symmetry while parading "before the public in an attitude of honor, self-improvement and devotion to justice."[73]

This is not to say that uniform state laws did not benefit large corporations or that there were not other more subtle motivations for the interest of the elite bar in legal uniformity. Members of the American Bar Association were generally concerned with raising the standards of the legal profession at the expense of poorly trained "pettifoggers" of questionable social standing. In the earlier years of the uniform laws movement, at least, there was an undercurrent of feeling that eliminating the technicalities of the law would directly assist in this end. As Henry T. Terry said in a letter to the ABA, the more the law remained "a mass of unorganized and arbitrary detail, the more will the mere digest-manipulating and precedent-hunting type of lawyer be given the advantage."

Uniform acts regarding marriage seem to have originated in part from the desire of the legal elite to hamper the profitable but unsavory business of divorce lawyers.[74] But even uniform laws of commerce might strike at the pocketbooks of the lower strata of the bar. In Michigan, opposition to the passage of the N. I. L. developed from collection lawyers who complained that simplification of the law would be bad for business.[75]

Since this period of transition in the American Bar Association was contemporaneous with the rise of Progressivism in the United States, it is not surprising that the desire to preempt the growth of federal power generated some of the impetus for uniform state laws. Alton Parker even claimed that the uniform state laws movement was part of a national reaction against the growth of the national government.[76] But despite some brave talk and the promulgation of a Uniform Child Labor Act, there was little interest by either the ABA or the state legislatures in uniform laws which had important social consequences.[77]

For uniformity in one area of commercial law, the law of bankruptcy, the American Bar Association looked not to state legislatures but to Congress. The United States Constitution had specifically authorized national bankruptcy laws, so in this case there was no talk of

restraining federal growth but rather of persuading Congress to exercise powers already delegated. An older bankruptcy act had been repealed without replacement in 1878--the year the ABA was organized--and although sentiment among Association members was favorable to the passage of new national bankruptcy legislation, the ABA remained typically cautious in its pronouncements. It endorsed the idea of a national bankruptcy law in 1887 but not the particular bills drafted by its Committee on Commercial Law.[78] There the matter rested for nine years. Not until 1898, when Congress passed a new bankruptcy act, did the Association experience a revival of interest in the subject. Its Committee on Commercial Law, now chaired by influential patent lawyer Walter S. Logan, began lobbying for changes in the law almost immediately. Not surprisingly, many of these proposed changes provided increased protection for creditors.[79] Armed with Association approval of his report, Logan enjoyed considerable success in Washington. He received the cooperation of the chairmen of appropriate committees in both houses of Congress, and his report was quoted extensively and "with unqualified commendation" by Attorney General John W. Griggs. In 1903, the recommendations of the ABA committee were in substance approved by Congress, and Logan was able to boast that the bankruptcy law, "as it

stands today as amended, is practically the work of this Association."[80] Thereafter, the Committee on Commercial Law and its successors defended the law against dozens of attempts to amend or repeal it during the next two decades.[81]

The minor success of the Association in amending the national bankruptcy law was significant mainly because it was so unusual. Before 1912, the Association had very little influence upon either state or national legislation and, except in the area of legal education, almost negligible effect upon the legal profession as well. In an attempt to list Association achievements at the commencement of the organization's fourth decade, Jacob M. Dickinson specifically mentioned the ABA's promotion of higher standards in legal education, the enactment of uniform state laws, and the encouragement which the ABA had provided state and local bar associations. Otherwise, Dickinson contented himself with the comforting generalization that the Association had "justified its existence...in many other ways not necessary to recapitulate....Our record,"he said, "is without a blemish."[82]

To be fair, one cause of Association inaction was its confrontation with problems that had no easy governmental or professional solutions. One such problem was the profusion of reported court decisions that, by the late

nineteenth century, threatened to swamp lawyers in a morass of words. While every scrap of precedent might be useful in some lawyer's brief, elite members of the bar had the uneasy suspicion that the lower ranks of the profession were at an advantage when it came to ransacking a multitude of dull reports. The law, said one Tennessee lawyer, was in danger of being reduced from a science "ruled by intellect and learning into a merely speculative, laborious and mechanical pursuit, in which endurance, shrewdness, accident and, often influence, win the day."[83]

The difficulty was in finding a way to lessen this flow of case law emanating from the publishers at the rate of two or three hundred volumes a year. Emlin McClain, speaking before the Association in 1902, suggested that judges summarize half of their cases "in such a form that the case could not possibly be cited in support of any proposition whatever," and that for the remainder, they consider "only the points of practical importance" in writing their opinions.[84] Similarly, the reports of the Committee on Law Reporting and Digesting, issued periodically from 1896 to 1916, recommended that judicial opinions discussing questions of fact or "reaffirming well settled principles of law" be omitted from the reports.[85] But these solutions posed new questions, the chief of which had been asked by John F. Dillon in 1886: "Who shall

establish a censorship over the publication of any class of judicial opinions?" Simeon Baldwin, by then an associate justice of the Connecticut Supreme Court, thought that appellate courts might safely be entrusted with this responsibility; James D. Andrews, a law reporter and author of digests, thought that reporters and digesters could make the decisions. Other members of the Association saw the dangers of committing this power to either of these special groups of lawyers.[86] In the end, the American Bar Association was reduced to endorsing a pious but bootless request that judges write shorter opinions.[87]

Appropriately, the problem of increasing numbers of reported cases was ameliorated (though certainly not solved) by the capitalistic system that brought it into being. The answer of the West Publishing Company to an overabundance of cases was not to eliminate any but to index them all in its "key number" system, still a mainstay of legal research.[88] By 1914, the members of the Committee on Law Reporting declared that while they would not trust judges or court reporters to decide which cases to eliminate from the published record, they <u>would</u> trust the reporters of the West Publishing Company to make those decisions![89] In 1919, the Committee was abolished. By 1923, the Association was using the groupings of states

used by West's Reporter system to compare the salaries of appellate judges.[90]

Another cause of the inaction of the American Bar Association before 1912 was its reluctance to offend a minority of its members or to appear to laymen as anything but scientific and objective.[91] Again and again the Association exercised caution, sometimes excessive caution, in its public pronouncements and legislative recommendations. For instance, in 1892, the Committee on Judicial Administration reported that while a resolution recommending a code of federal procedure for federal courts had been adopted unanimously by the Association in 1888, the Committee had determined that there was still controversy among ABA members and the legal profession generally regarding a code of civil procedure. Since the Committee believed that a consensus had been reached on the necessity for rules of criminal procedure, it suggested that the Association confine itself "at present to that part of the resolution which will not be likely to create any division of opinion."[92] Likewise, after two years of heated debate over legislation which would have given the federal government jurisdiction in cases similar to the New Orleans Mafia incident of 1891, the Association resolved it "inexpedient to make any recommendation to Congress" about the matter.[93]

In 1905, a newly created Committee on Insurance Law brought in a report advocating, among other things distasteful to some members, the federal regulation of insurance companies. This was definitely a sensitive issue during the Administration of Theodore Roosevelt, and the Association hurriedly backed away from consideration of the report. Walter George Smith of Philadelphia, an influential member of the ABA and a former law partner of Francis Rawle, spoke for the Association leadership when he said that the American Bar Association was

> not a body whose dignity and weight should be trifled with, and it is trifled with when we are called upon to pass upon questions that have been decided by a long line of decisions of the Supreme Court of the United States. We are trenching on dangerous ground....We have a wide field of usefulness within the limits fixed by our Constitution. I submit our committees ought not to go afield in order to throw the influence of this Association to the support of any special view of...political economy.[94]

Yet even controversial questions which bore no relation to Congressional legislation or Supreme Court decisions were handled in the same overly circumspect manner. On August 14, 1899, two weeks before the annual meeting, Fernand Labori, counsel for Captain Alfred Dreyfus during his second trial, was shot in the back by an unknown assailant. During the convention, an ABA member moved a resolution of sympathy to Labori for the assault made upon him "while in the discharge of his duty to his client."

The resolution was watered down by the excision of a pro-Dreyfus sentence and inclusion of a disclaimer declaring the Association's unwillingness to pass upon the merits of the case. Still there were objections. William H. Clark of Texas cautioned the Association to "be slow in passing resolutions. Matters political should be eschewed." In this case, however, the Association's hand was forced by some adverse publicity generated the previous day when the resolution had been temporarily tabled as out of order. Stephen Hoye of New York said that the image of the ABA would suffer if "it should...go out to the world that the American Bar Association is a pack of cowards." Eventually the resolution was adopted by a vote of 130 to 69.[95]

The American Bar Association was also slow to take action because of a factor common to all such loosely run organizations, that of bureaucratic inertia. One member found it "remarkable that whenever a report of a committee is made, it is at once followed by a proposition to postpone its consideration."[96] Postponements were especially ridiculous (and were seen as such) when the Association discussed delays in the Supreme Court docket.[97] Of course, committees might not make any report at all. The most extreme case was that of the Grievance Committee which made no report until 1904, though it had been in existence since 1878.[98] The Committee on Taxation made no

report in 1911 except to ask for an appropriation of $1000 to continue its work. This inactivity reminded Ernest T. Florence of a Gilbert and Sullivan ditty:

> The House of Lords throughout the War,
> Did nothing in particular,
> And did it very well.[99]

In a letter to the Chairman of the Committee on Federal Courts, Alexander Botkin, a government commissioner for the revision of criminal laws, chided the American Bar Association for its lack of cooperation with his Commission; but he did so with a measure of understanding. "I do not fail to realize," he said

> that the season of the year and the conditions attending the annual meetings of the Association are not conducive to the mature consideration of questions that inevitably invite differences of opinion and debate."[100]

In other words, Botkin realized that the American Bar Association of 1902 was primarily a social, rather than a professional, organization.

In fact, the social activities surrounding the annual meeting became even more important during the transitional period than they had been earlier when the ABA was virtually a society of intimates. Banquets could never again be as private as those at Saratoga, but what they lost in exclusivity, they gained in sumptuousness. For instance, the 1906 banquet at the Minneapolis Auditorium featured a table extending the whole width of the hall that

was literally covered with red roses. Four hundred guests marched into the hall to the strains of Tannhäuser played by the Minneapolis Symphony.[101] Abandoning its earlier closed-door policy at the banquets, the Association allowed reporters to cover the after dinner speeches of nationally known guests. Though the dinner itself remained an all male affair, women were also occasionally admitted to listen to the speeches after plates had been cleared and cigars had been served. After-dinner remarks often ran on into the next morning. A reporter for the American Law Review confessed that he had fallen asleep during the second speech of the 1899 banquet and "did not wake up until he heard at midnight, the singing of the doxology, 'My Country 'tis of Thee.'" The following year, however, he noted that joke tellers kept the assembly "in an uproar," so much so that "some of the sourer members" criticized the speeches as "a little too rollicking and undignified for so staid a body, especially after many ladies had come in."[102]

Most of one day of the three-day annual convention was devoted to a semi-official sightseeing trip, usually arranged by the local bar association. The trip was nearly always an excursion by water, although the Boston meeting of 1911 was highlighted by a drive through the countryside in automobiles borrowed from "public spirited citizens."

Other favors to ABA members were provided by hotels, railroads, and traction companies. The uneasiness of a few members on this score was brushed aside by the Association.[103]

There were other receptions, luncheons, and evening affairs to occupy the time of Association members during the convention, not to mention side trips and house parties coming and going. An atypical member complained that half the meeting was taken up in "being feted and magnificently entertained" and wondered if not more of the convention could be devoted to business. The Association answered him indirectly a few moments later with a resolution of thanks to the host city which praised "the generous manner of our entertainment [that] has tended in a great degree to make this one of the most successful meetings in the history of the Association."[104] No wonder an ABA president later referred to Association members during this period as "a parcel of extinct volcanoes, which met once a year, listened to one of their number (not yet quite extinct) in feeble eruption, dined together and separated for another year, when the performance was repeated."[105] Yet the growing membership and prestige of the ABA, in part the result of its caution, made it increasingly likely each year that the organization would abandon its "noiseless, unobtrusive way" for controversy and quasi-political activity.

CHAPTER 5

THE CONSERVATIVE IDEOLOGIES OF THE AMERICAN BAR ASSOCIATION, 1878-1914

When Supreme Court Justice John H. Clarke addressed the American Bar Association meeting in 1918, he prefaced his remarks with an explanation as to why he preferred not to discuss any abstruse subject before the convention. He said that as he considered possible topics for his address, his eye had fallen upon the collected volumes of the Association's Reports and he had reflected "upon the hours and days of intense and intelligent labor which is there buried--I weigh my words."[1]

Sixty-five years later the speeches, discussions, and committee reports of the early American Bar Association still lie virtually untouched by scholars despite the light which they shed upon the Association, the American legal profession, and the history of the United States in general. Although there have been selective exhumations from the ABA Reports, these widely available published records have never been systematically examined with the objective of analyzing the ideological position of the early Association. In part this neglect is probably due to

the assumed predictability of ABA opinion in the earliest years of the organization. Even the Association itself has adopted this attitude. On the cover of a recent ABA promotional brochure there is a photograph of some evidently prosperous but dour-looking turn-of-the-century gentlemen and the words: "The ABA/Reactionary/.../Stereotypes die hard."[2]

The first scholar to examine speeches made before the early American Bar Association meetings was Benjamin Twiss. In his doctoral dissertation, "Lawyers Against Government" (1938), Twiss argued that the elite bar had served as an intellectual bridge between capitalists and judges in introducing the doctrine of laissez faire to the courts. Since he believed that bar associations performed "an important function in the circulation of ideas," Twiss not surprisingly discovered that the American Bar Association was a hotbed of Spencerianism. While he admitted that the addresses cited in his study were specifically chosen to illustrate his thesis and that approbation of laissez faire thought "was not universally shared" within the Association, Twiss nevertheless contended that the "doctrine represented a consensus among members of the bar" and that "disagreement was the exception which proved the rule." Twiss's dissertation, edited by his mentor, noted constitutional scholar Edward S. Corwin, was published

posthumously as Lawyers and the Constitution (1942) and exerted a significant influence upon both later treatments of laissez faire and the now-conventional view regarding the ideology of the early American Bar Association.[3]

Nearly twenty years later, Arnold M. Paul examined speeches given before the ABA from a different perspective in his award-winning Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (1960). Paul's thesis was that "traditional legal conservatism" had given way to a "laissez faire conservatism" with the "hardening of conservative attitudes" in the 1890's. Since this thesis necessitated a close integration of politico-economic and intellectual history over a comparatively short period, Paul made much of the "laissez faire" speeches given before the Association in the Nineties but slighted examples with similar tendencies in the previous decade. Paul did not dispute Twiss's findings but expressed doubt as to the representativeness of the earliest ABA speeches to the thought of the legal profession as a whole.[4]

Following Paul, Norbert Brockman agreed that laissez faire conservatism grew more influential during the Association's first decade and reached "eventual dominance" in the Association during the Nineties. But Brockman, in a law review article, "Laissez-Faire Theory in the Early

American Bar Association" (1964), disputed the Twiss thesis that the ABA had played a large role in the transmission of Spencerian ideology to the courts. He also emphasized the point, conceded by Twiss, that belief in laissez faire theory was not universally shared by members of the ABA, that there were "voices of dissent" within the Association. In fact, by Brockman's count, there were more "voices of dissent" in the first decade of the Association's history than proponents of laissez faire.[5]

While both Brockman and Twiss agreed that the American Bar Association was dominated to some extent by laissez faire ideology, a systematic examination of the Reports leads to a different conclusion. In fact, speeches presented to the American Bar Association during the period 1878-1914 actually represent a spectrum of conservative beliefs not always theoretically consistent with each other or even with themselves. This conservatism was sometimes the laissez faire ideology of scholarly myth but was more often, in Paul's definition, a traditionalism

> which, while assigning the protection of private property to a high status in the hierarchy of values, was especially concerned with the problems of maintaining an ordered society in a world where the forces of popular democracy might become unmanageable.[6]

During the past twenty-five years, American historians have expressed doubts about the validity of the older perceptions of the Gilded Age and Progressive Era as simply

periods of conflict between "laissez faire" and "the general welfare state."[7] Instead they have viewed them as periods in which a new professional class led various social and political groups in a "search for order."[8] Whatever the weaknesses of this "search for order" model for American historiography generally, it provides the tie that binds together the speeches, discussions, and committee reports of the American Bar Association before 1915.

Lawyers, more than members of any other profession, were dependent upon a conservative order in American society. The peculiarly American habit of resolving questions of public policy in the courtroom had allowed the bench and bar to become, in de Tocqueville's famous phrase, "the American aristocracy." Lawyers, said de Tocqueville, had "nothing to gain by innovation."[9] Unfortunately for the legal profession, its dominance in American life was mostly remembered glory by the end of the nineteenth century; its day had passed as surely as had that of the clergy a century before. Lord Bryce, comparing the American legal profession of his own day with the "aristocracy" of de Tocqueville a half century earlier, concluded that the bar counted "for less as a guiding and restraining power, tempering the crudity or haste of democracy by its attachment to rule and precedent, than it did then." The

reason for this decline, Bryce believed, was the legal elite's loss of political power to professional politicians and its loss of social position to wealthy capitalists.[10]

The elite of the late nineteenth century bar noted other threats to the authority of the profession as well: public attacks upon the impartiality of the judiciary, injunctions met with contempt and violence, labor disturbances crushed by armed force, burgeoning legislative enactments overturning "settled" principles of common law, and corporate monopolies acting as law unto themselves. Furthermore, in the eyes of the elite, the legal profession itself had been overrun with new entrants possessed of little education, low ethical standards, and negligible social status. The objective of the legal elite, then, was to restore as much as possible of American public life to the direction of the profession and the restoration of as much as possible of the profession to the direction of the legal elite.

It would have been remarkable had the legal elite adopted any radical ideology to achieve this purpose. As Benjamin Cardozo observed in a memorial address for one prominent lawyer, "[t]he existing social order had brought him opulence and fame and happiness. He did not share the views of those who would supplant it by another or even greatly change it."[11] Unlike the "new" professions of

engineering, of investment banking, and even of medicine now erected upon a scientific foundation, the bar was forced to look to the past for its golden age.

But those of the legal elite who joined the American Bar Association saw no advantage in either simpleminded nostalgia or private fulmination.[12] To restore the leadership of American society to the legal profession required adjustment to current political trends. There was nothing conspiratorial or even cynical about either their purpose or method. Whatever their position on the political spectrum, most elite lawyers sincerely believed that the leadership of the bar would be as advantageous to the nation as to the profession. As Senator William Lindsay of Kentucky said in his "Annual Address" of 1899, lawyers formed

> a party with no peculiar badge, a party which adapts itself to the exigencies of the social body; which extends over the whole community, penetrates into all classes of society, acts upon the country imperceptibly, and finally fashions affairs to suit its purposes....The influence of this party has always been for good....[13]

The 159 speeches presented to the American Bar Association meetings between 1878 and 1914--not to mention the heated discussions which they sometimes engendered--frequently addressed the question of the profession's role in restoring order to the bar and to society as a whole. Differences of opinion represented differences more of

method than of aim. To characterize Bar Association speakers as "conservative," "moderate," or "liberal" is misleading[14]--most ABA members were conservatives of one sort or another. On the other hand, the speeches, discussions and committee reports often demonstrated a surprising flexibility as the elite of the bar groped for ways to reintroduce legal forms (and thus the legal profession) to disordered areas of American life. Systematic philosophizing was rare, although there was an occasional fumbling for first principles. While the Association speeches did not follow current events in a lockstep fashion, they did exhibit a rough accommodation to political realities; if suggestions proposed in ABA speeches were not always practical, they were, by and large, pragmatic.

Speakers before the American Bar Association were rarely as ideologically rigid as they have been pictured. For instance, in his speech "The Rise and Probable Decline of Private Corporations in America" (1884), Andrew Allison criticized contemporary court decisions which he believed had weakened the force of the Dartmouth College Case. He admonished the bar to defend the private utilities "which are so closely and prominently connected with our chosen profession and also with the wealth, prosperity, and glory of our common country." Twiss and Brockman, citing the

speech as an example of laissez faire dogmatism, seized upon Allison's paean to the legal profession: "Fortunately there is an inner Republic, formed of the Bench and Bar, to whose wisdom, moderation, and patriotism, the issues joined are first submitted." They did not refer, however, to the preceding lines:

> It is pitiable to behold a sovereign state so bound up by a contract that she can not protect the interests of her citizens,...Let the state reserve the power of altering the charter, but in such a manner only as not to reduce the net earnings below such a stated per centum as the state and the investors shall have agreed upon beforehand.[15]

That suggestion comes as close to Herbert Croly as to Herbert Spencer.

Even Edward J. Phelps, whose classic oration on John Marshall was quoted by both Twiss and Brockman as proof of laissez faire sentiment in the early American Bar Association, could on occasion endorse increased state regulation and criticize private power. Although Phelps was a sincere and able exponent of limited government, in his presidential address of 1881, he advocated regulation of firearms, fire and safety inspections, destruction of diseased cattle, and the prohibition of medical quackery by licensing physicians. He complimented the state of New York for enacting "a statute so humane that it ought not to have been necessary, requiring the proprietor of stores to

provide seats for the use of their shopwomen." The existence and extension of "the great corporations," he warned, was the "subject of the gravest foreboding among reflecting men." Railroads in particular, with

> their power, their vast accumulation of capital and influence, the disregard some of them have occasionally manifested for the public convenience, and the irritating discriminations they have imposed, have furnished facile material to the demagogues with which to inflame public sentiment against them.[16]

That two ABA speakers considered most doctrinaire in their laissez faire sentiments could have publicly expressed such reservations about private power warrants a reexamination of all ABA speeches for ideological content. An obvious starting place is an inspection of the Association's view of the large corporation--what ABA speakers, for reasons of legal clarity, disliked calling a "trust." Brockman says that lawyers in the late nineteenth century "believed that the good of the country was served through the massive combines that were building up American industrial empires."[17] In fact, usually the reverse of that sentiment was expressed in those speeches before the Association that touched upon the subject. An antipathy to mammoth corporations and their noveau riche owners was widely held and deeply felt; nor was it confined to any particular segment of the period 1878-1914.

For instance, in 1883, John M. Shirley, a leader of the New Hampshire bar, blasted the great corporations as "highwaymen of speculative finance."

> When capital discards its conservative character, and takes on that of a predatory brigand, in the end it will be treated like all other brigands. If often hides itself under the guise of an artificial person. It seeks to control as far as possible, the Treasury, and regards as legitimate the purchase of legislative bodies, and as the Wisconsin phrase is, the propitiation of "the feelings" of the judges....Let their lot, then, be cast with the criminal classes.[18]

This opinion was seconded in 1884 by Simon Sterne, a disciple of Herbert Spencer, a personal friend of John Bright and John Stuart Mill, Secretary of the Committee of Seventy which helped to break the Tweed Ring, and later, the draftsman of the Interstate Commerce Act. To Sterne, freely chartered corporations were "the new found toy of civilization."

> It is well to bear in mind that for thirty years our legislatures have been run by the corporate powers in their own way, that the legislation of the past generation has been whatever the strong nets and long purses of our builders-up of corporate wealth chose to have it....[T]he state owes to the community an intelligent supervision of the artificial organisms which it has created, so that these artificial organisms endowed with hugh maws and everlasting life, do not devour the natural flesh and blood organisms which create and constitute the state.[19]

In the same year, ABA President Cortlandt Parker, a man of strong moralistic bent, condemned the indifference of the railroads toward providing safety devices at road

crossings, alluding to the "blood [crying] from the ground." Parker spoke of the "sins of corporations" and the "struggle against the oppression of corporate power." For the future, he feared the "horrors" of labor conflict stemming from, "on one side, the most colossal and speedily acquired wealth; on the other, but too often, the most hideous and sickening poverty."[20]

Even during the early Nineties, a period that according to Paul witnessed "the hardening of conservative attitudes," speakers before the Association continued to warn the professional elite of the dangers inherent in great industrial combinations. For instance, U. M. Rose, the dean of the Arkansas bar, quoted Thomas Cooley to the assembly of 1893 because he believed that Cooley's opinions had "always been listened to by the profession with respect."

> A few things may be said of trusts without danger of mistake, [Cooley had written] They are things to be feared....When we witness the utterly heartless manner in which trusts sometimes have closed manufactories and turned men willing to be industrious into the streets, in order that they may increase profits already reasonably large, we cannot help asking ourselves whether the trust as we see it is not a public enemy, whether it is not teaching the laborer dangerous lessons, whether it is not helping to breed anarchy![21]

Only at the turn of the century was a good word openly spoken in behalf of the large combination. Acting ABA president Charles F. Manderson, former Senator from

Nebraska and a general solicitor of the Burlington Railroad West, conceded that there was such a thing as an "iniquitous trust," but he feared that the "groundlings...excited by the yellow-tinged articles of a partisan press and the loud mouthings of blatant politicians," might "destroy the legitimate corporation" along with the illegitimate.[22] In the same year, 1899, Edward Q. Keasby, a specialist in corporation law and a director of the Baltimore & Ohio Railroad, took a different tack in his apologia for New Jersey's lax corporation laws. Keasby saw no iniquitous trusts at all. In his view, by allowing "the largest practicable freedom of the individual," New Jersey had legislated in the "best interest of the community." On the other hand, Keasby also suggested that the economy of scale produced by monopoly might save "ill-directed energy" and provide "a steadiness and certainty of industrial effort" which would "increase actual wealth" and "decrease the cost of commodities."[23] Thus Keasby attempted to appeal to two different kinds of conservative thought in the same speech. Perhaps the most extreme statements justifying corporate monopoly were made by a Virginia lawyer, William A. Glasgow, in a poorly written speech of 1905. Glasgow wondered if the trust might not become "a weapon used by property to defeat communistic attack" and questioned "the

wisdom and patriotism of those who would destroy this messenger of peace and order."[24]

The notion that monopoly was the true conservative path to order was, however, attacked repeatedly in the new century. U. M. Rose, having been elected president of the Association in 1901, scoffed at the notion of a "benevolent industrial feudalism."

> [T]o speak of benevolent feudalism at present is even a more glaring solecism than to speak of the benevolent plague or the benevolent smallpox. Feudalism stands for great power over the lives and happiness of others unrestrained by law....[I]t is difficult to make men believe in a Utopia that is to follow from an exorbitant greed for money....[25]

Frederick Lehmann, an attorney for the Wabash Railroad and later Taft's Solicitor General, agreed. In his presidential address to the Association in 1909, Lehmann warned that the American people had "no faith in a benevolent despotism. They know that power tends to abuse. A corporation large enough to engross an industry cannot be trusted to a generous or even a just use of its mastery."[26] Thomas J. Kernan, another railroad lawyer who also represented "some rich employers of labor," further charged the "indiscriminate agitation" of the people against corporations and men of wealth to "the establishment of plutocracy in this country"--a "bastard aristocracy"--which in its final development would result "in a few vulgar masters and a horde of overworked and underfed slaves."[27]

If anything these anti-corporation sentiments intensified as the Association moved into its fourth decade. Two years before Woodrow Wilson was elected president of the United States, he spoke to the ABA convention in Chattanooga and there called for a cutting away of "the undergrowth of law that has sprung so rankly about the corporation and made of it an ambush and covert."[28] In the same year, Edgar H. Farrar, an impetuous leader of the anti-Bryan Gold Democrats, was elected president of the Association. Although Farrar was a railroad lawyer employed largely in corporation finance, he had written an open letter to Theodore Roosevelt near the end of his Administration urging legislation to curb the powers of railroads and financial capitalists. In his presidential address of 1911, Farrar reiterated these views, describing the "great aggregations of capital" as "armed colossusses astride the gateway of commerce" destroying "every entrant who presumes to compete with them."

> The burning question that now agitates the mind of the American people is how to control the corporations....The conservatives read the signs of the times, realize the danger of the growing excitement among the masses of the people, and are seeking an exit from the situation that will conserve political liberty and industrial property.[29]

In 1913, N. Charles Burke, a judge of the Maryland Court of Appeals, spent a goodly portion of his address outlining the causes and possible correctives for this "growing excitement." Burke believed that beginning in the previous three decades of the nineteenth century, the large corporation had made an "unrighteous alliance" with the political machine.

> It resulted in building up a great industrialism in which the rights of man were, in a large measure, sacrificed to the rights, not of the state, but to the rights of property--to the interests of a privileged class....[I]t was able to seize and retain the representative principle of the government and establish an imperium in imperio--a government of the many by the few and for the few--a government in which business and the interests of business counted for practically everything, and the rights of men for little.

Burke believed that "the sleeping giant" of American democracy had since awakened and had

> broken the shackles placed upon him by an indefensible selfishness, and is moving towards the Declaration of Independence and the reassertion of the rights of men secured by the Constitution. Nothing can stop this movement, and deep down in our hearts we know it is right. The duty of wise leadership is to set the metes and bounds of this movement, and to direct it into right channels.[30]

Regardless of how either their contemporaries or modern historians categorized them, ABA members such as Burke, who criticized corporate monopoly, were no less conservative in intent than the feeble defenders of the trust. And both opponents and defenders represented

various strands of conservative thought. For instance, in the earliest years, speakers critical of corporate power emphasized ethical conservatism, the noblesse oblige of the gentleman for the less fortunate. Other speakers stressed esthetic conservatism, a distaste for the garishness of the Great Barbecue. When Frederick Lehmann censured the financial manipulations that had plunged railroads into bankruptcy, he referred disdainfully to the private fortunes which were thus made and then "squandered with lavish hand and vulgar ostentation." To Lehmann, an immensely wealthy but cultured rare book collector, the bad taste of noveau riche consumption seemed an evil almost as great as the improper methods by which the riches had been acquired.[31]

More significantly, many speakers critical of corporate power realized that financial capitalism was helping to undermine the traditional social structure of the United States, a structure upon which the position of the legal profession was predicated. More clearly than modern conservatives, Association leaders understood the connection between the economic system that had provided them with so many material comforts and the national decadence which they so greatly deplored. Perhaps the philosophical J. M. Woolworth best expressed this pseudo-

Marxian respect for the transforming power of capitalism in his presidential address of 1897:

> Great accumulations of wealth in the hands of some, and equal accumulations of want, ignorance, brutality, and mental and moral degradations upon the heads of others, go hand in hand....One is certainly not the only cause of the other. But it cannot be denied that great accumulations of wealth in the hands of the few go along with the process by which the poor are crowded down in deeper depths of poverty....[32]

The most sinister aspect of great corporate wealth was its power to command special favors from government, whether financial assistance or de facto exemption from the law. The leaders of the American Bar Association maintained no illusions about the preservation of the traditional legal order if some check could not be placed upon predatory wealth. "If governmental policy, directly or indirectly, helps one to make a billion out of the many," said J. Randolph Tucker in 1892,

> why not, in turn help the many to distribute his excess? If it can give plethora of wealth to monopoly, why not aid the commune by healthful depletion, in order to return ill gotten gains to the victims of privilege?...Privilege sows the wind, the commune will bring the harvest of the whirlwind![33]

Two years later, Charles Claflin Allen, a St. Louis lawyer elected to the ABA Executive Committee in 1895, warned the Association of the potential consequences of using the injunction in the manner in which it had been employed in the Pullman strike:

> Speaking from a sociological point of view, the organization of labor against the organization of capital is entirely natural. Power breeds tyranny, which in turn brings rebellion and opposition, then counter-forces produce a new tyranny....Organized capital...by its violations of law, cultivates this class feeling.[34]

Most forceful in his criticism of corporate power was the respected but unloved Boston Brahmin, Moorfield Storey. In the "Annual Address" which preceded his election to the ABA presidency in 1895, Storey lashed out at the great corporations which could "secure or defeat legislation at will and dominate the politics of whole states [by] corruption."

> If a large body of voters...[believe] that their misery at any moment is the result of laws purchased by their employers or creditors, if they have lost faith in peaceful agitation and relief within the law, they will begin to consider how they can help themselves law or no law. Populist movements, Coxey armies, Chicago, Homestead and Pittsburgh strikes are symptoms, and symptoms to which we cannot close our eyes....[N]o government can long resist the insidious influence of general corruption.[35]

While the wealth of the large corporations endangered the legal order through their dominance of state and national legislatures, it also directly threatened the profession as well. Lawyers had prided themselves on their independence of action, their technical status as officers of the court. By the turn of the twentieth century, however, this vaunted professional independence seemed less congruent with reality. As Richard Hofstadter has said,

the leading lawyers "probably enjoyed more wealth and as much power as lawyers had ever had. But their influence was of course no longer independently exercised; it was exercised through the corporation, the bank, the business leader."[36] In his speech before the Association in 1910, Woodrow Wilson asked rhetorically if the lawyer had not "allowed himself to become part of the industrial development," if he "had not been sucked into the channels of business," been "turned away from his former interests and duties and become narrowed to a technical function?"[37] Many members of the legal profession were willing to answer in the affirmative.[38] Seymour Thompson, an ABA member and editor of the influential American Law Review, privately complained to Francis Rawle that the Association itself was "dominated to too great an extent by the ideas that prevail in the north-eastern, or usury corner of our country."[39]

Still, the elite of the bar did not despair. They remained confident that they could continue to exercise independence of thought regardless of their professional associations. "No amount of professional employment by corporations," wrote Elihu Root in 1898, "has blinded me to the political and social dangers which exist in their relations to government and public affairs."[40] From the earliest years of the American Bar Association, speakers at the annual meetings exhorted their colleagues to stand

against the "deification and absorbing power of wealth."[41] They were admonished to prove that lawyers were not "merely conservative" but rather "the best and safest organizers of improvements."[42] Then, as the Progressive Movement began to gain momentum, members were advised to take the lead in reform or suffer the consequence of declining influence. "If lawyers do not take the initiative," said Walter Logan in 1903, "the demagogues will;...someone else will take the matter out of our hands."[43] Likewise, Frank Kellogg, whom Theodore Roosevelt had called "the best trust-buster of them all," warned the Association "that the surest way to destroy our form of government" was "to blindly oppose all innovation." Lawyers, he said, must adopt an attitude of conservative reform: "If we do this we may maintain our influence in the councils of the state and nation, and we may aid in shaping progressive legislation and add immeasurably to the wisdom of government. But if we refuse, it will be done without us."[44]

To "set the metes and bounds" of reform, "to direct it into right channels," was to restore the leadership of the legal profession in society. In the view of most ABA spokesmen, the bar should stand as a conservative and impartial force between the vulgar rich and the uncouth poor. One Baltimore attorney declared that the legal profession ought to ignore the opinions of both of these

"predatory classes....To them alike, the lawyer, if worthy of his calling, is a stone of stumbling."[45] Rarely was this sentiment expressed so baldly in ABA speeches; but it remained an unspoken assumption of many of them. In a personal letter to Simeon Baldwin, George M. Sharp reminisced about one such address delivered by Supreme Court Justice David Brewer to the Section of Legal Education in 1895:

> [Brewer] put emphasis on the fact that wealth and power had usurped many of the places formerly occupied by lawyers, referring to the Senate. It was in this connection he used the language telegraphed over the country by the press: "It takes more than a five hundred dollar silk night shirt to make a statesman." The gist of his argument was, lawyers should govern the country; it was safer in the hands of lawyers who take a disinterested and scientific interest in government than those of millionaires who buy their seats and are interested in matters of legislation.[46]

So much for theory. Actually restoring government to "the hands of lawyers" proved a difficult matter. Association speakers occasionally suggested methods for regulating corporations through state law, but these were not compatible with political reality. For instance, Henry Hitchcock, a member of the "Saratoga clique" argued in his "Annual Address" of 1887 that by conferring special privileges upon the corporation, the state retained a responsibility to provide adequate safeguards for corporate good behavior. Hitchcock suggested limitations on

corporate debt, drastic restriction on the use of eminent domain by non-governmental bodies, and a requirement that corporations file statements of assets and liabilities quarterly--monthly in the case of railroads.[47] The problem, of course, was that corporations played off one state against another, "migrating, like divorcehunting wives, to the laxest of states."[48] To check this profitable traffic, other ABA speakers recommended uniform state laws. "Concerted action among all the states," said Edgar Farrar, "will end all the trouble."[49] But Frank Kellogg, who had prosecuted Standard Oil from its lair in New Jersey, correctly regarded the hope of uniform state action as an "idle dream impossible of accomplishment."[50] At least those who recommended uniform state laws took a more realistic view of the problem of corporate power than did Thomas Kernan. He believed the solution to the evils of concentrated wealth lay in forced heirship![51]

While most ABA members at least theoretically favored closer state supervision of large corporations, the issue of federal regulation proved to be a divisive one for the Association. In 1905, a report from the newly created Committee on Insurance Law recommended ABA endorsement of federal regulation for interstate insurance transactions. President Theodore Roosevelt had "expressed a warm personal interest" in the work of the committee and was "very much

in favor of the federal supervision of insurance." Furthermore, some larger insurance companies, frustrated by unusually hostile state regulation of "foreign" companies, decided that federal supervision would be the lesser of two evils. On the other hand, the Supreme Court had ruled in Paul v. Virginia (1869) that insurance was not "commerce" under the Constitution, and approval of the Committee report would put the Association at odds with the Court--four of whose members were actually present at the annual meeting. Opponents of the measure also feared that endorsing federal regulation of insurance while it remained a live political issue might seriously divide the Association.[52]

Attempts were made to bar the report from the floor on technical grounds, but the question was debated anyway. Ralph Breckenridge, the Committee chairman, argued that the report treated "the subject of federal supervision from the stand point of the people...regardless of what those dominated by life-long and ice-bound conservatism in insurance matters have to say in opposition." But out in the corridors, it was whispered that Philadelphia corporation lawyer James M. Beck had written the report for a fee paid by a large insurance company. Beck denounced the story as a "mean and despicable falsehood" and suggested that another insurance company, hostile to

federal regulation, had circulated the rumors to prejudice the members of the Association against the position of the Committee. The only certainty is that insurance companies considered the decision of the Association significant enough to send "representatives" to the meeting. In the end, the ABA fled to the safety of inaction and recommitted the matter to committee.[53]

The controversy regarding federal regulation of insurance was a mere academic exercise compared with the furor which erupted in 1903 upon the presentation of a report by the Committee on Commercial Law. The Committee had arrived at the meeting in the flush of success, having just won Congressional approval for ABA recommendations modifying the federal bankruptcy law; and the victory proved to be a heady one. The Committee was convinced that the American Bar Association now wielded "a power for good and an influence for wisdom and conservatism far beyond what any of us has heretofore supposed....The American people and their representatives are ready to heed its views and to follow its lead."[54]

Believing that the Association ought to tackle the big issues, the Committee decided to seek ABA endorsement for its solution to the "trust" question, a question that, as Chairman Walter S. Logan said, commanded the attention of the public more than any other. The Committee viewed

trusts as a threat to the old order of economic competition and advocated strong federal government action to check their tendency to combine "for their own good rather than for the good of the people." Industrial combinations, the Committee believed, would have to be made unprofitable in order to restore equality of opportunity.

> We can tax them to death; or if that is too radical a remedy, we can tax them until their growth and enlargement is impeded....If necessary, the state itself can enter the industrial field as a producer and restore the force of competition to its former supremacy by becoming itself a competitor of the great trusts....The only possible competitor for a billion dollar trust is a hundred billion dollar state. This involves no new principle....If the Meat Trust charges unwarrantably high prices for meat, the United States has several hundred million acres of pasture lands still unoccupied where it can raise the beef for half a nation. If the Coal Trust will not let us have coal at reasonable prices, we can take the coal fields by eminent domain and operate them by the government....The United States government, or any one of the larger states, coming into the industrial field in real earnest, would cause the people interested in the great trusts or combinations affected to have very unpleasant dreams, and possibly the government would in addition make a profit for itself out of the business.
>
> This might be called socialism, but it is not. We believe in individual initiative and stand for it....We believe that the initiative taking power of the individual should be preserved at all hazards.
>
> But if we are to allow a combination so great and so strong and so powerful as to prevent individual initiative, we believe that that combination should be the state itself, and that the citizens, if they must have a master, should be the masters of themselves.[55]

This remarkable and naive report was signed by five staid men of the world, all of whom, as the American Law Review said, were "lawyers of distinction."[56] Chairman Walter S. Logan, the author of the document, was typical of early ABA leaders. He had graduated from Yale, Harvard, and Columbia; had been associated with the firm of the noted New York lawyer Charles O'Conor; had been a leader in various reform movements; and had served as president of the New York State Bar Association. Henry Budd was a wealthy Philadelphian and the ABA vice-president for Pennsylvania; Gardiner Lathrop served as solicitor for the Atchinson, Topeka and Sante Fe; George Whitelock, future Secretary of the Association, was a leading figure at the Baltimore bar and a candidate for Maryland Attorney General in 1903; and John Morris, Jr., was a member of the ABA's local council for Indiana.

Needless to say, despite the personal credentials of Committee members, their solution to the trust question did not meet with unanimous approval from the Association. Former president Charles Manderson confessed that the report filled him "with amazement and indignation." Fabius H. Busbee of North Carolina said that if it had been made at a recent Populist convention, "by unanimous vote it would have been thrown out as too radical." Yet a surprising number of members spoke in favor of the report,

and even those in opposition seemed more concerned with the report's effect upon the Association than with its effect upon the nation. Everett P. Wheeler called the trust question "distinctly a political subject" that should not be considered by the Association. Oscar R. Hunley of Alabama urged the Association to throw out any question that might "bring discredit upon it; anything...bound to be merely political." Even Manderson's chief complaint was that the Committee had turned the Association meeting into "a political hustings."[57]

The debate over the report was heated. One supporter of Logan who read his somewhat stilted remarks was "literally hooted down." Finally in order to quiet the tumult and prevent any substantive action by the Association, the controversial portion of the report was recommitted to the Committee with instructions to return the following year with "specific remedies in legislative form for any unlawful combination which may threaten commercial intercourse." Incoming president James Hagerman--ironically, a former supporter of Bryan and Free Silver--then quietly replaced three members of the Committee with three opponents of the 1903 report. Not surprisingly, the majority of the reconstituted Committee on Commercial Law reported in the following year that no action against trusts was necessary. Undeterred, Logan

issued a series of minority reports that proposed legislation providing for national incorporation laws and progressive taxation of corporations. In 1905, the year before Logan's death, this proposed legislation finally reached the floor of the annual meeting and instigated another spirited debate. Charles Claflin Allen reminded the assembly that "no set of men [could] settle the trust question all in a moment" and that the Association "must proceed step by step, and most cautiously." But Logan remained convinced that by passing his bill, "Congress would be doing God's holy work." Apparently many other ABA members sympathized with Logan because his draft legislation failed of Association endorsement by only three votes.[58]

The American Bar Association proved unable to assert the leadership of the legal profession in the matter of industrial combination mainly because of the inability of the Association to reach a consensus about the matter itself. As long as the Association confined its efforts to "law reform" very narrowly defined, such as adjustments in federal bankruptcy legislation, it might enjoy some small success; but when it ventured into realms of political policy making, the results were potentially so divisive that no action was possible, at least during the first thirty-five years of the Association's history.[59] Clearly

the Association was neither ideologically rigid nor committed to reaction. Conservative social order based upon law was the objective of the Association, but "conservatism" might be variously interpreted as the preservation of the political and economic establishment, of traditional notions of justice, of economic initiative, or of leadership for the legal profession. Faced with conflicts between these conservative ideologies, the Association leadership successfully insured that no action would be taken on matters which might seriously divide the membership.

The view of the Association leadership with regard to labor unions was related to its view of the corporation. Although anti-union sentiment was occasionally expressed in speeches to the annual meetings, Association speakers usually reflected an understanding of, if not always a sympathy for, labor unions.[60] Supreme Court Justice Henry B. Brown reminded his listeners--in phrases oddly reminiscent of Marxian materialism--that "conflicts between capital and labor" were not new.

> Indeed, they have occurred from a time whence the oldest historical records run not to the contrary....As civilization advances, it is the patrician who lords it over the plebeian and oppresses him by unjust laws; and in later and modern times, it is the man who furnishes the capital and the employee who makes it available, both having, nominally at least, an equal voice

> in the enactment of laws for their mutual benefit and protection.[61]

Even William Howard Taft, who as a U. S. Circuit Judge was regarded as anything but a friend of labor, assured his professional brethren in 1895 that labor unions had developed naturally and were capable of some good if they acted "with reasonable discretion." Taft argued that the "organization of capital into corporations, with the position of advantage which this gave in a dispute with single laborers over wages, made it absolutely necessary for labor to unite to maintain itself."[62] The more sympathetic U. M. Rose similarly noted that the laborer

> by his contract of hiring, not only transfers his labor, but he surrenders a part of his personal liberty. As compared with most sellers of commodities, he is under many disadvantages....Usually the laborer's case will brook no delay--he must have work or he and his family will starve.[63]

In 1913 N. Charles Burke went so far as to condemn "consolidated wealth" for much of the "widespread social unrest" that had been attributed to labor. "The Master," said Burke, "has taught us that the oppression of the poor and the defrauding of laborers of their wage are sins that cry to Heaven for vengeance."[64]

These several views of labor were not especially unusual for the period, nor were they other than conservative in nature. As Morton Keller has aptly written, the "late nineteenth century polity was far from

being unremittingly hostile to the interests and desires of American workingmen."[65] The perceived inequality between the position of capital and that of labor had stimulated the passage of state legislation which "prohibited wage payments in scrip, required weekly paydays, forbade wage forfeits because the worker damaged his tools or materials, regulated working hours (especially for women and children) and banned Yellow Dog contracts that prevented workers from joining unions."[66] Such legislation was reviewed in the addresses of the ABA presidents and virtually never criticized.

U. R. Rose saw some benefit in strikes, because the threat of economic loss caused employers to treat their employees with greater consideration. Yet even he believed that "these important results could have been attained...without such appalling losses."[67] And the overwhelming majority of ABA speakers approached the topic of strikes with far less equanimity than did Rose. The bar elite shuddered at the violence which strikes necessarily engendered just as they feared corporate aggrandizement. Both were threats to the social order. While Association leaders were not insensitive to the claims of workers as individuals, their reaction to the weapons of organized labor--the strike, the picket, the boycott--was almost uniformly negative.[68]

In 1886, in the wake of the Haymarket Riot and a major railroad strike, ABA President William Allen Butler warned the Association that "organizations ostensibly in the interest of the working people [were] in their practical effects at war with the good of society."[69] C. C. Allen, who spoke in direct reaction to the Pullman strike of 1894, castigated those who violated "the laws for what they call 'organized labor'; as if the term covered privileges of a higher order than the inherent rights of the individuals included in it, and of all citizens."[70] Labor unions, said William Howard Taft in 1895, were "like corporations" capable of "great good and much evil....The more completely they yield to the dominion of those among them who are intemperate of expression and violent and lawless in their methods, the more evil they do to themselves and society."[71]

In his presidential address of 1897, J. M. Woolworth painted a grim picture of labor solidarity that labor leaders themselves might have envied. Woolworth envisioned a nation of workingmen diligently reading Marx and Henry George at the public library. ("If these books were left to grow shelf-worn with time and dust, it would be different.") Laborers, he said, displayed

> a strange and enthusiastic loyalty to their class. Each abdicates his free will, his judgment, his personal wishes and

> interest....What this great body of the citizenship, possessed of political power, transported by the enthusiasm of self-sacrifice, directed by a relentless discipline will be when it becomes thoroughly saturated with these doctrines, it is not hard to divine.[72]

Certainly one of the most disturbing aspects of labor organizations to the legal elite was the possibility that individuality might be sublimated to some impersonal ideology capable of destroying the American social order.

Fear of social disorder was more than the age-old antagonism between social and economic classes. A deeper concern was the threat to the legal order which societal derangement posed. To ABA members this perceived threat emanated not only from corporations and labor unions but from another prevalent but less formal "organization" of the same period, the lynch mob. If anything, ABA speakers were more concerned with the threat posed to the social order by the lynch mob than they were with the deleterious effects of labor unions, in part because participants in lynch mobs often included men of substance and reputation in the community, including members of the legal profession itself.[73]

Speakers at ABA annual meetings strongly condemned participation in lynch mobs, not necessarily because of the injustice done to an individual, but because the "wound inflicted upon the law and upon society [was] even deeper and more ghastly."

> The flagrant violation and open defiance of law...sets all law and authority at naught. It degrades the courts, debases the administration of justice, brings judges, juries and lawyers all into contempt and strikes at the very roots of all social order...Thus the road to anarchy is opened wide with the gaunt, grim figure of the red specter grinning in the distance.[74]

Thomas Cooley agreed with this analysis and further reminded the respectable lynch mob participant that when the disorder he engendered became general, it would not be "the vagabond or the beggar that the lawless classes [would] select for victims."[75]

The leadership of the American Bar Association was in general agreement that the solution to the use of lynch law was speedier criminal procedure in the courts. They found it much more difficult to find a mutually satisfying solution to the problem of labor organization and the violence that accompanied strikes. The intellectual J. M. Woolworth thought that socialistic feeling among the working class might be checked by strengthening the jury system, putting laborers on tax assessment boards, and reinstituting the town meeting.[76] Quixotic former Senator John Stevenson insisted that if both labor and capital would follow the Golden Rule there would be "no more strikes, no more collisions."[77]

More realistically, some members of the ABA in the 1880's, along with reformers from every segment of the

political spectrum, suggested a formal system of arbitration as the solution for disputes between labor and capital. In fact, the idea became something of a "middle class panacea" during the decade; "almost every industrial state passed laws creating machinery for collective bargaining and arbitration."[78] One advantage of arbitration in the eyes of the legal elite was that it would remove "social questions" from the courts, thus protecting the judiciary from the charge that it was simply the tool of capital.[79] On the other hand, lawyers were wary of endorsing the notion that quasi-legal decisions rendered by lay panels were preferable to those reached by legal professionals. Charles C. Lancaster of Washington, D. C., called an ABA resolution recommending arbitration "an astounding confession of weakness"; and George W. Biddle, dean of the Philadelphia bar during this period, argued on the basis of experience with the Stock and Produce Exchanges that, in any case, arbitration could not be successful in the long run because of the temptation for one of the parties to seek "the benefit which follows from uncertainty or delay."[80] Perhaps for this reason "government sponsored arbitration played almost no part in late nineteenth century labor relations."[81] Simeon Baldwin anticipated as much in his report for the ABA Committee on Jurisprudence and Law Reform in 1888. However, Baldwin

argued for the passage of such legislation anyway on the grounds that "should a single railroad strike be prevented or terminated by it, the law would be amply justified."[82]

Ironically, it was the general railroad strike beginning at the Pullman works in 1894 which terminated any serious thought that arbitration or homilies about the Golden Rule would solve the problems associated with organized labor. Most members of the American Bar Association were frightened and angered by this strike and sided firmly with President Grover Cleveland in his decision to send federal troops into Illinois against the wishes of Governor Altgeld.[83]

Thomas Cooley spoke for the overwhelming majority of the profession when, in his presidential address of 1894, he denounced the illegality of the Pullman boycott and the violence which "almost immediately" became "its leading characteristic." The burden of the strike, said Cooley, was bound to fall upon the general public, and he castigated the strike leaders for ignoring the plight of innocent third parties. Furthermore, the laborers did not even consider what the effects of coercion "were likely to be upon their own interest," especially if they were to lose the strike. The constitutional position of Governor Altgeld--himself a member of the ABA--Cooley criticized as "unwarranted" and "revolutionary."[84]

Yet despite the relief of most ABA members at the failure of the strike, the innovative use of the injunction which contributed to breaking it caused serious concern to members of the legal elite who believed that traditional legal procedures were as necessary to the preservation of the social order as was the rapid suppression of labor violence. William Howard Taft recognized that

> there were many conservative, unprejudiced and patriotic citizens in this country, many of them members of the bar and of this Association, whose anxiety that the Chicago riots should be suppressed was as great as that of any one, and yet who were of the opinion that the action of the Federal Courts in issuing the injunctions...was an unwise stretching of an equitable remedy to meet an emergency which should have been met in other ways.[85]

One such citizen was prominent St. Louis attorney Charles Claflin Allen, who delivered his speech, "Injunction and Organized Labor," to the 1894 annual meeting shortly after Cooley's speech had been read. Allen criticized the use of the injunction "against ten thousand strikers and all the world besides" as either a dangerous and unnecessary innovation, subversive of trial by jury, or as "a mere pronunciamento of no force...tending to bring the judicial process of a court of equity into disrepute."[86]

A spirited discussion ensued in which other ABA members voiced their fears of placing excessive power in the hands of a single judge, of giving the public the impression that courts cared "more for the accumulated

capital of the country than they do for the lives of those who labor," and of allowing soldiers to act "as sort of special police without the declaration of martial law." Even Taft, who had supported the actions of the federal government, later regretted that one consequence of the issuance of injunctions in the Pullman strike was a stronger public impression that the federal courts were "constituted to foster corporate evils and to destroy all effort by labor to maintain itself in its controversies with corporate capital."[87]

Clearly, however, the general sentiment of the ABA members assembled in 1894 was that this novel use of the injunction, though to some degree unprecedented, was both legal and necessary under the circumstances. William Wirt Howe, a noted authority on the civil law and later president of the ABA, boasted that businessmen in his home city of New Orleans had nipped a local strike in the bud when they discovered new equity jurisprudence in the Sherman Act of 1890. "We thought", said Howe, "that possibly the author of the Act, going out to curse the people of the Lord, had really, like Balaam, turned around the blessed them, for we found that all combinations [in restraint of trade] were denounced as criminal."[88] E. B. Sherman, an ICC Commissioner, argued that rather than

degrade the judicial process, the use of the injunction during strikes would

> teach the people of this country who think they are above the law, to beware of the lightning of justice. God grant that may be the result. If there ever was a time since our forefathers struck the first blow for liberty when such a lesson was needed it was in this crisis through which we have just passed.[89]

Finally, there was some concern that even the debate itself might lend comfort to the enemies of law and order.[90]

Even a cursory examination of the foregoing positions of the American Bar Association leaders on the conflict between capital and labor reveals that the interest of the legal elite in solving contemporary economic problems was secondary to and determined by its concern to maintain social order through the courts. The Association leadership opposed unrestrained capital and predatory labor not only because it feared both plutocracy and anarchy but also because the burgeoning political power and potential for conflict of these rival economic interests threatened to undermine the authority of courts and strengthen those of legislatures. For most of the nineteenth century the elite of the bar had maintained its influence through a legal system peculiarly dominated by judges. But, as J. Willard Hurst has written, "after 1880 the leadership in making general policy had passed from the courts" to the legislatures.[91] The burden of elite lawyers, then, was to

reverse the trend and enhance the authority of the courts vis-à-vis the legislatures. Between 1878 and 1914, ABA leaders could and did disagree on such questions as the proper allocation of power between labor and capital, between state and federal governments, and even between their own nation and others. They achieved near consensus, however, in the belief that courts, not legislatures, ought to make such determinations.

In defending the traditional exercise of judicial power, the leadership of the American Bar Association was not necessarily defending an inflexible Constitution written by demi-gods and interpreted by nine men writing with the pen of inspiration, though such thinking was stereotypically attributed to the elite bar. As early as 1914 the American Winston Churchill, had Hugh Paret, the lawyer-protagonist of his novel, A Far Country, declare that his Harvard Law School class of 1884 had been inculcated with the doctrine

> that the law was the most important of all professions, that those who entered it were a priestly class set aside to guard from profanation that Ark of the Covenant the Constitution of the United States. In short, I was taught law precisely as I had been taught religion,--scriptural infallibility over again,--a static law and a static theology,--a set of concepts that were supposed to be equal to any problems civilization would have to meet until the millenium.[92]

Curiously, two important addresses given before the ABA annual meetings reflect precisely the view of the Constitution taught at Hugh Paret's Harvard. Both were delivered by legal educators, E. J. Phelps of Yale (1879) and J. Randolph Tucker of Washington and Lee (1892). Phelps and Tucker were almost exact contemporaries and had already achieved professional success before the Civil War; both were founders and later presidents of the American Bar Association. Both of their addresses were delivered in the old-fashioned, Daniel Webster-style of oratory, and both seemed to envision a static constitution guarded by a class of quasi-religious professionals. Tucker's opening sentence described the "American Bar" as "that priestly tribe to whose hands are confided the support and defense of this Ark of the Covenant of our fathers."[93] Phelps' closing line urged ABA members to "join hands in a fraternal and unbroken clasp, to maintain the grand and noble traditions of our inheritance, and to stand fast by the ark of our covenant."[94]

Unfortunately for the received theory, while the speeches of Phelps and Tucker have lent themselves well to quotation by scholars--no doubt partly because their quaint rhetoric lends an air of ridiculousness to the arguments--they are not particularly representative of the thought of ABA leaders during the period under study.[95] While the

legal elite was always receptive to the notion that the future of the commonwealth rested with itself, only rarely was the annual meeting a forum for even a formal profession of faith in the unchangeable nature of the Constitution. On the contrary, the noted progressive judge, Charles F. Amidon, a member of the Eighth Circuit Court of Appeals, ridiculed the words of Chief Justice Taney in the Dred Scott case

> that the Constitution "Speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers." The only objection to that fine phrase is that it is not true. The exact contrary would be nearer the truth....A changeless constitution becomes the protector not only of vested rights but of vested wrongs....A constitution which fixedly restrains a people from correcting their actual evils, becomes associated in the popular mind with the evils themselves.[96]

Another Progressive, Frank B. Kellogg, urged ABA members not to carry

> conservatism to the verge of the worship of antique ideals. We should not interpose it to retard legitimate progress. The Constitution is not a commandment of divine origin, everlasting and unchangeable....John Marshall gave the Constitution its most progressive and elastic construction.[97]

As early as 1885, Richard M. Venable, professor of Constitutional Law at the University of Maryland, frankly criticized the written Constitution for its outmoded forms.

> Some of the bulwarks of the constitution were built to face in the wrong direction. Those intended to guard against monarchy were

> protections against a moribund institution; those built against popular rule, have, like the electoral college, become empty forms or obstructions which are tossed out of the way in emergencies....We are not surprised, therefore to find that the constitution was framed in part to delay, mature, chasten, and check....the national will by itself--and not always its first thoughts by its second. The whole scheme involved the same kind of absurdity as a man's attempting to lift himself by his boot-straps.[98]

Even the conservative theoretician, George Sutherland, one of the future "Four Horsemen" of the New Deal Supreme Court, cautiously conceded the flexible nature of the Constitution. While to Sutherland the "principles of the Constitution" were not outgrown any more than the "Ten Commandments or the enduring morality of the Sermon on the Mount," the Constitution itself could not be considered a

> dead wall in the path of progress to be assaulted and overthrown before we can move on....It is not and never has been a wall, but a wide, free flowing stream within whose ample banks every needed and wholesome reform may be launched and carried....The due process of law clause of the Constitution does not perpetuate for all time the rules of the common law....It is not enough, therefore, to know the old precedent; we must also know the new conditions in order to determine whether the precedent any longer justly applies. If it does not, we must frankly recognize the fact and take up the duty of reforming the law, within the principles of the Constitution, which because they are broadly fundamental are practically unchanging.[99]

Likewise E. Q. Keasby, who so strongly defended New Jersey corporations and corporation laws as "progressive," based his defense of monopoly on the need to abandon shibboleths such as "competition is the life of trade." " The judge,"

he said, "must take the long view,...The question must be examined anew from time to time as conditions change, and in view of latest experience and the best opinion of experts in social science and of practical men of affairs."[100] Circuit Judge Lebaron B. Colt agreed, "Law must march with society; the Constitution must march with the nation....Laws should be interpreted and decisions rendered in the spirit of the present, not the past."[101] Similar examples might be cited from other Association speeches of the period.[102]

Considering the openness with which the ABA speakers announced the mutability of law and of the Constitution, it is not surprising that they would also acknowledge the judge as the instrument of legal change. "It was long a favorite fiction that the judges did not make, but only declared the law," said New York corporation lawyer John F. Dillon in 1886. "But [judicial lawmaking] is no longer anywhere denied."[103] Leading New Hampshire lawyer John Shirley reminded his hearers that the "fellow servant rule" announced by Chief Justice Lemuel Shaw "was established by a great and wise legislator as a species of protective tariff for the encouragement of infant railway industries."[104] And in an ironic attack upon the notion of judicial recall, Henry D. Estabrook, solicitor for Western Union, confessed, "Give me the right to interpret a law by

which I am to be bound, and I care not who makes it. Thus judges do make law. It is the most hypocritical of all legal fictions to say that they don't."[105]

To have asserted that law was static and that judges were simply engaged in a search for preexisting legal rules would not only have strained the credulity of the legal elite, it would have run contrary to one of the cardinal tenets of contemporary thought, a belief in evolutionary progress. Speakers before pre-World War I conventions of the American Bar Association were, in fact, naively enthusiastic in their attempts to draw parallels between biological and legal theory. The metaphor of Darwinian struggle in the development of the common law was an obvious point of comparison and used as early as 1879 in the address of James Broadhead, the first president.[106] Richard Venable made it the theme of his address, "Growth or Evolution of Law," in 1900.[107] And New Jersey Governor John W. Griggs employed evolutionary theory to defend the common law from what he considered undue legislative meddling.

> The contemplation of the history of the system of English law which we inherit is to the lawyer a cause of enthusiasm and a lesson in conservatism. To trace the growth of this system from the earliest beginnings, from the proto-plasmic cells, so to speak, of village and tribal customs among the primeval fens and forests of Saxony, or the bogs and crags of Jutland, on through centuries of progressive evolution upon English

> soil and under English skies until we see its mature development is well calculated to arouse the admiration and enthusiasm of the lawyer and statesman as well as of the mere student of history. Modern scholars like Sir Henry Maine, Professor Austin, Doctor Stubbs and Professor Maitland, have done for the history of law what Darwin and his successors have done in the domain of biology.[108]

The use of an evolutionary metaphor did have undoubted advantages for the conservative legal mind. In the first place, evolution was slow. As ABA President Charles Manderson said in 1899, "Nature, in her evolutionary processes, moves with a deliberation only equaled by her precision. Her motto seems to be, 'make haste slowly!'"[109] Furthermore, evolution promised continued progress with a minimum of conscious direction. ABA President George R. Peck wondered that a man,

> a member of a great zoological order should ever have been brought under the sway of law at all; but when we see him putting the curb upon himself, by his own voluntary action, it surpasses the marvelous....We have traveled far from the half-human troglodyte in his cave and step by step, have advanced to the height we now occupy. On this height we rest, serene and self-confident.[110]

Another speaker during the same annual meeting of 1906 affirmed that the only conclusion one could reach from a study of mankind was that "the race is indefinitely, if not infinitely, perfectible."[111] Finally, and most importantly, the evolutionary paradigm firmly linked the law with science, a most desirable association in an era in

which technological marvels had become an increasingly familiar part of daily existence and whose professionals were rising in public esteem. Science also seemed to have made obsolete the religious foundation on which law had been predicated in previous centuries; yet the members of the American Bar Association could have hardly been expected to relinquish all philosophical moorings for their discipline. As other conquered peoples had done in the past, they rushed to abandon their old gods for new and substituted a hazy and optimistic vision of evolutionary progress for the old imperatives.

There were clearly some difficulties with this vision. In the first place, the legal elite usually lifted its sights to a distant rosy horizon above nature "bloody in tooth and claw." They imagined evolutionary struggle as a matter for the boardroom and the courtroom, not the battlefield or the barricades. Further, the legal elite failed to appreciate the consequences of subscribing to a thesis which ultimately made man a cipher "driven by forces uncontrolled by him toward impersonally determined ends," of adopting a theory which, in the words of William Jennings Bryan, had "a tendency to paralyze the conscience."[112] Finally, the legal elite seem to have embraced an unreasonable confidence that they and their profession were riding on the crest of the evolutionary

wave. Since there was nearly unanimous agreement that public opinion ultimately moulded the law, it might have been more reasonable to conclude that evolutionary progress would lead in directions other than those approved by the legal profession.[113] However, this unsettling possibility seems to have been firmly excluded from speeches delivered at American Bar Association meetings during this period.

To the leaders of the American Bar Association evolutionary progress in the law was chiefly the product of judicial decision. Even though they did not consider the Constitution sacred writ, they believed that sound development of constitutional law depended upon its untrammeled exposition by the courts. Therefore, regardless of political preferences, the legal elite generally rallied to the support of federal courts, especially during periods of popular antagonism. In 1879, E. J. Phelps reminded his listeners that the government of the United States rested "upon entrusting to the judicial department...the whole subject of constitutional law."[114] In the supercharged atmosphere of 1893, James M. Beck declared that "Man approaches no nearer to God than in exercising the judicial function" and that "No greater calamity can befall a people than to lose respect for the decisions of its judiciary."[115] Moorfield Storey warned

the annual meeting of 1894 that if the community lost "faith in the absolute purity of its courts, the whole social fabric [was] imperilled."[116] And in 1914, a correspondent of ABA President William Howard Taft declared his agreement with Taft's position "that united professional effort [was] absolutely necessary to prevent irreparable harm being done by irresponsible agitators in their attack upon the judiciary."[117]

From the beginning the American Bar Association treated the role of the federal courts in shaping American legal and political life with great seriousness. For instance, in 1883, Robert G. Street, a forty-year-old Galveston attorney, argued before the annual meeting that courts should not have the power to declare acts of the legislature unconstitutional and that each of the three branches of government ought to be the exclusive judge of its own powers.[118] Fortunately, the mordant Irving Browne was on hand to describe the verbal fireworks which followed:

> [Street's] heresy raised in horror the few remaining hairs on the heads of the reverend seniors of the association, and Mr. Street was accordingly offered up for reprobation for two bad hours...[A]ll but three [members] agreed that Mr. Street's sentiments, although doing great credit to his scholarship and dialectical skill, were quite irregular and incendiary, and calculated to shake the pillars of our social system, etc. In short, Mr. Street was distinctly "sat upon," and his case should be a warning to

> all presuming young men who venture to introduce new ideas into the association.[119]

The comments of C. C. Bonney capture the general tone of the discussion: "Let us encourage rather than retard, the work of judicial evolution. Let us acknowledge and honor, rather than decry and seek to remove that golden crown of constitutional government, JUDICIAL SUPREMACY."[120]

Support of the judicial power by the bar elite was not disinterested, of course. As James Bryce perceived, the "better lawyers" formed "a tribunal to whose opinion the judges are sensitive....The federal judge who has recently quitted the ranks of the bar remains in sympathy with it, respects its views, desires its approbation."[121] John Lowell, President of the Boston Bar Association in 1891, welcomed the ABA to his city with the reminder that it was

> the privilege of the bar to sit in judgment on the bench. The bench has the last word in every case, but the bar has the last word on the general principles which should govern cases, and many a time has the final form both in this country and in England felt the influence of the settled judgment of the bar when it came to consider finally cases which have been wrongly adjudged by the court below.[122]

Henry Estabrook expressed the same sentiment more slyly: "Law is not simply the latest guess of a Supreme Court," he said; "a good lawyer may sometimes prevail upon that tribunal to guess again."[123] Obviously, a "guess" of a supreme court, whether first or last, would be of little

value if the prestige and influence of the courts were not maintained.

Support of the judiciary by the American Bar Association took differing forms. For instance, the perennial endorsement of higher salaries for federal judges was a superficially innocuous means of assisting the bench. Another was the Association's crusade against the recall of judicial decision, treated below. But criticisms of some aspects of court procedure could also play an oblique role in defending the kind of legal system agreeable to the elite of the bar. As Lawrence Friedman has written in a discussion of law reform, "To admit to some defects in one's own system and to search for one's own solutions may be tactically wise."[124]

One early controversy in the ABA regarding the proposed reform or elimination of the jury was, to a large degree, structured on the members' perception of how such a change would effect the authority of the courts. In the first two decades of ABA history, the jury system came under sharp attack by many leading members. In their view, juries tended to decrease the value of judicial precedent by bending "the conceded law...to the equity of the case."[125] Juries, they believed, were "largely composed of men who could not be trusted to run a peanut stand at a circus" and tended to reduce "legal inquiry to a game

having about as many elements of certainty as the roulette table."[126] Delay and expense of trials were increased by this "relic of barbarism" and it was ominously noted that some chambers of commerce and manufacturer's associations had begun establishing boards of arbitration "in order to keep their commercial controversies away from the ignorant and pinch penny determinations of the juries." Alfred Russell, an influential railroad attorney from Detroit, claimed that "if a tithe of the expense [of summoning and keeping jurors] could be devoted to paying judges properly, the very best legal talent in the country could generally be secured for the Bench."[127] In 1891, the Association adopted a report by the majority of the Committee on Judicial Administration supporting legislation or amendments that would provide for a verdict by three-fourths of the jury in civil cases.[128] There were at least two confident predictions that the jury system would disappear entirely.[129]

But defenders of the jury system were never entirely lacking at the early ABA meetings. While delivering the Annual Address of 1884, John F. Dillon tried to "invoke the conservative judgment of the Profession against the iconoclast who in the name of Reform comes to destroy the jury....Its roots strike deep into the soil and cling to the very foundation of our jurisprudence."[130] Gradually

sentiment within the Association began to swing in favor of juries for somewhat different, though still conservative, reasons. By the turn of the century, the bar elite had listened for a decade to extremist attacks upon the courts, and they realized that juries might play a useful educational role in leading the citizenry "to apprehend and esteem justice for themselves and all others."[131] If juries were abolished, "the courts would then be looked upon as something separate and apart, with which the citizen had no concern."[132] But if juries were "regulated, invigorated and popularized," they would prove "the best and perhaps the only known means of admitting the people to a share, and maintaining their interest in the administration of justice." The highly successful corporation lawyer and orator, Joseph Choate, cautioned his audience that the rule of unanimity must be maintained so that the "more conservative, the more deliberate, the more just members of the tribunal" would not be overruled by "a jury roused to even just indignation by the oppression, or misconduct of a rich individual or gigantic corporation."[133]

The controversy over the role of juries was one of the more interesting reflections of ABA interest in maintaining the authority of courts, because the position of the Association changed over time. But there were other

examples during this period of the Association's use of "constructive criticism" to enhance judicial power. One obvious example was the intermittent ten-year search for a solution to the problem of backlogged cases before the Supreme Court, which finally resulted in the establishment of the Circuit Courts of Appeal in 1891.[134] Criticism of other aspects of the judicial system were not infrequently made before the annual meetings, although the Association was not usually so successful in effectuating change as it had been in the Circuit Court struggle. For instance, in 1883, Seymour D. Thompson discussed the abuses of the writ of habeas corpus by federal courts and suggested that a remedy would be a restoration of the right of appeal to the Supreme Court.[135] Later there was discussion of the discrimination against the states in favor of the territories and the District of Columbia in respect to the right of appeal to the Supreme Court.[136] As the Association's official historian, Edson Sunderland, has written, "It was common practice [in the early years] when papers were read at the Association meetings pointing out defects in the judicial system, to refer the paper at once...to a committee for study and report." Sunderland then gives six examples of this practice, the last having occurred in 1894.[137]

As has been mentioned previously, the committee system was ineffectual, and little of substance was achieved by the Association in regard to the ideas advanced in the speeches, especially in the decade before the turn of the century. By 1903 the Committee on Judicial Administration and Remedial Procedure reported that nothing had been referred to it and neither had it "thought of anything of sufficient interest to bring before the Association."[138] Ironically, the committee was gripped by inertia at the very moment when courts began to come under the increased scrutiny and criticism of Progressives outside the legal profession.

Three years later, however, the Association once again found it politic to admit to some defects in the judicial system so as to protect the authority of the courts and of the legal profession itself. The catalyst for this decision was the delivery of a speech at the St. Paul meeting of 1906, by the thirty-six year old Roscoe Pound of the University of Nebraska. In professional legend the speech became a "celebrated address" almost immediately. Legal scholar John H. Wigmore, writing thirty years later, claimed that it had kindled "the white flame of Progress." Pound's first biographer asserted that it was "the most significant address ever delivered before the American Bar Association before or since." Sylvester Smith, President

of the Association in 1962-63, dated a new era of the organization from the speech, and the Association itself dedicated a plaque at the site of its delivery.[139]

Pound's speech was learned, articulate and well-organized. He argued that while dissatisfaction with the administration of justice was as old as law itself, there was more than the usual amount of dissatisfaction with the courts in contemporary America. Proceeding to the causes for this dissatisfaction, Pound laid emphasis on the disharmony between the individualist spirit of the common law and the collectivist spirit of the age, the lack of a philosophic basis for legal reforms and the adverserial nature of Anglo-American legal procedure. Pound criticized the multiplicity of courts, their concurrent jurisdictions, and the time-wasting emphasis upon points of pure practice rather than substantive controversies. He shrewdly noted that contemporary law had to do work performed by morality in former generations, and he criticized the lack of popular interest in justice, the degradation of the legal profession, and the courtroom reporting of yellow journals.[140]

At the conclusion of the address, Everett P. Wheeler, a prominent New York admiralty lawyer and urban reformer, moved that unanimous consent be given to the printing of four thousand copies of the speech to be distributed by the

Association. The motion provoked an acrimonious debate in which two members, James Dewitt Andrews and M. A. Spoonts, argued that the paper was an unnecessary attack upon the courts of the United States. A compromise was devised whereby Pound's speech was referred to the Committee on Judicial Administration and Remedial Procedure. In the following year a report favorable to Pound's criticisms was presented to and adopted by the Association.[141]

The controversy has frequently been represented as a turning point in the history of the Association, the moment when the conservative leadership of the nineteenth century began to be displaced by the younger, more progressive members.[142] In fact, nothing of the sort occurred. Roscoe Pound had been invited to address the annual meeting by George Peck, President of the Association. Peck knew in advance what Pound was going to say, and afterwards Pound was congratulated by such ABA leaders as Moorfield Storey, Henry Estabrook, Charles Amidon, and Thomas Shelton. James D. Andrews, Pound's chief antagonist, was a learned member of the bar elite, but something of an eccentric who overrated his own importance in the scheme of things and believed that an introduction to law which he had written was destined to become "an American Blackstone."[143] He was also convinced that the system of legal procedure in the United States was "the most refined and scientific system

of procedure ever devised by the wit of man."[144] As for Spoonts of Texas, he was a minor trial lawyer who concluded his cranky remarks with Edgar Allan Poe's poem "El Dorado," "which, amidst a fusillade of objections, [he] recited to the bitter end."[145] At the time, Pound was not amused by this "legal illiteracy" and even professed to be "alarmed by it," but in later years, he admitted that the opposition of Andrews and Spoonts "impressed Dean Wigmore, who was not an active participant in the work of the Association, as amounting to very much more than it really did."[146]

Pound's speech was actually quite acceptable to the leadership of the American Bar Association. In it Pound had emphasized the evolutionary nature of legal development; he had endorsed the scientific study of the law and the necessity for bar associations; he had stressed that only lawyers could determine which defects of the legal system were remediable and how to correct them. Finally, in the last sentence of his address, Pound had expressed the hope that in the "near future" the courts would be "swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."[147] Even if many of the bar elite were reluctant to have legal procedure "evolve" at a too rapid pace, law reform controlled by the American Bar Association would allow them, in Lawrence Friedman's phrase, "to parade before the

public in an attitude of honor, self-improvement, and devotion to justice with no real danger to the protected position of the profession."[148]

Not surprisingly, Pound's address sparked the creation of a Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, a committee to which both Pound and James Andrews were appointed. Under the leadership of Everett Wheeler (1908-1921), who took his responsibilities seriously, the committee became one of the most active in the Association. Nevertheless, while it would be unfair to characterize the committee's work as high-level wheel spinning, even Edson Sunderland admitted that only "very slight results" were obtained "from the persistent and continuous efforts of the committee in seeking legislation for improving judicial procedure."[149]

Appropriately, when the committee attempted to explain why none of the reforms it had sponsored had been enacted into law, it blamed the "indifference of Congress"--and added somewhat self-righteously that the experience proved that it was not lawyers who were "responsible for a failure to improve our methods of administering justice."[150] Of the four branches of government--including the bureaucracy--the leadership of the American Bar Association most disliked and distrusted the legislative branch. As early

as 1881, ABA President E. J. Phelps insisted that the country could "endure all its other dangers with less apprehension than the action of its federal and state legislation inspires. It is already manifest that the danger lies far less in the executive than in the legislative power."[151] Perhaps Moorfield Storey, in his Annual Address of 1894, best summarized the attitude of the Association towards legislatures. To Americans of the Revolutionary era, he said,

> a popular legislature was believed to be the great safeguard against arbitrary power....Their descendants do not share their faith....When a state legislature meets, every great corporation within its reach prepares for self-defense, knowing by bitter experience how hospitably attacks upon its property are received in committees and on the floor. The private citizen on his part never knows what cherished right may not be endangered by existing monopolies or by schemers in search of valuable franchises....Of our historical representatives we are justly proud. On our possible representatives we still rely, but our actual representatives we fear and distrust.[152]

At more dramatic moments in Association speeches, legislators became "reckless politicians" who truckled for "the unthinking vote"; "social agitators" who sought office for "self advantage, not for the public weal"; "professional demagogues" who filled the land with "ill-considered and impractical theories" and engaged in "gross, persistent, flagrant and sometimes corrupt dereliction."[153] The few words spoken in defense of legislators were often

couched in apologetic language such as those of Edmund Wetmore in his Presidential Address of 1901: "[I]ndignation at iniquity, or impatience with ignorance and stupidity, should not habitually divert our attention from what is good and admirable....[I]t is just that the commendation that is their due should be uttered in behalf both of our laws and our legislators."[154]

This antagonism between law maker and elite lawyer seems evident even from the organization of the American Bar Association. In a preliminary letter sent to a number of influential lawyers in May, 1878, Simeon Baldwin suggested that the proposed Association would be "of great service...in publishing the failure of unsuccessful experiments in legislation."[155] Baldwin's constitution, written a few months later, directed that the president of the Association "communicate the most noteworthy changes in statute law" to the annual meeting.[156] In practice the recitation of these "changes" often emphasized the frankly inane and foolish special legislation to which the bar elite took particular exception. An editor of the New York Times who had listened to one such speech reported that "on the whole, we get an idea that the immense mass of legislation with which the country is yearly inundated is very far from being indispensable."[157]

There were three major reasons for the antipathy between the bar elite and the legislatures. The first was theoretical. For the bar elite to have admitted the legitimacy and necessity of legislative change would have been to deny the professional orthodoxy: that maintenance of social order was the responsibility of the legal profession, that true legal progress was the product of slow, evolutionary development, and that this development was best directed into acceptable channels by the judiciary.

Alexander R. Lawton, the former Confederate Quartermaster General who himself had served three terms in the Georgia legislature, winced at the legislative enactments he was compelled to organize for his Presidential Address of 1883. Very few of the statutes, he said, either adhered "to any great principle of action," gave evidence of "high moral standard," or demonstrated "that practical sagacity familiarly known as common sense....Undue haste, inconsiderate action, controlling prejudice, and temporary passion, are written all over them." But, Lawton continued,

> How pleasant and refreshing to us, gentlemen of the Association, to turn from consideration of this most imperfect statutory mechanism, to the law as we find it written in the decisions and opinions of the great judges of England and America--to those expositions, based upon the immutable principles of right and justice, which

> settle principles on such a firm foundation as to furnish guides for all future action....[158]

Likewise, E. J. Phelps complained that the majority of session laws exhibited "hasty, inconsiderate, ill-advised legislation, framed to meet the real or supposed hardships of some particular case, to further some private end, or to reflect some temporary gust of feeling." Far from settling legal controversies as did judicial decision, most legislation was characterized by "a looseness and a ambiguity of expression that leads to endless uncertainty and litigation."[159] "The courts," said New Jersey Governor John Griggs frankly,

> are apt to make better laws than the legislatures....Judge-made law is apt to be better because it is not violent or revolutionary, because it is the result of the keenest and best trained thought striving for consistency, uniformity and stability, and is inspired by the principles of justice.[160]

Alton Parker added that unlike

> statutes made and provided so plentifully...the common law is expanded slowly and carefully by judicial decisions....derived from the habits, customs and thoughts of a people....So far as it is given us to realize an ideal method of building the law of a people, we possess it.[161]

A second barrier between legislators and the aristocracy of the bar may be termed professional. In the early years of the nation's history, the bar elite had been entrusted--or so the guild mythology averred--with the legislative affairs of the state. As the president of the

Illinois State Bar Association ruefully reflected in welcoming the ABA to Chicago in 1889:

> "In the old days (a custom laid aside,
> With breeches and cocked hats) the people sent
> Their wisest men to make the public laws."[162]

Beginning in the Jacksonian era, however, the bar elite had been displaced, especially in local and state politics, by professional politicians. The elite disdained such men, who frequently had emerged from the lower rungs of the legal profession itself. As the upper strata of the profession saw it, these

> legal turncoats placed themselves at the head of every popular movement, however unwise or dangerous its objectives. They even spearheaded legislative attacks upon the bar and the judiciary and encouraged a rash of other ill-considered measures that purportedly reflected an ever changing popular will.[163]

Challenging them on their own turf would have entailed groveling for the votes of the masses. Instead, the bar elite withdrew from politics--except as an incidental part of their careers--to the equally exciting and more remunerative worlds of industrial and financial capitalism. "It is well known," said one legal commentator as early as 1844, "that men of the highest eminence in our profession are seldom members of legislative assemblies in the country, and when they are, their influence is comparatively small."[164]

The dilemma of the bar elite, as Maxwell Bloomfield has correctly perceived it, was that they found it difficult to "reconcile their antipolitical attitudes with the demands of public order. For if legislatures were corrupt and the laws they passed unwise, why should citizens obey?"[165] To maintain their credibility as concerned professionals, some means of reintroducing the influence of the bar elite into American political life had to be discovered.

Suggestions for accomplishing this goal, made before the annual meetings, were not very practical. One obvious solution, occasionally advanced, was that the upper strata of the bar "do their whole duty to the state" by running for elective office.[166] However, the impediments to this course were also reviewed. As one ABA member put it, "if it were certainly known that, as legislators, we would treat the special interests or caprices of our constituents with judicial impartiality, we could never get the suffrages of our 'deestricks.'"[167] J. Randolph Tucker, who favored elective office holding by the elite, reflected that the "pittance" provided by the state for service in the legislature was enough in itself "to affright the able lawyer from its halls."[168]

Less onerous than standing for election was the possibility of achieving the same results by admonishing

others--whether judges, citizens, or the American Bar Association members--to stand firm against legislation spawned "with the fecundity of codfish." Judges were encouraged to continue to rule such legislation unconstitutional with no apology being made for holding to "the less popular view of the law."[169] Indeed, according to John W. Cary in 1892, one of the most fearful "signs of the times" was "the disposition of our courts to sanction the lawless violations, by the legislature, of rights and property secured and guaranteed by the Constitution."[170]

Challenging the citizenry was more problematic. Like all conservatives the elite of the bar generally viewed democracy with suspicion. Yet professional orthodoxy insisted that lawyers could successfully lead the masses into truth. As President Alton Parker said to the assembly in 1907,

> You cannot move legislators crazed with ambition. But the people can, and will do so when they fully understand the situation. And we need never fear they will not understand it after a time. But the people should be informed now. Do not forget, however, that if you attempt it, you will be denounced by the demagogue and cartooned by the yellow press, a fate which has come to few who have appealed to reason and to justice. These tactics have enforced silence upon many whose hearts have prompted them to point out the danger of government by passion. But they cannot keep silent the earnest lawyers of this country for a minute after they have determined that duty calls them to speak out.[171]

"If every citizen did his duty," said President Charles Libby three years later, "there would be no place for the professional politician."[172]

The Association itself was also viewed as a bulwark against legislative folly. In the second year of the organization's existence, E. J. Phelps advised the members to make of it an effective instrument of support for a "fearless spirit of constitutional jurisprudence." Party ties, he said, should "hang very loose," so that "fundamental law" would never "stand or fall upon political considerations."[173] More than twenty-five years later, another member cautioned the assembly that while the current "age of experiment, of nostrum and of investigation" might eventually work for "the betterment of our land," the American Bar Association must not "enter into the rivalry" but "remain the one conservative body in this republic, now and forever."[174]

Nevertheless, the limits of oratory were well known even to an organization of lawyers, and ABA members cast about for other more substantial ways of curbing legislatures and reasserting the influence of the bar elite in lawmaking. One such suggestion was superficial, and another, while in a sense forward-looking, was impractical. The superficial suggestion, quite popular during the first decade of the Association, was that state legislatures be

restricted to meeting only every other year. The rationale behind the proposal, in the words of critic Simon Sterne, was that since "legislatures do more harm than good when they meet, cut their years of meeting to one half, and presto! but half the mischief." Sterne rightly called this logic "the merest refuge of imbecility." Many new state constitutions did mandate short, biennial sessions for their legislatures, but the output of legislation was not much affected.[175]

More perspicacious was the proposal that some type of drafting bureau be established in each state to revise the "slipshod" laws passed annually by the legislatures. The idea was not original with the ABA or even with the post-Civil War bar, having been advanced in legal periodicals as early as the 1830's.

> In its most rudimentary form, the commission idea suggested to antebellum journalists a small body of skilled legal draftsmen appointed by the governor of a state to scrutinize the final version of all legislative measures. They would act primarily as stylistic critics, correcting the language of a law to make it more intelligible to the general public as well as consistent with professional norms. Some writers went further and argued for a true board of censors, with power to weed out in advance all doubtful bills, including any which contradicted previous enactments.[176]

The ABA formally endorsed such drafting bureaus as early as 1882 and maintained a sporadic interest in the subject until 1921 when the Special Committee on Drafting

of Legislation was discharged at its own request, believing that the idea of expert drafting assistance for legislative bodies was "now generally recognized."[177] The model statute adopted by the Association was cautious in that it recommended only "a joint standing committee for the revision of bills" rather than an independent commission. However, in a flight of fancy, C. C. Bonney went so far as to envision state senates "composed only of experienced professional men, assimilated in tenure and compensation to the judiciary in order that bills might be constructed clearly." This body, in Bonney's view, would substitute for the "hereditary governing class of other countries."[178]

Obviously, the establishment of a drafting bureau, even if only a committee of the legislature itself, would increase the influence of the bar elite who would most likely be appointed to it. Furthermore, criticism of "slipshod" legislation by drafting bureaus could be passed off as a non-political and technical responsibility, even though substantive change might well be made in the interest of "clarifying" laws. For example, Governor Griggs of New Jersey praised the volunteer "commissions of eminent lawyers," whom he had appointed to "aid the legislature" in revising statutes, because he believed that these groups had served "the double purpose of improving present conditions and warning against further excess."[179]

Still, the attempt at displacing elected legislators with appointed members of the legal elite was never as successful during this period as some of the latter might have wished. In the first place, the success of the notion depended upon the sympathy of the very legislative bodies whose irresponsibility the drafting bureau was supposed to check. "Furthermore, the commission idea, for all its apolitical tone, pointed to the development of a fourth branch of government--an administrative wing whose personnel would enjoy the substance of political power without its attendant risks."[180]

The third cause of antipathy between the bar elite and the legislature was ideological; that is, the conservative elite was as much concerned with the substance of the legislation passed as with its alleged shoddy drafting or its lack of deference to the judiciary. In fact, on the basis of some selected passages from ABA speeches, the cynic might conclude that the stated concerns about legislative incompetence were a mere pretext to mask partisan prejudice. This conclusion would be an error, however, for given the diverse personalities and political opinions of the ABA leadership, it was never possible for the organization to reach agreement as to which legislation was constructive and which was destructive in the purview of the legal elite.

The closest that the Association came to a consensus on the relationship between the individual and the state was a consistent attack by ABA speakers on government "paternalism"--in the words of J. Randolph Tucker, "that worst of systems which the world has ever tried."[181] Charles Manderson completed his review of a year's legislation with the conclusion that much of it "with its socialistic tendency, its destruction of individuality, interference with personal liberty, encroachment upon property rights, making of the State not only a fostering father but a nursing mother, will affright every true lover of liberty."[182] "The result of such legislation," said William Glasgow in 1903, was "to demoralize and corrupt the individual, and make him the mere hanger-on upon the government."[183] Henry Estabrook described the "spirit of personal independence" as the "unique inheritance" of Americans and flayed laws which created "categories, classes and distinctions among men." "Every law," he said, "which in effect takes from one and gives to another without compensation should be declared void."[184] U. M. Rose tied together two fears of the bar elite when he pointed out that if government should "buy up all the railroads and telegraphs" the controlling power "would be placed in the hands of American politicians," and the nation would be covered

> with officials like the locusts of Egypt. Such an officialdom would establish a slavery more terrible and exasperating than any that has ever been known....As there would be no large rewards without infringement on the sacred principle of equality, the mainspring of progress would be broken.[185]

That such sentiments were expressed before the American Bar Association of this period would surprise few of those conversant with the traditional view of both the era and the Association. More remarkable are the host of complementary and even contradictory statements made in the same years and before the same audiences. For instance, Randolph Tucker who, in Irving Browne's words, had "tossed, gored, trampled on and rent the detestable doctrine" of paternalism had also announced four years earlier that the regulation of interstate commerce by Congress was a positive good.[186] William Glasgow, who insisted that governmental aid to individuals only sapped their character, found "no cause for anxiety or fear that the constitutional liberty of the individual" would be impaired by the growth of the state police power.[187] In 1885, Richard Venable reviewed the growth of the federal involvement in agriculture, education, and health and frankly stated that it "would be hard to point to any clause or section in the Constitution which would sustain such legislation." But, he continued, "I see no occasion

for making ourselves unhappy over this state of things, more than I do for mourning over evolution."[188]

To some degree these paradoxical views are attributable to a stronger belief in the probity of the federal government than in that of the state legislatures. Leading North Dakota Progressive, U. S. District Judge Charles Amidon, referred to state regulations of commerce as "conflicting, oppressive, inefficient. They seldom represent intelligent investigation, but in the main have had their origin in agitation, often in popular frenzy." The solution, Amidon believed, was to give "exclusive control" of commerce to the federal government, which would then produce an administration of law "both efficient and just."[189]

More importantly, governmental regulation of certain activities was in line with the emphasis of the legal elite upon the necessity for societal order. George Wright, in his presidential address of 1888, praised legislation which provided for "the better protection of labor, more efficient means for its certain payment, as also upon the subject of boycotting and blacklisting" since these laws would serve to protect the public against "that spirit of anarchy and violence which scouts all law...places the individual above courts, juries, their verdicts and

judgments, and thus endangers not only the public peace and welfare but the very existence of organized government."[190]

Finally there was the legislation ironically excused from the paternalistic label because it was truly paternalistic either in looking to the succor of the unfortunate or in demonstrating, in some way, the elevation of the human spirit. Under such a heading often fell legislation promoting railway safety, food and drug laws, and provision for public libraries, parks, water, sewers, and fire codes.[191] Frederick Lehmann, in his presidential address of 1909, dismissed the notion that "[l]aws which look to shorter hours of arduous and dangerous labor, to the relief of women from the thrall of unwomanly drudgery, and to the care of children that they may develop into strong manhood and good womanhood" bore any relationship to "the bread and circuses of decadent Rome."[192] Even an unimpeachable (and hard-hearted) conservative like Alexander Lawton found that protecting Yellowstone Park and planting shade trees along highways in New York were "in the direction of a more cultivated state and a higher civilization."[193]

A few ABA speeches went further and advocated just such kinds of government action that other speakers had termed paternalistic. That Roscoe Pound, Eugene Wambaugh, and Charles Amidon would side with those who believed more

governmental regulation necessary is unexceptional--although the fact of their being invited to address the Association is worthy of consideration.[194] But perhaps even the more "forward-looking" of ABA conservatives were startled by an address given to the Association in 1893, by Associate Justice of the Supreme Court, Henry B. Brown. Brown not only advocated wage and hour legislation as well as health regulations for factories--legislation state courts had been striking down for a decade under the "freedom of contract" doctrine--but he went on to suggest governmental ownership of gas, electricity, telephones, rapid transit, telegraphs, express delivery, and ultimately canals and railways. He mused over the possibility of a million dollar limit for any individual inheritance and, in conclusion, pronounced himself "by no means satisfied that the maxim that the country which is governed least is governed best, may not, in these days of monopolies and combinations, be subject to revision."[195] Unfortunately the comments of President J. Randolph Tucker have not been preserved.

Certainly the ideology of Brown's speech--and Arnold Paul suggests even this might be called "moderate conservative"--was not representative of the American Bar Association of that or any other era. But then neither were the orations that gloried in Herbert Spencer and/or

the unchangeable nature of the American Constitution. The conservatism of the American Bar Association was at least broad if not deep. There never was a true consensus on the burning socio-political questions of the day, only a belief in legal order and the necessity for the profession to strengthen its role in that order. What rough consensus there was on other issues may be captured in excerpts from the presidential address of railroad lawyer and G. A. R. orator George R. Peck, for in it are mingled a wistfulness for the past, an uncertainty about the present, and a restrained optimism for the future.

> I believe that the state...should have the power, and should unflinchingly assert it, to protect all its people, and that it should guaranty that all privileges shall be enjoyed without impairment of the privileges of others. I do not believe in laissez faire. I do not believe the infinitely complicated affairs of our modern life can be safely left to the unregulated instincts of those who are interested in or profit by them....
>
> [T]he period of governmental ascendancy, of regulation and inspection, and interference is upon us, and I think it is but the natural outgrowth of the not very remote past. When we insist on making the journey from Chicago to New York in eighteen hours, we need not murmur because the days of pastoral simplicity are gone....[O]ur deepest concern must be for the present and for what it and its tendencies may bring forth. When Edmund Burke lamented that the age of chivalry was gone, the age of chivalry did not come back....
>
> [T]he enormous increase in the statutory regulation of human affairs in our country and everywhere is the unavoidable result of the scientific impulse....Whether that impulse was for good or for evil cannot yet be answered. It has helped and it has harmed; but on which side

of the ledger the balance will stand at the end, who can guess?

How the problem shall be solved, the mystery made clear I do not pretend to know. We are so little, and life so large, that in the entire scope of things not much is left to be counted among the certainties. And yet, I do not think we can be forgiven if we desert, or fly, or surrender. What we may do to reconcile individual rights and individual freedom with the assured certainty of an increased exercise of governmental authority, we must do as lawyers, and still more as American citizens....And out of it all, step by step, we shall go forward, maybe to better things. But anyway, we shall go forward.[196]

CHAPTER 6

BETWEEN GENTLEMAN'S CLUB AND PROFESSIONAL ASSOCIATION: INTERNAL AFFAIRS, 1911-1928

In the external affairs of the American Bar Association, 1911 signaled the opening barrage in an attempt to rouse public opinion against judicial recall, an effort which J. Willard Hurst has called the first "effective formulation and execution of policy in the name of the Association."[1] Nineteen eleven proved just as significant for the internal development of the organization. In that year, for the first time, a deliberate effort was made to enlarge the membership. Vice-presidents and Local Councils were requested to submit lists of "the most desirable members" of their state bars; and invitations to join the Association, extended by the Executive Committee, were then sent to the persons recommended. Since even such a discreet solicitation would have been distasteful to the founders of the Association, 1911 serves as a convenient date with which to mark the beginning of the organization's slow and hesitant transformation from an apolitical social club into a

representative professional organization and political pressure group.

As a result of the Executive Committee action, the ABA experienced "a most gratifying increase": 1118 new members elected and a 27% growth in the size of the organization.[2] Not surprisingly, during the following year, the Association created a standing Committee on Increase in Membership, and Lucien Hugh Alexander (1866-1926) was appointed chairman. Alexander, a Philadelphian who specialized in representing railroads before the ICC, had the diverse qualities needed for the job. The son of a railroad magnate who had been president of the National Reform League, Lucien Alexander had studied at Harvard and in the offices of two elite Philadelphia lawyers. He was a member of the right clubs. Most importantly, Alexander possessed the temperament of a successful bureaucrat: he loved giving orders and calculating percentages. Before his resignation in 1921, Alexander could boast that over ten thousand new members had been added to ABA rolls during his administration.[3]

After 1913, Alexander's committee consisted of all former ABA presidents who would lend their names to the effort plus a half dozen or so active members. These two groups of committeemen were not differentiated on the letter head, but the ex-presidents were told that nothing

beyond the use of their name was expected. As was typical of most ABA committees--indeed, of committees anywhere--the real work devolved largely upon the chairman. Alexander's footsoldiers in the struggle for new members were the vice-presidents and the other two to nine members of the Local Councils for each state. Since these positions had been hitherto largely honorary, Alexander's importunity was not always greeted with enthusiasm. As Sunderland commented drily, "The plan worked well in some states and not so well in others."[4]

Alexander certainly tried hard enough to make it work. Especially in the earlier years of the campaign, he frequently addressed long, detailed and somewhat overbearing letters to the state officials describing in detail what he expected of them. ("Pardon our putting this point so personally direct--<u>but this means YOU,</u> the recipient of <u>this copy</u> of this letter.") Occasionally the local officials invested some imagination in the effort, as in Oklahoma, where the Local Council went in a body to courts and law offices to personally urge membership in the ABA upon various judges and prominent lawyers.[5] Generally, however, the state officials adopted the method preferred by Alexander, the sending of "process letters"--form letters individually typed and signed--to the more elite of the prospective members. Alexander hoped that the letters

written by state officials would be as "strong and urgent," as the model that he provided; but he was convinced that the key to achieving results with the process letter lay not in logical or even emotional argument but in finding individuals of sufficiently "high standing in the profession" to sign them. As for the "desirable rank and file of the bar," they received a less expensive letter from the state membership chairman along with a printed version of a model letter from a member of the local or national elite. In both cases the Membership Committee was prepared to assume the cost of state mailings from its appropriation of several thousand dollars.[6]

In the days before personalized letters could be composed, signed, and sealed by entering a few digits into a computer terminal, the process letter was a surprisingly effective tool in recruiting the upper strata of the bar. Many recipients of the letters treated them as actual communications from the bar leaders who had signed them, an illusion Alexander tried hard to preserve. Undoubtedly during the first few years of the campaign, the Association was able to tap a pool of potential members who had been, in the words of ABA President J. M. Dickinson, "restrained by a fine sense of delicacy from suggesting their own election," and who were flattered by the thought that say,

Alton B. Parker would care to place their names in nomination for membership.[7]

It should have been obvious, however, that such a direct mail appeal would be subject to the law of diminishing returns. As the chairman of the membership committee observed in 1925, "it was doubtful if there [were] to be found any considerable number of lawyers eligible to membership" who had not been invited to join the Association during the "persistent and systematic membership canvasses" of the previous fifteen years.[8] Such being the case, the tendency of the later years was in the direction of mass mailings--28,000 letters in 1928--to the "desirable rank and file of the bar" rather than continued special appeals to the elite. When membership began to decline in 1919, even Lucien Alexander appealed directly to prospective members to submit their own names for consideration.[9]

In 1921, the ABA instituted a new plan for soliciting members which included installing Treasurer Frederick Wadhams as the new chairman of the Committee and by-passing the reluctant or even hostile Local Councils with specially chosen District and State Directors. The Association also lowered its membership requirement that prospects must have practiced law for five years prior to being admitted to the ABA. In 1917, the requirement was reduced to three years

and, in 1928, it was abolished altogether. By 1927, the position of the ABA Journal was that since all members of the legal profession benefited from the work of the Association, and since none wished to eat "of the bread of others' labor," then every "respectable lawyer should join in and share its work."[10]

This is not to say that prospective members were no longer rejected by local or national officials. In one unusual recorded case, an obviously Jewish prospect was secretly barred from membership for "doing a collection business" and engaging "in promotion schemes of somewhat doubtful character."[11] Nor did every prospect consent to nomination. Oliver Wendell Holmes turned down a sincerely personal invitation from Lucien Alexander, and even the polite request of William Howard Taft did not suffice to bring in the four non-members on the bench of the Supreme Court. Of course, many of the rank and file refused to have their names put into nomination as well.[12]

Nevertheless, from one perspective, the solicitation of members by the Association was a great success. Membership soared from 3690 in 1910 to 26,595 in 1928, with the largest percentage of increase occurring in 1911, 1913, and 1921, the years in which new membership campaigns were inaugurated. However, it is impossible to distinguish the effect of the campaigns from other factors such as the

generally healthy state of the national economy and the well-publicized leadership of the Association in the fight against judicial recall.[13] The average yearly percentage of increase in membership from 1911 to 1928 was 12%, an increase of less than 3% above the previous decade when no formal solicitation had occurred. Furthermore, the Association was plagued with a high rate of turnover. In 1925, Wadhams boasted that 15,604 new members had been added to the Association during his tenure as membership chairman; but the actual increase in membership was only 8165. Some newly elected members never paid their dues, and the Association was saddled with both the cost of bookkeeping and the expense of sending the Journal. The obvious solution, payment of dues in advance of election, was instituted in 1928, thus quietly severing another tie to the gentlemen's club of the nineteenth century.[14]

The half-conscious decision to abandon the principle of selectivity on which the American Bar Association had been founded was greeted with a lack of enthusiasm by some of the older members. In 1915, Robert M. Hughes, vice-president for Virginia, declared himself out of sympathy with "the frantic efforts" to increase the membership; and Alexander Dunnett, vice-president for Vermont, hoped that if the Association took "any step respecting its membership, that step should be in the direction of making

it more select."[15] Simeon Baldwin, the founder of the Association, now in his late seventies, was at best lukewarm towards the membership campaign. When asked for a promotional paragraph in 1916, he dourly began, "We want no additions to our membership except of those who sympathize with our work and are ready to do their part towards supporting it as they have opportunity." (Alexander printed it but italicized a more positive sounding sentence.) In 1919, when requested to continue his honorary position on the Membership Committee, Baldwin grumbled that

> the original policy of the Association, which was to confine membership to leading men or those of high promise was a sound one. It would be difficult if not impossible to revert to this policy now, but I would prefer not to be a member of a committee expected to solicit accessions to the Association."[16]

However, most leaders of the American Bar Association in the second and third decade of the century were quite willing to abandon the outmoded ideal of a national bar association composed only of the "best men" in exchange for the potential opportunity to increase the efficiency and political influence of a large professional organization.[17] The same impulse, typical of the progressive period, was at work in state and local bar associations as well, and only the haughty Association of the Bar of the City of New York could even attempt to check a natural tendency towards

membership growth.[18] On the occasion of the fiftieth anniversary of the American Bar Association, an editorial in the Journal suggested that a good way to celebrate that milestone was to extend the "power and influence" of the Association in all proper ways, especially "by securing a notable increase in membership."[19]

The growth of Association membership and the pro forma manner in which new members were admitted resulted in the greatest internal crisis in the Association's first half-century of existence. In 1911, it was discovered that a Negro, William H. Lewis, had been admitted to membership, and the effects of this admission threatened to split the Association and bedeviled its leadership until 1914.

Lewis, the leading black lawyer in metropolitan Boston, was a native of Virginia who had been educated at Amherst and Harvard Law School. Though he began his law practice as a militant opposed to the policies of Booker T. Washington, he soon realized that a black man ambitious of political preferment must of necessity treat Tuskegee with a proper degree of respect. Through Washington's influence, Lewis was nominated by Theodore Roosevelt as assistant district attorney in Boston, a position in which he served with some distinction for nine years. Though Taft did not consult with Washington as frequently as had Roosevelt, the black leader finally wrangled Lewis'

appointment as assistant attorney general in 1911, the highest appointive office held by a black in the federal government up to that time. Ironically, Lewis' nomination was opposed by a militant segment of the black community which disliked his conservative opportunism--Lewis, among other things, had defended Roosevelt's course in the Brownsville affair. William Monroe Trotter, the influential editor of the black Boston Guardian, may have petitioned Congress in an attempt to block Lewis' confirmation. It was during this interval, when his nomination was being challenged, that someone noticed Lewis' admission to the American Bar Association earlier in the year.[20]

While it is far from certain that a black assistant attorney general could have been peacefully elected to membership in the ABA twenty years earlier, the chances would certainly have been greater than in 1911. In 1893, when Simeon Baldwin and George Sharp were preparing for the establishment of the Section of Legal Education, they considered inviting representatives of the black law schools to meet with them at the organizational meeting. "Whether their appearance would create friction," said Sharp, "I do not know." But since the black schools were educationally "insignificant," Sharp advised that it would be safer to omit them, with the possibility of their later

admission being left to the Association and the law schools in question.[21]

In any case, the first negative reaction to the revelation that the Association had admitted a black man came not from the ABA leadership but from recently recruited members of the rank and file. H. H. Watkins of Anderson, South Carolina, called for Lewis' resignation out of consideration for the members of his race in the South. S. O. Pickens of Indianapolis condemned the election as "very indiscreet" and found Lewis blameworthy for having applied for membership in the first place. Alexander Troy of Montgomery, Alabama, said he felt "so deeply on the subject that I cannot trust myself to be quoted, except to say that the proposition before the American Bar Association looks to me like this: you keep your negro and lose a thousand members throughout the South."[22]

The threats of resignations registered so loudly upon the inner circle of the Association that the printing of the 1911 Report--which would have contained Lewis' name as a member--was held up while the Executive Committee on January 4, 1912 rescinded his election, an action which neither the Committee nor the Association as a whole had the constitutional authority to take. Some feeble excuse was made that Lewis had not properly filled out his application because he neglected to mention that he was an

assistant attorney general! Lewis'superior, Attorney General George Wickersham promptly came to his defense by writing a letter to all ABA members protesting the illegality of the expulsion, and he included a postcard addressed to ABA Secretary Whitelock with which members themselves could comment upon the action. Whitelock was greatly annoyed and replied that Wickersham was both "discourteous and dogmatic" for questioning the good intentions of the Executive Committee. (Wickersham's temerity probably cost him election to the presidency of the Association.) Unfortunately for Whitelock, almost as soon as he had written that no other non-whites had ever been admitted to the organization, two more black members were discovered, one of whom, Butler A. Wilson, had served on the local entertainment committee when the Association had met in Boston the year before.[23]

The situation grew more ominous when Wickersham and his supporters threatened to resign if the black members were not retained. One "lawyer of national standing" quoted by the Nation in May, 1912, confidently predicted that the ABA would have to face the issue squarely and that this would probably "result in splitting the Association into two parts." The leadership, in fact, was bending every effort to find a solution which would dodge the issue

and preserve the organization regardless of conviction or logic.[24]

The matter was entrusted to ABA founder and long-time treasurer Francis Rawle, who carefully orchestrated a compromise at the annual meeting of 1912. Former President J. M. Dickinson of Tennessee presented the resolution, and it was seconded by Nathan William MacChesney of Illinois. Both pleaded that there be no discussion of the matter so "that the crisis which has been impending will pass by, leaving unimpaired an Association which has done so much for the usefulness and honor of the profession." This, said Dickinson, "is one thought which I am sure is uppermost in the minds of all of us." An obscure member from Indiana took the chair, perhaps so that President S. S. Gregory would not have to sully his hands. Opposition to the formula was ruled out of order, the resolution was gaveled through, and the session was adjourned to stave off any further attempts at discussion.[25]

By terms of the compromise the three Negro lawyers were allowed to retain their membership, but the resolution made it offensively clear that their election had been unintentional and their presence unwanted.[26] The next day, one of the three blacks, William R. Morris of Minnesota, resigned from the Association. Joseph Hansell Merrill, a Georgian who confessed his opposition to the admission of

Negroes, proposed a resolution praising Morris for his "dignified appreciation of the conditions as manifested by his telegram of resignation."[27]

The Association's solution to the question of admitting blacks to membership received more public comment--most of it unfavorable--than anything the organization had said or done up to that time. While newspapers and popular journals were generally sympathetic to racial segregation in social clubs, they were surprised to learn that ABA members did not rather consider their Association to be a professional organization. "Will some one tell us," said the editor of the Independent, "why the American Banker's Association can give full privileges of membership to a Virginia negro...and without serious complaint, while objection is made to the admission of a colored lawyer to the American Bar Association?" The New York Tribune observed that if there was "one place where race prejudice should not exist, it [was] in an organization which purport[ed] to be representative of a learned profession." There were many other adverse comments about the "sneaking settlement" which closed the dispute. "The association did not even have the courage to do a mean thing manfully," said the New York Sun. "Apparently," said the Tribune, "it has neither the wish to admit negroes nor the courage to shut them out."[28]

Some Northern and Western members who felt the compromise had conceded too much to the "colorphobes" with in the Association resigned or refused to pay their dues. In the case of a few individuals, such as former Massachusetts Attorney General Albert E. Pillsbury, the resignation was deliberately timed to generate more unfavorable publicity. But most of the offended members left quietly. Other potential members refused to join because they did not care to endorse racial discrimination.[29]

Still, the inner circle of the Association had not yet faced that perennial advocate of unpopular causes, former president Moorfield Storey. Storey had planned to use his considerable influence within the Association to support the cause of a non-discriminatory admissions policy, but he had been taken seriously ill while vacationing in Switzerland and was unable to attend the annual meeting of 1912. Upon his return to Massachusetts, he addressed a circular letter to ABA members, sharply criticizing the leadership for railroading its resolution through the house without discussion. Storey vowed to labor personally for its repeal and continue "the contest for equal rights." Then, in curious homage to the gentleman's club that he might have overturned, Storey followed his broadside with a second message calling for a truce during the 1913 meeting

in Montreal since "distinguished Englishmen have been invited to come as our guests."[30]

The leadership of the Association was not pleased with the prospect of another, and possibly more effective, challenge to its authority, especially since Storey had suggested that the matter be put to the membership on a postcard vote. Lucien Hugh Alexander created a monument of expostulatory letter writing, ten overwrought pages of alternating denunciation and pleading. He insisted to Storey that reliance upon the deliberation of the Executive Committee afforded a much better method of solving the dispute than "involving our general membership--and we had an addition of 47% of new members this year--in a race war of words."[31] The Executive Committee scotched any possibility of a referendum by claiming that it had no constitutional power to submit such a question to the membership. On the other hand, its members wisely consented to meet Storey's request for a place on the 1914 program fearing that should they resist him, he would have his way in any case. "I'm sorry that the matter must come up at all," wrote Secretary George Whitelock to Taft, "but it is destined to be discussed and this seems to me to be the best way to deal with it."[32]

Storey might have been a tenacious opponent of the leadership clique; his ability to occasion more unfavorable

publicity for the Association was undoubted. But not too surprisingly, considering Storey's patrician truce of the year before, the Association leadership was able to strike a deal with him and once again extricate itself from a vulnerable position. The compromise was moved on the floor of the 1914 convention by Henry St. George Tucker of Virginia and defended by Storey, who said that he was unwilling "to begin a discussion which might become bitter and might perhaps disturb the pleasant relations that have hitherto existed between the members of this Association." The Tucker resolution was adopted almost unanimously, Storey grasped Tucker's hand, and the audience broke into applause. Once again the meeting was adjourned to prevent any unscheduled discussion. In the halls there were jokes at Storey's expense.[33]

The compromise of 1914 rescinded its predecessor of 1912 and replaced it with the following formula:

> WHEREAS, It is important that full information be furnished as to all applicants for membership in this Association; be it Resolved, That all applicants for membership shall state the race and sex of the applicant, and other facts as the Executive Committee may require.[34]

As William Howard Taft wrote to his niece, it simply substituted "one thing for the other so as not to carry on the face of the minutes a reflection on the negro race, although the sting is there just the same I should think."[35] By typically attaching "more importance to the

abstract than to the actual," Storey managed both to enhance the power of the Executive Committee and to help suppress further public discussion of the race issue until 1943.[36]

For a few years following the compromise, ABA committee chairmen stepped warily around the topic of membership qualifications. John H. Wigmore, who headed a committee on proposed changes in the ABA constitution, stated defensively in his report for 1915 that his committee members wanted nothing to do with the issue, that they did not know each other's views on the subject, and promised not to "meddle with that topic." Lucien Alexander unveiled a plan to card index every member of the bar in every state who would probably receive the approval of his local council for election to the Association so that no one in a position of authority would extend an invitation to join the ABA to "some man who probably would not be elected if his name were presented here in annual meeting."[37]

If the Executive Committee believed that the "membership question" could be banished by simply requiring that race and sex be provided on the application, they were badly mistaken. Instead, because applicants came in varieties other than "black" and "white," the Executive Committee was soon enmeshed in a web of inconsistent racial

line drawing. It discovered that the serious practice of racism was an onerous and disagreeable task. Even before the 1914 compromise, Alexander had written to Whitelock asking advice about the applications of William Crockett, a Negro from Hawaii, and William H. Heen, "who is certified to be part Hawaiian and part Chinese." To make the dilemma more severe, Heen was "a gentleman of ability and good standing" who resented "being classed with the African."[38] ABA President William Howard Taft also questioned Whitelock about the propriety of inviting the Haitian minister to the annual meeting.

> He will not look any darker than a good many others from South America. A man who was Minister when I was in Washington was as black as the ace of spades, but I am quite sure they have made a change. The way to do such a thing is just to do it, if we decided to do it, and not ask anybody. It is a very different thing from inviting a man of color to become a member.[39]

In January 1922, the Executive Committee, by a close vote, left the door of membership open to "native members of the Filipino Bar," but later that year it faced a more difficult decision regarding the application of Seid G. Back of Oregon, a native American of Chinese parentage.[40] While Back was approved by such notable Executive Committee members as ABA President John W. Davis, former President Cordenio A. Severance, Secretary W. Thomas Kemp, and Treasurer Frederick Wadhams, his admission was opposed by

nonentities like A. T. Stovall of Okolona, Mississippi, and S. E. Ellsworth of Jamestown, North Dakota. Wadhams, in a letter to other Committee members, admitted that Back's admission would cost the Association some members and seemed inconsistent with "the Americanization campaign now in progress," but he believed that the only true color line established by the Association was that which barred blacks from membership. Furthermore, the Association had already elected a Japanese to honorary membership and two "Chinese-Hawaiians" to regular membership. "I am sure that if we bar this Chinese-American from our Association," said Wadhams, "and all the above facts were known, the Association would be ridiculed for glaring inconsistency and would be severely criticized." Nevertheless, Back was denied admission.[41]

When Moorfield Storey had pressed the Association for the admission of blacks, Lucien Alexander warned him that a "stand pat" attitude was necessary since the whole matter was "tied up very closely with the woman question." Indeed, the possible admission of women to the American Bar Association had been broached as early as 1901, when two Colorado lawyers, Mary Lathrop and Minnie K. Liebhardt, joined male colleagues in a discussion of women in the legal profession before the Section of Legal Education. The Section seemed quite favorable to the idea of women

lawyers, and later during a session of the annual meeting, the influential Lyman Brewster moved that women be admitted to the Association. His resolution, however, was referred to the General Council, which later ruled it "inexpedient."[42]

In 1914, the year of the Storey compromise, three women were also awaiting the verdict of the Association on their applications for admission. In this case the leadership side-stepped the issue by "postponing" a decision. The matter remained postponed until 1918, the year that Congress passed the Nineteenth Amendment. Then, without fanfare or public controversy, two "white female applicants," including Mary Lathrop of Colorado, were admitted to membership.[43]

Once admitted, women were treated chivalrously by the leadership and given more than their share of committee assignments and honorary positions. In 1921, Pearl McCall of Idaho became the first women elected a member of the General Council, a position of real importance in the internal politics of the Association. The same year a separate table for women members was set at the annual banquet--although wives of members had to wait until 1927 to be admitted as diners.[44] Such treatment of women members proved advantageous to the Association since it probably squelched any annoyance from the Women Lawyer's

Association, an organization which began "tagging...round" the ABA annual meeting. By and large, the women members were as conservative as their male peers, and no particular "women's views" seem to have been expressed by female members of the Association. Mary Lathrop even reported hints of restive feminism to the ABA leadership.[45]

The decision to admit women to the Association, like so many other questions of policy, was made privately by a very small group of influential members. The control of clubs and professional organizations by cliques is not unusual and, as has been seen, had a long history within the American Bar Association. However, the growth of the inner circle did not keep pace with the tremendous growth of membership in the second decade of the century, and the unwieldy nature of the annual meeting stimulated the leadership group to further aggrandize power to itself. George Wickersham, who had good reason to know, complained bitterly of the "little group of mutual admirers" that ran Association affairs, and he understood that his support of Lewis in 1912 had secured him "the lasting enmity of the 'ring.'" Roscoe Pound privately protested the reduction in size of a committee on which he served, but he was resigned to having the leadership "put it through by means of the steamroller as they have done everything they have proposed in recent years." Publicly, ABA leaders denied that the

Association was controlled by a clique, and they usually tried not to flaunt their power. When a decision concerning a proposed trip to Great Britain needed to be made, President John W. Davis warned the Treasurer not to call

> an express conference for the purpose....There is a good deal of talk in the Association, as you know, about the arrangement of affairs from the inside, and it seems to me we can get the sense of all the gentlemen in question without making an effort to assemble them.[46]

The leadership group included men of national political or professional significance who took at least a modicum of interest in the affairs of the Association, men such as Davis himself, James M. Beck, and most notably William Howard Taft.[47] But it also came to include others of only local eminence who spent a considerable amount of time working for the Association and who were rewarded with the opportunity of rubbing shoulders with the mighty. Theoretically, the promotion of the industrious rank and file to positions of leadership within the Association should have "democratized" it. In fact, there is little indication that it did, partly because lawyers who actually enjoyed toiling among the humdrum affairs of bar association committees were probably not very typical of the membership. Much of the patrician quality of the early organization was lost and was replaced by a more narrow and formalistic approach to the running of the Association.

James Grafton Rogers referred obliquely to the change in a luncheon talk on the Association's history in 1928. After commenting upon the way in which the old leadership had reacted to the self-seeking of David Dudley Field during the medal fiasco, Rogers reflected that the Association had "grown out of the ability to enforce the system as a system. There are too many of us. Now through sheer inertia of the great mass, active men somehow gain, and along with the old methods, I think something of value and dignity has departed also."[48]

The most influential among these new leaders of the Bar Association were the Secretary, George Whitelock, who served from 1909 till his death in 1920, and the Treasurer, Frederick E. Wadhams, who held his position from the resignation of Francis Rawle in 1902 until his death in 1926. Both men, although certainly not leaders in the national bar, were more in the nineteenth century mold of the legal elite than many other members of the Executive Committee in the sense that their interests were broader than the law. Whitelock, for instance, had studied Romance Philology at Johns Hopkins and was fluent in French, German, and Italian; even his obituary writer wondered that he had chosen the law over the life of "a man of letters." Wadhams was a clubman, a dilettante musician, and vestryman of his church. Both men were diligent and exceptionally

industrious, and both were strongly opinionated, always ready to defend their respective bailiwicks. Hampton Carson, himself a man of considerable influence in Association affairs, wrote a former president for advice on how to avoid the "opposition, easily made active, of the two officers of the Association who between them seem to manage its affairs."[49]

Wadhams, vain and excitable generated more criticism, especially towards the end of his long tenure. Joseph Choate, with typical sarcasm, referred to the Treasurer as "the invincible, the impregnable and the inevitable Wadhams," but presidents did well to remember Wadham's demonstrated ability to run Association affairs over the heads of the other officers. R. E. L. Saner, seeking funds for his Americanization program, averred that he would take Wadham's word that certain funds would be appropriated, even though the Executive Committee would not meet until after they were needed. Wadhams was capable of charming a member out of a $1000 donation to the Association; but he could also respond to another, who had challenged his authority, that it would give "great pleasure to include your name among the very few...members...dropped for non-payment of dues." When a friend of John W. Davis asked Wadhams for support in the successful campaign for Davis' election as Association

president in 1922, Wadhams had the hauteur to reply, "I am saving Mr. Davis for 1924." As soon as Wadhams died, the Executive Committee paid him the backhanded tribute of immediately bringing in an amendment to the constitution restricting the secretary and treasurer to terms of three successive years.[50]

During this period presidents of the American Bar Association were of two basic types: prominent public figures like William Howard Taft, Elihu Root, Frank Kellogg, George Sutherland, John W. Davis, and Charles Evans Hughes; and members of the legal elite who had promoted their own interests through service to the Association, men such as Peter Meldrim, Walter George Smith, George T. Page, William A. Blount, Cordenio A. Severance, R. E. L. Saner and Silas Strawn. The tendency was towards the election of more of the latter, a trend often privately, and occasionally even publicly, disparaged. In 1928, for instance, James Grafton Rogers asserted that a group of Colorado history students recognized the names of more presidents from the first ten years of the Association's history than they did from its third decade and knew more from the third decade than they knew from the most recent ten years. To Rogers, the usefulness of the Association depended upon "giving leadership to men whom the public will understand, whose

voices we can hear."[51] However, while it is true that the election of men of only local prominence did lead to more parochialism within the Association--Saner, for instance, channeling as much of the organization's funds as possible into his Americanism campaign--the election of the "big names" hardly improved the situation when, as frequently occurred, the gentlemen had little interest in the workings of the ABA. George Sutherland was not even a member of the organization in the year before his election, and the chief contribution of Charles Evans Hughes was in lending his dignified appearance to the Association's overseas meeting in 1924.[52] From the men of national prominence, only Taft and, to a lesser extent, Root may be said to have influenced Association affairs as much as the early presidents from among the "Saratoga clique."

Election to the presidency was now highly contested with extensive campaigns sometimes organized years in advance. Certain informal ground rules were followed, the most important being that candidates should affect ignorance that any campaign was being conducted. Generally speaking, the effort was organized by the prospect's friends, who wrote to as many of their acquaintances in other states as possible. It was considered helpful if mention of the candidate could be incidental to some business or personal matter of interest to the

acquaintance, but men active in Association affairs were sometimes solicited by correspondents unknown to them.[53] Since officers of the Association were chosen by the General Council, which consisted of one member from each state, a great deal of the campaign had to be carried on indirectly. Sometimes Council members would be elected at home and instructed to vote for a a certain presidential candidate, but as often as not the members attending the annual meeting from a particular state would "meet in a corner and hastily select one of those present" as the representative.[54] Often the candidate's friends could only request their correspondent to talk with the member who would most likely be elected to the Council. Elections might be excruciatingly close because no one would be certain who, if anyone, would represent certain states until the very last moment. For instance, in 1923, five states remained unrepresented at the annual meeting. According to a member who troubled himself to ferret out the information, two Council members in that year were self-selected

> being the only persons who have come here from their respective jurisdictions, and we have four who have been selected by two members...and three by three, and five by four. In other words, we have a General Council of 52, and we have 16 members of that General Council selected by a majority of 22 out of the thousand or more who are represented here. From the compilation I

> have made, 61 votes have been sufficient to select 24 members of the present council.[55]

Needless to say, the political situation at the annual meetings lent itself well to what Taft disdainfully called "intriguing and buttonholing." While the "big names" might bypass some of the less delicate aspects of this politicking, even they were advised not to remain too aloof. Taft himself, shortly after leaving the White House, managed to win the ABA presidency by only one vote; and though he decided that Elihu Root should be his successor, he found his choice forestalled by advance pledges to Peter Meldrim, a lawyer virtually unknown outside the Association and his native Savannah. Root was elected the following year but only after his supporters had advised him to at least "show his interest in the Association by personal attendance" at the annual meeting.[56]

Candidates who were not nationally prominent had to rely much more heavily on what James Grafton Rogers diplomatically called "those winning social qualities which count so much in organized professional life." These could be of the "gladhanding" variety of a "Bob" Saner or the more traditional patrician type so effectively utilized by C. A. Severance. Geography could also play a role in certain circumstances; the growing interest in making the Association a truly national organization aided Blount of

Florida, Page of downstate Illinois, and Saner of Texas. George Sutherland, though a "big name," probably was able to defeat Walter George Smith in 1916 only because he was a senator from Utah. It was beneficial if the candidate had stood aside for another man in a previous election. If he was elderly, the "passing years" and demise of his "contemporaries during his long years of service" might be mentioned to effect. It was always helpful if one had the blessing of Whitelock and Wadhams.[57]

Most important was membership in, or influence with, the National Conference of Commissioners on Uniform State Laws. While its members were in theory appointed by state governments, in fact they were self-selected from active members of the Association. Political advantage was achieved from the custom of the Conference of meeting the week before the Association and in the same place. Thus the Conference regularly arranged the politics of the larger body. Charles Libby, Peter Meldrim, William Blount, and Walter George Smith were all members, and "scores of Executive Committeemen and other officers owe[d] their election primarily to participation" in this body. Since the work of the Conference was time-consuming and uncompensated and since by implication its mission was to check federal aggrandizement, the Conference had a tendency to attract some of the Association's wealthiest and most

reactionary members. Its dominance of Association affairs was considered deleterious even by Francis Rawle.[58]

One of the curious aspects of Association politics was that while annual meetings buzzed with "intriguing and buttonholing," the Association tried to ignore its presence. Newspapers were provided with the information that elections were unanimous--which, of course, they were, since technically the assembly elected while the General Council only made nominations. At the conclusion of the 1920 meeting, President Hampton Carson made the audacious declaration that "Nobody knew who was going to be nominated for President. The Association is always as free and representative as it is possible for any association to be." This was not the lie absolute, given the uncertainty of deliberations within the General Council, but some of Carson's friends must have been amused. William Blount, the president-elect, had been waging a strong campaign for at least two years and had been out-maneuvered during the previous year by Carson and his friends.[59]

Even more remarkable was an editorial which appeared in the ABA Journal for September 1922. The editorialist said that John W. Davis

> was chosen by the council as president for the ensuing year, in spite of the fact that he himself was reluctant to permit the consideration of his name for that office. He was in no sense a candidate....Three distinguished and deservedly

> popular gentlemen were candidates for the presidency. The preliminary campaign conducted for them by their respective supporters was carried on with strict regard to the proprieties of the occasion. One of the delightful features of the San Francisco meeting was the staging of a presidential campaign on an ideal plane.[60]

But a somewhat different view of the election process emerges from a report by one of Davis' "campaign managers," Harvey Smith of West Virginia. "Bob Saner," said Smith

> went after [the nomination] with all the power of his friends, very much after the fashion of the tactics pursued by Mr. Severance, Senator Kellogg and a number of ex-presidents....But Brother [Thomas] Shelton was there with a strong hand from the time the special train started until the act was completed. In fact, once or twice I suggested to him that we gum shoe it a little more, so that if we failed we would be in good trim later. Do not forget that Chief Justice Parker of Washington is your friend....May I say to you in the strictest confidence there was some marked opposition to your selection. You of course should know who your friends are.[61]

Smith himself implied that the Journal editorial was written by Shelton in an indirect attempt to commend Davis for the 1924 Democratic Presidential nomination; but the piece is also an indication of how strongly Association leaders wished to believe in the professional myth that elite lawyers did not stoop to the campaign techniques of politicians.[62]

One reason why prominent public figures were chosen for the presidency with less frequency towards the end of the period was that the Association had grown large enough to require more than an impressive figurehead to preside at

annual meetings. As James Grafton Rogers lamented in 1932, the Association was "faced annually with the problem...of choosing between a faithful servant of the craft who will do much or a prominent figure who will do little executive work." Besides the growing complexity of Association affairs produced by an expanding membership and increased political involvement, the president was expected to be available to represent the ABA at state bar association meetings. As early as 1896, Moorfield Storey found this task "exacting," though agreeable in the sense that it provided him with a "standing at the bar all over the country" which he might not have attained otherwise. Twenty-three years later, Walter George Smith was obliged to abandon some of his interests in urban reform in order to meet his speaking engagements for the Association. But perhaps Silas Strawn, elected for 1927-28, may be considered the first modern ABA president in that he "gave up the year to his post." The "big names" had neither the time nor the commitment to the Association to do likewise--although Davis' friends hoped there might be political capital in his speaking tour.[63]

The presidents were anxious that their annual meeting be a success and often went to great lengths to provide speakers who would attract the attention of both the membership and the press.[64] A standard method of injecting

some excitement into the proceedings was to invite some foreign dignitary to bring the "Annual Address." Alton Parker was horrified when French Ambassador Jusserrand withdrew his acceptance to speak just three days before the annual meeting of 1907 in Portland, Maine. Fortunately, James Bryce happened to be vacationing in New Hampshire and agreed to deliver the address.[65] Taft estimated that Frank Kellogg had spent ten or fifteen thousand dollars of his own money on the 1913 meeting at Montreal where he presided. Five thousand of that, thought Taft, was incurred in bringing Richard Burton Haldane, the Lord Chancellor of Great Britain, to the United States via the regal suite on the Lusitania.[66] Taft, with more influence than cash at his disposal, managed to schedule his meeting in Washington, D. C., and for October rather than in the traditional summer months. In this way, the Association was able to advertize a welcoming speech by President Wilson, a reception for the members of the Supreme Court, and addresses by both the Chief Justice of Canada and the Argentine ambassador. The meeting attracted a far greater attendance than any other until 1921, by which time the Association's membership had grown by 58%.[67]

Taft helped lift one burden from the shoulders of the president, the onerous task of compiling "noteworthy changes in statute law" which the constitution required to

be presented to the annual meeting as the president's address. Though this made for less than scintillating speeches, an attempt to amend the constitution in 1904 was soundly criticized and tabled. Nevertheless, the presidents began to range far afield in their addresses, and the "noteworthy changes"--which they paid others to compile--were printed only as a kind of appendix. In 1913 the responsibility was finally transferred to a standing committee; however, the burden and expense grew too great even for the committee, and in 1927 the Association endorsed a successful effort to have the information gathered and published by the Library of Congress.[68]

One responsibility which was a perennial difficulty for presidents was the appointment of committee members. Theoretically, a president might make a clean sweep and name all his own men; in fact, as George Page discovered, the committees "were tied up in such a way that most of them ought not to be disturbed." To fill vacancies, the president would consult with the inner circle and committee chairmen and then consider how to distribute appointments to lawyers in different states while keeping members of respective committees close enough in geographical proximity to hold a meeting. He might also feel the need to appoint a woman or a "Hebrew." Taft, who acted with more independence than most presidents of this period,

added to Whitelock's problems by appointing committeemen who were not members of the Association. (Whitelock suggested writing "one of your characteristically persuasive invitations to join.") Naming a member who would do actual work was not always necessary. Lucien Alexander asked that one Lawrence Maxwell be retained on his membership committee strictly for the value of his name. "He tells me," said Alexander, "he can get O'Hara to do the work." Though George Sutherland complained that by annually continuing committeemen in office the committees had a "tendency to get in a rut and stay there," it was difficult to replace members with long records of uncompensated service to the organization, especially when their feelings might be hurt.[69]

With the growth of ABA membership came a concomitant rise in the Association's income and expenditures; total disbursements rose from $17,725 in 1911 to $193,882 in 1928. Since appropriations for committees and sections were considered at the mid-winter session of the Executive Committee, that meeting, usually held in the South, gained increased importance as committee chairmen waited to present their requests.[70]

With increased financial support from the Association, ABA committees became more seriously interested in lobbying and other attempts to influence the political process.

Still, a distinct aura of ineffectuality hovered about their efforts during this period. One committeeman, perhaps more sensitive than most, wrote his chairman,

> I enclose bill for my expenses to New York and return. It is some expensive trip these days and I doubt if it was worth the money either to the Association or myself. However, I enjoyed the meeting very much....I hope we will be able to make a report that will look as if we were trying to do what we should.[71]

A complete survey of committee activities is inappropriate here, but a few examples may suffice to suggest both attempts at pressure group tactics and the lack of substantive results achieved by the majority of ABA committees.[72] For instance, in 1920, when the Association established a committee on air law, the law of aviation seemed a fertile area for bar association activity. There was little law of any kind on the subject, and even the most hardboiled opponent of legislative activity could hardly approve waiting until a sufficient number of accidents had provided the necessary case law. The committee did point out the deficiencies of the current situation, criticized a bill on the subject sent to Congress by the Harding Administration, and drafted part of a model act which it strongly endorsed. Thereafter, as Sutherland says, "it kept the Association informed as to the progress of the law of aviation"--which remained

virtually unaffected by the recommendations of the committee.[73]

The Committee on Commercial Law had a much broader area for possible investigation, but in the earlier years of the period its greatest concern was in preventing the repeal of the Bankruptcy Act of 1898. The act was, in fact, never repealed; but it is doubtful that the opposition of the committee played any significant role in its retention since Congress also ignored improvements in the law suggested by the Association. In 1919, the Commerce Committee inaugurated the custom of holding an annual three-day meeting in New York at which businessmen, trade organizations, and clubwomen might appear and present "anything that they thought was within the realm of commerce, trade and commercial law." Both the committee and the Association were enamored of this method of opinion sampling, perhaps because it projected an image of quasi-public responsibility. In 1921, the Association adopted a general resolution recommending that all committees which formulated laws affecting "social and economic conditions" open their deliberations to public hearings. Unfortunately, it is difficult to assign any but a public relations value to the annual hearings of the Commerce Committee. There is even something ludicrous about highly

paid lawyers donating their time to hear an afternoon's testimony urging the adoption of a thirteen-month year.[74]

Unlike the Committee on Commercial Law, the Committee on Insurance Law had a considered and worthy objective towards which to direct its efforts. In 1909 it developed a plan to have Congress write an insurance code for the District of Columbia, believing this would then be used as a model code for adoption by the states. Not only were the insurance statutes in the District particularly bad, the Committee also hoped to avoid many of the evils engrafted into insurance legislation by state legislatures. In 1910 the bill to create the code commission passed the House but was stalled in the Senate. In 1913 the Association Committee appeared before the Senate Committee on the District of Columbia, and the senators assured the ABA members of their support. The Committee on Insurance Law then proceeded to prepare drafts of an insurance code, and the fifth draft was approved by the Association in 1918. The bill was introduced in Congress but no action was taken until 1922, when it was defeated. In 1924 two other bills, neither of them incorporating the Committee's code, were introduced and defeated. At this point the Committee wearily abandoned the effort, complaining that "unless our published reports have been helpful in arousing public interest to the necessity for change in the law...we have

nothing to show for our work in its entirety." An attempt was made to cooperate with the Commissioners on Uniform State Laws in drawing up a model code to be adopted by the state, but this revised code was nearly a complete failure as well since it was adopted (in part) only in Kansas and the Province of Quebec.[75]

The Committee on Patent, Trade-Mark, and Copyright Law experienced an even more frustrating defeat for its primary objective, the establishment of a federal court of patent appeals. The new court was the hobby of successful patent attorney Robert Stewart Taylor, a charter member of the Association and long-time chairman of the Committee. Taylor believed that a special appeals court would establish uniformity of judicial decision in his legal specialty, and to that end he attempted to arouse the support of his ABA colleagues. The committee's draft of a bill establishing the court was approved by the Association in 1905, and year after year Taylor appeared before congressional committees arguing its merits. While the measure was frequently reported from the committees, it consistently failed of passage in Congress. In 1911 Taylor sent out cards to all ABA members asking them to signify their willingness to aid him in his effort, and he received over five hundred affirmative replies. Taylor believed the bill was on the brink of success. Then, during the annual

meeting of 1911 in Boston, President William Howard Taft was driven in from Beverly to give a short speech. In the course of his off-the-cuff remarks, he mildly criticized the idea of a separate court of patent appeals. "Never," wrote Taylor to Taft two years later, "were five men so completely paralyzed as we were. To proceed with our bill against the opposition of the President was hopeless." Taylor died in 1918. In 1919 his committee was abolished, and the Section of Patent, Trade-Mark, and Copyright reversed the committee's long-held position on the need for a special court.[76]

The most protracted and noteworthy of all committee efforts during this period was that made by the Committee on Uniform Judicial Procedure to have Congress approve a system of uniform practice for the federal courts. By the Conformity Act of 1872, Congress had provided that procedure in civil actions at law in federal courts should "conform as near as may be" to the practice of the state in which the trial was held. For elite lawyers who practiced in the federal courts of many states, the resulting confusion was at best annoying.[77]

During the annual meeting of 1911, Thomas Shelton, a corporation lawyer from Norfolk, Virginia, proposed that a new standing committee be appointed to lobby for a bill which would allow the Supreme Court to prepare a uniform

system of law pleading and procedure for the federal courts. As was customary, Shelton was appointed chairman of the new committee after the resolution had been passed. When the bill was drawn and introduced into the House of Representatives, it received unanimous approval from the House Judiciary Committee. In the Senate, however, it was referred to a sub-committee of the Judiciary Committee, and from there it never emerged because of the opposition of Montana Senator Thomas J. Walsh.[78]

Walsh, who had joined the ABA in 1906 and remained a member until his death, opposed the measure for several reasons, the chief being that the country lawyer, who needed to know only one system of practice under the old system, would be forced to learn another if federal practice was standardized. The bill, wrote Walsh,

> was proposed by some estimable gentlemen standing very high in the profession, whose practice is confined almost exclusively to the federal courts, and who naturally do not desire to burden themselves with the labor of acquiring familiarity with systems of practice prevailing in...a dozen states....I undertake to say that 99 percent of the lawyers of the country never try cases outside their own states. The change signifies an effort to unload on to them the burden which now rests...upon those whose high standing at the bar calls them to distant parts of the nation.[79]

Shelton, one of the most active and determined of ABA committee chairmen, pressed various senators to force the bill out of committee. He received endorsements of the

measure from Presidents Taft, Wilson and Coolidge, five Attorneys-General, forty-six bar associations, all the law journals, the Conference of Appellate Judges, all but three of the U. S. Circuit Court judges, the Conference of Commissioners on Uniform State Laws, the National Association of Credit Men, the U. S. Chamber of Commerce, the National Association of Manufacturers, and the National Civic Federation. Even eighty senators admitted their approval of the measure in principle. The difficulty was that too few of them considered uniformity of judicial procedure an issue important enough over which to break "senatorial courtesy" with Walsh, especially since passage of the measure would transfer power from Congress to the judiciary. Everett Wheeler, Chairman of the ABA Committee on Law Reform, fumed that such an abuse of the "courtesy" was "autocratic government"--though he did content himself with the thought that when lawyers were blamed for the law's delay, they could now reply that it was the fault "not of the lawyers, nor of judges, but of the senate."[80]

The more pressure the Association exerted, the more implacable Walsh became. He spoke before bar associations on the matter and engaged in a letter writing controversy with Shelton and Wheeler in the New York Times. He complained to the ABA Journal that he had been given "a good brown roast" at the annual meeting though his

objections had never been answered. Shelton died in 1931. His successor as chairman of the Committee on Uniform Judicial Procedure was hostile to the project and secured both the discharge of the Committee and the abandonment of its twenty-year struggle. Walsh was named Attorney-General by Franklin Roosevelt. The supreme irony, however, is that on the day following his appointment, Walsh died. He was replaced by Homer Cummings, and Cummings supported a system of uniform federal procedure for the somewhat different reason that it was a step toward the elimination of the distinction between law and equity. Having gained the approval of the President, the measure was quickly enacted by Congress in 1934.[81]

Reasons for the failure of ABA committees to secure substantive changes in the law are not difficult to discern. One obvious impediment to many committees was the lack of clearly defined goals. In other cases, the proposed legislation was too much the cause of a single individual or small group, so that while the bill might receive the indifferent approval of the Association, it was incapable of weathering even the mildest squall of political opposition. Finally, as Willard Hurst has written, ABA leaders during this period were "crude amateurs" at operating a political pressure group. They did not show the "energy, internal discipline, or staff

work comparable to the activity of the contemporary spokesman organizations for industry, commerce, labor or agriculture."[82] It is not surprising, therefore, that one of the important functions of ABA committees in the first three decades of the century was to serve as lightning rods into which politically sensitive or otherwise inexpedient issues might be discharged.[83]

A contributing factor to the frequent failure of committees was the perfunctory treatment of committee reports at the annual meeting. While it was true, as one committeeman himself said, that the reports received "about as much attention as they deserve[d]," the five to twenty minutes allotted to various committee chairmen virtually prohibited discussion on their proposals. This necessary limitation in turn provided "little inducement to the committees to labor upon the reports."[84]

By the second decade of the century, the mechanism of the Association was, in fact, hopelessly out of date. The ABA had been organized as a gentleman's club where every member could comment upon the content of speeches as well as upon committee reports. After the turn of the century, however, the attendance at the annual meetings grew so large that the workings of the Association reminded James Grafton Rogers of a "clumsy, unguided leviathan." The only representation allowed a member in the operation of the

organization was personal representation on the floor of the annual meeting, and this, of course, was theoretical only since few speakers could be heard even from the podium without a megaphone. Some sessions of the meeting resembled an attempt to hold a town meeting in a small city. Rogers himself was presiding one afternoon in 1926 when

> a man spoke up in the back of the room and made a motion. I ruled him out of order and we went on. I never saw him. I don't know what part of the room he sat in. All that I know was a voice reached across the audience to me. There were 3000 people in the auditorium. That is not the American Bar Association that we contemplated in 1878.[85]

On other occasions, the routine business sessions were so sparsely attended that the Association ran the risk of having national policy promulgated by a handful of lawyers from the locale of the convention city.[86] Rogers claimed that there was "no great professional organization in the world" which was "as weak in actual participation" as the American Bar Association.[87]

As a consequence of this inefficiency and lack of representative government within the Association, the ABA sections and related but autonomous organizations began to exercise more independence in attempting to further their own interests. Two new legal organizations, the American Law Institute (1923), founded to prepare "restatements" of

the common law, and the American Judicature Society (1913), which advocated progressive "efficiency" in the organization of bench and bar, both avoided a direct connection with the American Bar Association. Twenty years earlier they might well have become Sections of the Association or at least affiliated bodies like the Association of American Law Schools. On the contrary, during this period the AALS grew strong enough vis-à-vis the Association to virtually co-opt the ABA's Section of Legal Education.[88]

The organizational weakness of the Association had been a long-standing problem only exacerbated by the sudden growth of membership. As early as 1907 a resolution suggesting the appointment of a committee to study reorganization had been referred to the Executive Committee, where it died. The following year ABA President J. M. Dickinson noted the danger to the Association from the small attendance at business sessions and suggested consideration of both representative government and closer relations with the state bar associations. Again the matter was referred to the Executive Committee, and again it was reported adversely.[89]

Regardless of the Executive Committee's wishes, the problem would not go away. Not only did membership continue to rise, but more importantly, ABA members noted

well the contemporaneous rise in prestige and influence of the American Medical Association, a development which they credited to the AMA's reorganization in 1901 as an integrated and representative body. The public comparisons made by ABA members bordered on envy. Dickinson noted that the AMA was wielding a power to enforce ethical standards and pass legislation "incomparably greater than that exercised by it when its organization was somewhat similar to ours." H. A. Bronson called the medical society "the most efficient and prosperous" organization in the United States; John Wigmore said it was "the best organized, the most extensive, and the most powerful professional association in the United States, if not the world" and held it up as an example "of what it is possible for this Association to achieve, if it seeks with a will to do so." Privately, the comments could be harsher. Henry Bates, dean of the Michigan Law School, asserted that the ABA was "only a husk. Its journal is a joke, its principal activity is the annual meeting with its pompous banquet and days devoted mostly to guff. It is utterly failing to have the influence in law that the Medical Association is having in its field."[90]

In 1913, John Wigmore, dean of Northwestern Law School, offered another resolution for the appointment of a special committee to study organization. This time the

Executive Committee reluctantly agreed, and Wigmore was appointed chairman. Finding some of his fellow committeemen too reactionary for his taste, Wigmore attempted to enlarge and pack the committee with ABA colleagues who had "shown an interest in the subject." The Executive Committee rejected that idea unanimously. Wigmore did receive more time to complete his study, but the inner circle warned him, in the words of crusty William A. Ketcham, "to be damned careful."[91]

Wigmore's method of study was to draw up a questionnaire and send it to both the ABA vice-presidents and the presidents of the state bar associations. The responses--when he could get them--were varied, but many of the bar leaders did agree that the Association needed some type of representative government, some even suggesting an organization composed of "all lawyers in good standing throughout the United States." The members of Wigmore's committee differed among themselves as widely as had the respondents, and they were able to agree on only one rather inane recommendation, that the Association allot four rather than three days to its annual meeting. Not only did the Executive Committee reject this proposal, it refused to print the majority and minority reports as had been customary. Wigmore then prepared and distributed to ABA members a lengthy document, printed with the financial

support of the American Judicature Society, which explained his position regarding the institution of representative government within the Association, and he prefaced it with a criticism of the Executive Committee for using "gag rule" tactics to prevent "bona fide and moderate proposals from receiving any consideration on the floor of the meeting."[92]

Although the broadside produced no direct effect, ABA President Elihu Root, who had expressed appreciation for Wigmore's work, almost immediately initiated a less controversial movement to organize into an affiliated organization the delegates appointed by state and local bar associations to the annual meeting. By this time, the seating of these delegates was anachronistic even from a public relations standpoint. In an assembly of a thousand persons, the function of the delegates could only be, in Root's words, to "go into the meetings and sit there." Thus in 1916, Root issued an invitation to the delegates to attend a conference preliminary to the annual meeting, the purpose of which was "to consider what, if any, steps may be expediently taken to bring about a closer relationship" between the ABA and the state and local organizations. At the second meeting of this group in 1917, it organized itself into the Conference of Bar Association Delegates, and in 1920, the Conference became a Section of the Association.[93]

Root, as well as other ABA leaders, realized that if the Association was to play an influential role in pressing matters of professional concern, such as raising admission standards and purging the bar of "unfit practitioners," the ABA would require the cooperation of the local associations. On the other hand, he also understood that a thoroughgoing reorganization of the Association along representative lines was premature. "[Y]ou can draw up 10,000 different and beautiful schemes on paper," said Root, "but they are of no value at all unless men, living men...do the things contemplated in the scheme." The solution, he believed, was for the ABA to establish informal ties with the local associations. To this end Root, with Executive Committee approval, presented the 1916 Conference with two proposed amendments to the ABA constitution. The first was a provision for referenda of ABA members to be taken upon questions of pressing public importance. The second amendment provided that the president of every state bar association, already a member of the ABA, would become a member ex officio of the politically important General Council, thus creating "a point of functional contact" between the national and state associations. One segment of the ABA leadership also hoped that these measures would dilute the power of the Association's "elder statesmen" who they believed were not

"fully in touch...with active heads of the local associations." Not surprisingly, Frederick Wadhams opposed the second amendment.[94]

Both amendments were passed by the Association, but their effect was negligible. Only one referendum was taken in this period--on the hardly controversial topic of raising the salaries of federal judges--and the provision to enroll state association presidents in the General Council was dropped in a 1919 revision of the constitution. Furthermore, a third amendment proposed by the Conference itself was opposed by the Executive Committee and defeated by the Association, a provision that would have required applicants for membership in the ABA to first join their state bar associations. Some ABA members complained that such a requirement would reduce the membership, especially among "first-class practitioners" who would not join the more inclusive state associations.[95]

While the old guard of the Association held tenaciously to its power, an increasing number of ABA leaders saw the need for coordination of state and national bar activities in the interest of policing the profession and supporting a conservative philosophy of government. It is not coincidental that John W. Davis, in his presidential address of 1923, both "expressed his philosophic opposition to the incipient welfare and regulatory states" and

emphasized the need for a federal union between national and state bar associations. President R. E. L. Saner did virtually the same thing in the following year, again comparing the strength of the American Medical Association with the weakness of the ABA.[96]

In 1923 an attempt was made to pass a constitutional amendment empowering state bar associations, rather than ABA members present at the annual meeting, to choose the General Council members. C. A. Severance spoke in favor of the amendment, warning that if the Association was "to function with the utmost power" it would have to work with the state associations. "[T]here is a feeling that has grown up for years in favor of having a federated system just as the physicians have in their organization....They can go to legislatures and get almost anything they ask for."[97]

The amendment did not pass, but the tide had begun to run against the old elitist position and in favor of bar coordination. A new representative constitution was finally approved by the Association in 1936, although diehard opposition continued to the bitter end. By that date, however, the Association was divided on ideological grounds, and both factions believed that a federative association would strengthen their respective positions.[98]

While the debate over the institution of representative government continued, the Association took other steps to bring its formal organization more into line with its growth in membership and the somewhat unwarranted prestige which its age and name had bestowed upon it. A revised constitution, written by Charles Thaddeus Terry and promulgated by the Executive Committee, was passed after several days of repartee at the annual meeting of 1919. Theoretically, the new constitution gave the Association greater control over the affiliated bodies which waited upon it for appropriations; in fact, its chief importance was that it gave the Executive Committee authority "to perform all functions which the Association itself might do" except to amend the constitution.[99]

The Association also investigated the possibility of incorporating under a federal charter as the American Historical Association had done some years earlier. Incorporation had been suggested as early as 1890, but the old guard believed that it might destroy some of the "spontaneous and affectionate" life of the organization. Wadhams, in this case, was a hearty devotee of reform, since on several occasions he had had to borrow money on his own note to pay Association expenses. He also hoped that some members could be induced to leave the ABA a legacy if it were incorporated. The idea received

Association approval in 1923, but a House Judiciary Subcommittee did not favor granting a federal charter, and the ABA eventually incorporated under the laws of Illinois in 1927.[100]

The previous year the Association had established headquarters for its secretary and the Journal in rented office space at 209 South LaSalle Street, Chicago. Following Wadham's death in 1927, the treasurer's office was moved to the same location. Before this time, the Association had had no permanent offices, except that as all four previous secretaries had lived in Baltimore, the ABA might be said to have been headquartered there. Opposition to a formal Association office was so strong in 1912 that, when H. S. Mecartney presented a resolution suggesting it, another member quipped that the resolution ought to be referred to the Obituary Committee. By 1925, however, the job of the unpaid secretary had become a nearly full-time responsibility; his office not only did the copy editing and proof reading of the Report but also arranged the details of the annual meeting and handled an increasing volume of correspondence. In 1927, the Executive Committee finally hired an executive secretary, Miss Olive G. Ricker, who immediately began to make her presence felt and who was to have a long and influential career with the Association.[101]

As long as the American Bar Association continued to think of itself more as a gentleman's club than a professional organization, publicity for ABA activities remained rudimentary. The sentiment gradually developed, however, that the first duty of the Association was to "popularize itself." As one member expressed it in 1915,

> the ABA should not be a mere mutual admiration society which convenes for the purpose of talking to each other all the time. Let it talk to the great mass of the people; let it make the people understand that its members are working for them and not preeminently for its own Association.[102]

To that end, a Committee on Publicity was organized in 1912, and by the end of the decade its chairman, Charles A. Boston, was providing "accurate information" about Association affairs to over 1300 newspapers and journals around the country. The committee frankly operated on the theory that "the more times the American Bar Association could be mentioned with approbation in the papers...the more sanction would be given to it, and more weight would be given to its recommendation." While the committee was satisfied with the number of stories placed, the whole operation was amateurish even by contemporary standards. No press bureau was provided, even at the annual meeting, and no press agent was employed by the Association until 1937. The Committee on Publicity saw its major responsibility simply as collecting, duplicating, and

distributing speeches and committee reports before the annual meeting--as if the newsworthy aspects of the event could be assembled in print before it occurred.[103]

During the same period the annual Report fell out of favor as an agent of ABA publicity. Though it was still labored over and distributed freely to libraries around the country, there was less inclination to believe that it was actually being read. In fact, Wadhams suggested that a special letter be addressed to the membership concerning the London trip of 1924 because he said, with pardonable hyperbole, "a great many of our members do not even know that there is such a thing as a report issued every year." During the first decade of the century the bulk of the Report continued to grow until, in 1904, it included not only the proceedings and papers read before the Association and all the committee reports, but lists of members by state and alphabetically, a list of those present at the annual meeting, a list of new members, a list of persons attending the Universal Congress of Lawyers and Jurists, the minutes of the Sections of Legal Education and Patent Law, the proceedings of the Association of American Law Schools, the Conference of Commissioners on Uniform State Laws, the National Conference of State Boards of Law Examiners, obituaries of deceased members, a summary of the proceedings of state bar associations, a list of bar

associations in the United States, and lists of all the speeches ever made before the ABA and some of the ancillary groups as well. The 1906 Report, the largest ever published, had to be divided into two large volumes. After this time, however, the affiliated bodies began to publish their own proceedings, and the Association itself began to cut down the size of the volumes as an economy measure. For instance, in 1913, the ABA stopped printing obituary notices; in 1925, it dropped the "Review of State and Federal Legislation"; and in 1927, it cut the list of all the speeches given before the Association.[104]

For some years the possibility of publishing an ABA periodical had been discussed within the Association. One reason for interest in the venture was frankly imitative--other professional groups had journals. Another reason was the possibility of drawing back the affiliated organizations, such as the AALS, into a closer relationship with the parent body by publishing some of their proceedings. Finally, the growing number of announcements and advance programs could more conveniently be included in a journal than be mailed separately to the membership.[105]

At the annual meeting of 1914, the Executive Committee was given authority to begin a new publication, and the first number of the quarterly American Bar Association Journal was published in January 1915. The debt-ridden and

dilettante Bulletin of Simeon Baldwin's Comparative Law Bureau was incorporated into the new periodical, and Baldwin was made chairman of the Committee on Publications. For its first five years, the Journal was an exceptionally dull publication, filled with long committee reports and much other indigestible material. The Publications Committee was so stodgy and fearful of controversy that it refused to print any personal communications to the editor, though it was not above editing out criticisms of ABA policy from the stenographic record. The frustrated John Wigmore unsuccessfully tried to persuade Baldwin and the Executive Committee to purchase the American Law Review and convert the Association's official organ into a law school-type review.[106]

In 1920, however, a new publication committee gained control of the Journal, and with the approval of the Executive Committee, turned it into a relatively more popular monthly. The sponsor of the change, former President S. S. Gregory, became editor-in-chief and managed to bring out two issues before his death the same year. Under the new format the Journal had editorials, letters to the editor, and "articles of general interest." It republished speeches given to national and state bar associations and contained a review of Supreme Court decisions by the second and long-time editor, Edgar B.

Tolman. It even included pictures and jokes--much to the distaste of the more stuffy members. Still, most members appreciated the changes, one declaring that since the passage of the Eighteenth Amendment, things had been "quite dry enough."[107]

Even the social life of the Association reflected the ABA's perceptible shift away from being merely a club. For instance, in 1921, Wadhams had guarantee companies told "in a courteous manner" that they were no longer to provide free lunches and stenographic services to members during the annual meetings, fearing "that something very unpleasant" would happen otherwise. The banquet speeches, first published in the 1915 Journal, seem to become more formal and less frivolous over the years. And Samuel Williston remembered in his old age that in the days before the membership campaigns, the "meetings were delightful, perhaps more socially than in later years, because a larger fraction of those present were familiars from past meetings." The great social event of the period, an official visit to Great Britain in 1924, was arranged with caution. Although the leadership was in virtual agreement that the trip should be made, General and Local Council members were polled on the reaction in their areas to determine if "a feeling of animosity" would be aroused

among the rank and file who could not afford to go or who did not "instinctively feel any kinship with England."[108]

In some ways the American Bar Association did achieve its goal of becoming a professional association between 1911 and 1928. A growing percentage of American lawyers were members, and they had been inducted by deliberate membership campaigns, a professional journal had been published by full-time employees at a central headquarters; and the Association's positions on various political issues had now at least become newsworthy. On the other hand, the attitude of the Association toward the admission of black members, its inefficient and ineffective committee system, and its virtual control by an inner circle of active members left no doubt that the Association retained many features of a social club long after its fiftieth anniversary.

CHAPTER 7

"GATEKEEPING:" EDUCATION, EXAMINATIONS, ETHICS--AND DOCTORS

During the first fifty years following the founding of the American Bar Association there was a dramatic change in the relative status of the three traditional professions: theology, law and medicine. In the seventeenth and, to a lesser extent, the eighteenth centuries, the clergy had provided leadership for American communities. The nineteenth century, on the other hand, was preeminently the age of the lawyer. Religious pluralism and the growth of republican institutions combined to elevate the bench and bar to a position at least equal to that of the ministry, confirming de Tocqueville's judgment that lawyers were the "American aristocracy." Medicine, however, was not highly regarded in either era. As law school dean William Draper Lewis told the Section of Legal Education in 1906, the medical profession in the early nineteenth century was "recognized as a profession, only to cast a shadow on the social position of those that followed it."[1]

But in the last quarter of the nineteenth century and the first two decades of the twentieth, doctors quickly

surpassed their professional brethren in occupational status. To perhaps overdraw the point, the rise of the medical profession may be dated from the yellow fever epidemic of 1878 which resulted in both the creation of a federal department of health and the enrollment of more charter members from Louisiana than from any other jurisdiction at the first meeting of the American Bar Association. Certainly by the fiftieth anniversary of the ABA in 1928, organized medicine enjoyed the kind of prestige and wide public support necessary to achieve guild control of medical service, an authority that the legal profession could only envy.

The cause of this swift rise in the prestige of physicians is not self-evident. It is true that during the last two decades of the nineteenth century European scientists had for the first time identified various disease-causing organisms. Likewise, after the turn of the century, treatments for certain diseases such as syphilis and meningitis were perfected, and wider experimentation in radiological and surgical procedures was attempted.[2] But despite these scientific advances, personal medical services did not, during this period at least, raise the level of personal health among Americans. The decline in the mortality rate "was due primarily to such social improvements as better sanitation, nutrition, housing,

health education, and various public health activities."[3] In some cases there may even have been retrogression as physicians superseded their less formally trained predecessors. For instance, midwives in turn-of-the-century New York City and Washington, D. C., seem to have achieved a lower infant mortality rate than the doctors who replaced them.[4]

The rising prestige of physicians was actually the result of a complex interaction of factors, one of which was the popular acceptance of the germ theory of disease beginning in the 1880's. Abraham Flexner, the foremost student of the medical profession during the period, clearly noted the relationship between the germ theory and the improved status of the medical profession. In the past, Flexner wrote, the doctor's relationship with the patient had been almost entirely private and remedial, but now it was "fast becoming social and preventative." Society was beginning to rely upon the doctor "to ascertain, and through measures essentially educational to enforce, the conditions that prevent disease and make positively for physical and moral well-being."[5] In fact, before the turn of the century, the influence of the medical profession had already extended beyond "educational measures" as doctors allied themselves with government to

introduce public health measures in American cities. Even Tammany Hall "declared public health beyond politics."[6]

During the Progressive Era the medical profession not only surpassed theology in prestige, it itself assumed some of the attributes of revealed religion. The new medicine was science, and science, in the words of Robert Wiebe, was "the basic word that every school of thought claimed and worshipped." The new doctors were "like religious men" descending upon "the cities and towns with a scientific gospel."[7] The medical profession even expanded the notion of illness to include social problems previously considered the domain of religion and law: insanity, drug addiction and, to a lesser extent, criminality. Ironically, while physicians became wise in the ways of the commercial world, they simultaneously wrapped themselves in the mantle of pseudo-religious mystique.[8] In a speech before the ABA annual meeting of 1910, W. A. Henderson, a railroad trial lawyer, commented upon this aspect of the contemporary medical profession with a combination of respect and edged humor. "The medical man," said Henderson,

> holds his rank more steadily than any other. He does it by being a man of mystery. You never heard of a doctor who could speak or write the word "salt." With him it is always "chloride of sodium." He is a walking, talking hieroglyph. He holds sway as a veiled prophet of Khorassan. No profession is so simple and none so sensible. None has made such advances--especially in late years.[9]

More reverent was noted California psychologist G. M. Stratton who, in a 1913 Atlantic article, compared the medical and legal professions, to the detriment of the latter. How different, he wrote, was

> the manner of surgeons with their attendant nurses intent upon their operation, from that of the lawyers and their clerks....There in the surgery, the whitegowned doctors and the nurses, dealing with a problem distinctly physical, seem to represent and symbolize the refinement, the intelligence, the silent mastery, the perfect cooperation, which lies at the heart of all that is truly civilized.[10]

Lawyers, on the other hand, resembled adepts of outworn theology who would "apply and expound and defend against misconstruction a body of revealed truth."

> For all the difference in their work, the jurist and the ecclesiastic are thus schooled in like modes of thought. When Huxley went forth in the name of Darwin to smite the embattled bishops, the fray was not so different...from that which now, as at all times, society must wage against its lawyers.[11]

Lawyers too were "eager to see their work as a science."[12] Charles A. Boston, a New York corporation lawyer and Chairman of the ABA Publicity Committee, attempted a reply to Stratton in a later issue of the Atlantic, arguing that the legal and medical professions were not strictly comparable and taking special exception to Stratton's suggestion that law resembled "priestcraft."[13] Railroad attorney Henry D. Estabrook went so far as to suggest to the annual meeting of 1901 that

"the legal mind is the scientific mind with an ethical kink in it."[14] Yet, even before the turn of the century, leaders of the American Bar Association were all too aware of the unfavorable comparisons which might be drawn between the legal and medical professions. By the second decade of the century, it is no exaggeration to say that the medical profession had become a model that the legal profession intended to emulate. In 1913, for instance, the ABA Committee on Legal Education and Admission to the Bar stated frankly that "the doctors, dentists, and pharmacists" were "setting a higher standard for their professions" than the lawyers were for theirs. "It is fair to ask the question," the Committee continued rhetorically, "whether the lawyers should be satisfied to have it so, and whether we should be content to have the standard lower for law than for medicine?"[15]

To Bar Association leaders, there were two aspects of medicine's success which seemed especially worthy of emulation. Perhaps Harvard Law School Dean Roscoe Pound stated them most concisely in a 1913 letter to William Howard Taft:

> It is generally felt by those who have studied the matter that the legal profession is far behind the medical profession in organization and training and that it is largely because of this that it has lost the confidence of the public and has not the influence as to matters upon which it is competent to speak.[16]

Of the two areas in which Pound believed the medical profession to be superior--"organization and training"--the ABA's interest in improved organizational structure was hardly surprising. On the contrary, it would have been remarkable if elite lawyers, intimately involved with the affairs of their own professional organization, had ignored the rapid rise of a sister body in both political power and popular esteem as well as its growth from 8,400 to over 70,000 members in the single decade between 1900 and 1910.[17]

However, as has been seen in the previous chapter, the attempt of the ABA to expand its membership and to integrate its organization with existing state and local associations was only modestly successful, in part because of the significant differences that existed between law and medicine. Medicine could virtually ignore state (and even national) boundaries, whereas these were fundamental to American law. And while an integrated bar would have forced elite practitioners into an unequal yoke with the lower echelons of its profession, orthodox medicine was actually able to organize against its equivalent of the "ambulance chaser": the osteopath, the neuropath, and the chiropractor.

In any case, the logical and efficient organization of a professional association was never entirely seen as an

end in itself. Elite lawyers admired not the systematic structure of the American Medical Association per se but what doctors were able to accomplish with it: chiefly, gain control of professional education (the "training" of Pound's letter) and with it, control of the profession itself.

In an era when education was not only the means for inculcating "science" but was also invested with a religious aura of its own, controlling legal education was obviously a matter of great importance. First, formal education might confer status upon a profession directly. At the ABA annual meeting of 1895, Justice David Brewer warned that if society perceived the lawyer to be imperfectly educated, he would soon fall into "disrepute....He will be only the object of the sneer of the cynic and the laugh of the wit. He will be thrown from his position of leader, and no longer be sought after, respected, or followed."[18] But more importantly, control of professional education promised the elite a means of becoming a "gatekeeper," allowing professional admission to only approved types and numbers of applicants. William Draper Lewis emphasized this "gatekeeping" function in spontaneous remarks made to the Section of Legal Education in 1915:

> I have had a feeling for a long time that the morals of our profession as far as they can be

> affected by the system which you follow to educate a lawyer, and to weed out, or prevent admission of, those who are unfit, will never be satisfactory in the conditions which prevail over most of the United States, and especially in the larger communities, unless we do what is done by the medical profession--methods which, in a comparatively short time, have lifted that profession from below us to a point where they now have the greatest respect. They make every man go through a medical college if he wants to practice medicine. I believe the time has come when we must have same the rule in regard to law students.[19]

In the eighteen and nineteen centuries there had been little need for such formal supervision of legal education. Generally speaking, learning the law had been a matter of apprenticeship. After admission to the bar, a lawyer continued to be under the scrutiny of both professional colleagues and prospective clients. However, with the growth of industrial capitalism which followed the Civil War, certain aspects of the legal profession underwent gradual but profound change. Most patently, industrial growth led to an increased demand for legal services which in turn encouraged many young men to enter the profession of law. Some of these new entrants were recent immigrants or their children, quite different in educational background and social status from the legal elite.

The immigrants might have been forced to wait another generation for admission to the bar had not the old apprenticeship system of legal education begun to break down at the same time. The invention of the typewriter and

carbon paper eliminated the need for clerks to "copy all the letters in a big, round hand." Further, the time of the elite lawyer was no longer profitably spent teaching apprentices; and it became more difficult for the remaining clerks to learn from observation in the courts because their erstwhile preceptors were now making fewer appearances there.[20]

> Because enormous sums of money often were at stake and because the consequences of courtroom defeat therefore became much more serious, lawyers began to cultivate a different set of legal skills. Office counseling, designed to arrange a client's affairs so as to prevent later court challenge, became of greater importance than courtroom advocacy designed to extricate a client from an immediate crisis. This shift from advocacy to counseling led to a greater emphasis upon technical mastery of the law; and, in the long run, it contributed to the importance of law schools where sophisticated technical abilities could be taught more systematically and more effectively.[21]

In a real sense the modern law school--one with a specified curriculum leading to a degree--and the modern bar association--an organization not primarily engaged in setting fee schedules, maintaining a library or memorializing the dead--grew up together in response to this transformation of the profession. Since the new law schools were themselves usually profit-making ventures, they were less concerned than the early nineteenth century practitioner-teachers with a student's antecedents and ethnic origin. (Color and sex were another matter, partly

because admission of blacks and women to proprietary law schools did not make good business sense at the time.)[22] The increased demand for lawyers and the gradual disappearance of the apprentice system effectively transferred control of entrance to the legal profession from elite practitioners to a heterogeneous group of law schools. Not surprisingly, the practitioners attempted to regain at least part of their lost power by organizing selective bar associations and using them to impose more formal requirements upon those entering the legal profession.[23] The connection between bar associations and legal education was nearly foreordained in any event both because "organization and training" were virtual watchwords of the period 1878-1928 and because the eventual success of the American Medical Association in gaining control of medical education and entrance to the medical profession clearly demonstrated the rewards of organized professional activity along these lines.

As J. Willard Hurst has written, the belief of Simeon Baldwin "that legal education and bar admission standards must be improved was a prime factor in the founding of the [American Bar] Association."[24] Not only was Baldwin a professor at Yale Law School from 1869 to 1912, during some of the earlier years he virtually <u>was</u> the Yale Law School. While, as a group, neither the prominent individuals whom

Baldwin selected to sign the call for organization of the ABA, nor the elite lawyers who responded to it exhibited any unusual concern for legal education, the "Saratoga clique," which directed Association affairs during its earliest years, was largely composed of gentleman practitioners whose dedication as part-time law school instructors sometimes extended to the donation of their time. As an extreme example, Henry Hitchcock not only served as dean of St. Louis Law School (Washington University School of Law) without compensation for seven years but also used his wife's inheritance as the school's endowment.[25]

While the improvement of legal education was not a stated objective of the new association, the professed goals of "advanc[ing] the science of jurisprudence" and "uphold[ing] the honor of the profession" provided ample justification for any forays the ABA wished to make into this area. A Committee on Legal Education and Admission to the Bar was one of the original standing committees formed in 1878, and at the annual meeting of 1879, the Chairman, law school dean Carleton Hunt, brought in "an elaborate report" recommending the "public maintenance" of law schools with faculties of no less than four "well-paid" teachers; a graded, highly theoretical, three-year course of studies concluded by written examinations; and admission

to the bar only after graduation from a law school. "The model was to be the scientific training of France and Germany" with due regard for such subjects as "Moral and Political Philosophy," the "Lex Mercatoria," the "Laws of Nations," and "Civil or Roman Law."[26]

As modified the following year, the resolutions received the approval of ABA President-elect Edward J. Phelps, who spoke of changing times which made higher education in the law imperative and of the need to do "something to exterminate the rats....We should put ourselves on the record in favor of an elevated standard," said Phelps, "the most elevated standard it is reasonable to require of legal education, looking to a time when [it] will be both practicable and a requisite, as it is with regard to the medical profession."[27] Still, the Hunt resolutions, even in their milder version, were too radical to be adopted by the ABA in 1880. The suggestion that law school training ought to be mandatory aroused a special "storm of protest."[28] Part of the problem was that Hunt himself, though a learned and gracious gentleman, had difficulty appreciating the lack of enthusiasm for his continental approach to legal education. Both his personal interest in Roman law and his position as dean of a Louisiana law school led him to overestimate the importance of the civil law in legal education even to elite lawyers.

Irving Browne, editor of the Albany Law Journal, commented that Hunt's course of study "if properly pursued, with the indispensable attention to the living common law, would require nearer six than three years."[29] But the major factor in the rejection of Hunt's proposals was that as yet the majority of ABA members perceived no great need for such a program of formal education.

In 1881, the Association finally approved three weak resolutions which "requested" state and local bar associations to "further, in all law schools, a three year course under an adequate number of professors"; endorsed admission to the bar for those having completed a law school course (the "diploma privilege"); and recommended that time in law school study be counted as the equivalent of time spent in an apprenticeship.[30] However, the Committee on Legal Education then lapsed into silence for nine years, and when it revived under the chairmanship of William G. Hammond, chancellor of St. Louis Law School, it "set its sights lower than some of its predecessors."[31] In 1892, the Association passed a resolution calling for only two years of legal education as a prerequisite to bar admission and did not even explicitly state that these two years must be spent in a law school. On the other hand, the ABA declared against the diploma privilege for the first time. Though it had weakly endorsed it only a decade

before, it was now becoming clear that state legislatures would grant the privilege to all law schools under their jurisdiction, not just to those favored by the legal elite. By a kind of educational Gresham's law, schools with lower standards seemed likely to weaken or destroy the better ones--a prospect unappealing to gentlemen concerned with upholding "the honor of the profession." The Association, in fact, specifically deprecated the "needless multiplication" of law schools, especially those conducted for profit.[32]

While full-time instructors at elite law schools would have undoubtedly applauded the latter sentiment, a significant philosophical difference separated them from the leaders of the ABA during the late nineteenth century. Legal educators who had been influenced by the methodology of Christopher C. Langdell--a rapidly growing number during the 1890's--tended to find legal "science" either in Langdell's methodology itself or in his notion that the law library was the "proper workshop"--the laboratory--"of professors and students alike."[33] Although there was much talk of "science" in the 1891 Report of the ABA Committee on Legal Education, the Committee's idea of science was quite different from that of the legal educators. Committee members, such as Simeon Baldwin himself, were not primarily litigators, and they had been humanely educated.

Therefore, they had little sympathy for Langdell's case method of instruction and, indeed, pronounced it "unscientific." The Committee deplored the "elaborate study of actual disputes" which turned out graduates "admirably calculated to argue any side of any controversy...but unable to advise a client when he is safe from litigation."[34]

The breech between the elites of legal education and legal practice might have grown wider throughout the period had not the rapidly increasing rate of admission to the bar of lawyers from diverse ethnic and social backgrounds posed a challenge to both and obliged a close, though persistently strained, relationship between them. Even previously apathetic ABA leaders realized that new circumstances demanded more than the leisurely attention which the organization had paid to legal education during the first dozen or so years of its history.

In professional parlance, the problem was styled "overcrowding," and from the 1890's on, ABA members were warned of its consequences and advised of its cure. "A growing multitude," said Justice David Brewer in 1895,

> is crowding in who are not fit to be lawyers, who disgrace the profession after they are in it, who in a scramble after a livelihood are debasing the noblest of professions into the meanest of avocations, who instead of being leaders and looked up to for advice and guidance, are despised as the hangers-on of police courts and

> the nibblers after crumbs which a dog ought to be ashamed to touch....It would be a blessing to the profession, and to the community as well, if some Noachian deluge would engulf half of those who have a license to practice.[35]

Twenty years later, John Wigmore, dean of Northwestern University Law School, repeated the charge that the bar was "over-crowded with incompetent, shiftless, ill-fitted lawyers who degrade the methods of the law and cheapen the quality of services by unlimited competition." Wigmore also hoped the number of lawyers could somehow "be reduced by one half."[36] Elihu Root, emphasizing a typically Progressive notion of efficiency, weighed the economic cost of what he termed "superfluous lawyers." Such unnecessary practitioners, he said, in his presidential address of 1916, were "mere pensioners and drags upon the community" and "ought to be set to some other useful work. There is plenty of work for them to do on the farms of the country."[37]

In 1897, the Committee on Legal Education and Admission to the Bar noted with apprehension that the number of law school students had increased by 175 percent in five years, whereas it had grown by only seventeen percent in the previous twelve. This phenomenon, the Committee said, could only be explained by "the existence of some unusual and powerful cause." Ignoring population growth, increased demand for legal services, and the

growing preference for law school training over apprenticeship, the Committee suggested that the rise in law school enrollments might have resulted from higher educational standards in "medical and other professional schools," which thereby encouraged more mediocre students to choose law as the career path of least resistance. If this hypothesis were true, the report continued, "the result must inevitably be to elevate the other occupations and, relatively at least, degrade our own profession....The place of the lawyer in our country is one of leadership; a place of dignity, power and trust....To maintain the power and prestige of the Bar is not only a professional but a public duty."[38] Edmund F. Trabue, an influential ABA committeeman during the first two decades of the twentieth century, offered no explanation for the cause of "overcrowding," but he was clear as to what he considered its consequences. Lawyers of "that class," said Trabue, would bring

> the practice of the law and the character of the Bench into disrepute....If they got in the majority, why they would be in control. So the result would be that a premium would be put upon improper practices, and bad men at the Bar instead of the best men, and clients would find it possible to turn you away and get that class of men, as they often do.[39]

While most ABA leaders would have agreed, their public arguments were generally pitched at a more elevated level than Trabue's. Thus Simeon Baldwin, though finding the

growing number of law students "alarming," told the Section of Legal Education in 1897 that his desire to limit bar admissions arose not from "guild feeling, the feeling that you want to keep things to yourself, but from the higher feeling that we want our country to have the best, that we want our profession to rank as high as the profession anywhere."[40]

What the ABA leadership believed was necessary to "uphold the honor of the profession" was "not an increase of technical skill, but a great increase in cultural background and in the habit of scientific analysis," developed, as they believed by traditional humanistic education both in preliminary work and through sufficiently theoretical studies in law school.[41] For instance, George Hoadly, a member of the "Saratoga clique," argued in the Annual Address of 1888, that law students ought not to be admitted to practice without a knowledge of Latin and Roman law.[42] And Gustave Koerner, with his unusual continental training and second career as litterateur, not surprisingly asserted that though a law school graduate might be technically prepared for practice

> yet he may in all other respects be very little informed. Such persons, without having obtained a general, liberal, and not to mince matters, a classical education, are apt to take up the profession as a business merely. To make as fast as possible a good living in the profession, no matter how, will as a general thing be the

> principal, if not the only, pursuit of such half-educated persons. They are very apt to succeed too, but it is on the degradation of their honorable profession.[43]

While a truly classical education was nearly a memory in 1881 when Koerner wrote his letter, the legal elite, irrespective of ideological differences, continued to emphasize the necessity of general educational preparation before entering legal practice.[44] Henry Wade Rogers, who first opposed and then supported Langdell's methodology, affirmed in 1906 that "a member of the legal profession surely ought to be a man possessed of some general culture, and no one should come to the study of the law with faculties not trained by previous study."[45] Herbert Harley, the founder and secretary of the American Judicature Society, went even farther and frankly equated intellectual training with virtue, rejoicing in 1922 that the ABA had finally realized "the tie between good education and good morals."[46] In the same year, an editorial in the ABA Journal affirmed that while "Education may not convert the sinner,...it is one of the means of grace which enlightens his path lest he fall to destruction."[47]

Of course, such sentiments had both positive and negative aspects. On one hand, it could be argued that the ABA leadership had more perception than the Langdellian school, which consigned law to case books and libraries.

Long before the appearance of Legal Realism or even Sociological Jurisprudence, the ABA leadership was well aware that law ought not be divorced from life. Furthermore, the legal elite understood that a broad general education for lawyers was necessary if the legal profession were to continue in the leadership roles to which it had become accustomed. "Mr. Dooley" complained that even reform administrations chose lawyers for places of political responsibility because "in th' course iv his trainin' a lawyer larns enough about ivrything to make a good front on anny subject to ennybody who doesn't know about it."[48]

On the other hand, the ABA's insistence upon non-legal preparatory studies before bar admission might be justly interpreted as a biased method of "gatekeeping" so as to maintain elite control of the profession. When the elite criticized the newcomers to the bar, it was not generally their ability to render assistance to their clients that was attacked. In fact, the elite were more often critical of the shrewd use to which the immigrant lawyers put legal technicalities.[49] The emphasis of the ABA elite upon a liberal arts education and the more "philosophical" parts of legal study--legal history, comparative law, international law, etc.--was actually a double-barreled assault upon the newcomers. The elite believed that either

the longer period of study would discourage young men of an improper type from entering the profession or the education itself would inculcate the necessary moral virtue. Especially unfortunate was their pseudo-religious emphasis upon the conjunction of education and morality which allowed otherwise thoughtful gentlemen to declare their position to be righteous as well as right.

For instance, Franklin M. Danaher, a member of the New York State Board of Law Examiners, argued both in 1909 and 1914 that bar examinations alone could not keep undesirable classes from entering the legal profession. He was appalled to discover that some men who had passed his exam were former clock salesmen, "firemen, policemen, insurance agents, waiters and even bartenders." He suggested requiring a high school education for admission to the profession because the

> time and effort required to obtain [it] after eighteen years of age...will be almost prohibitive, and will certainly decrease the number of applicants and thus render competition at the Bar less deadly, tend to make the profession reasonably safe as a means of livelihood, and make it more honest.[50]

In 1915, John Wigmore advised the Section of Legal Education that

> a requirement of two years of college [was] a rational and beneficial measure for reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the Bar. The legal profession all over the world is a selected,

> limited group; and such is the Anglo-American tradition of the past. We must restore this tradition, if the profession of the law is to regain its leadership in American thought.[51]

Prominent ABA committeeman Lucien H. Alexander found it "somewhat startling, with the rank and file of our profession overcrowded, that the American Bar Association should not long since have placed itself upon record in favor of a four year course of study, particularly when the medical profession has already blazed the way."[52]

Ironically, in objective terms, there may have been no "overcrowding" of the legal profession at all. A detailed survey of the Wisconsin bar published in 1935 under the direction of Dean Lloyd K. Garrison of the Wisconsin Law School concluded that "in Wisconsin since 1880 the volume of legal business and the opportunities for lawyers have increased much more rapidly than the increase either of the lawyers or of the population." Garrison argued that there were actually fewer lawyers in proportion to the population in 1920 (1: 1145) than in 1880 (1: 948), and he claimed that the figures for his own state were roughly congruent with those available for the nation as a whole.[53]

In any case, the reproachment of full-time law school professors and the gentlemen practitioners who served as part-time instructors may be said to have begun with the establishment of the Section of Legal Education in 1893. Before the new organization had an official name, George

Sharp, its co-founder, called it the "Teachers' Association," and its first speakers included leaders from both segments of elite legal education. The organizers privately decided to have "nothing to do" with the "question of methods of instruction." Rather than rehash arguments for and against the case method, they determined to address "other questions just as important which may be discussed without feeling."[54] Within two years the Section had passed a resolution favoring the lengthening of law study to three years. This resolution was passed by the ABA annual meeting of 1897, though with much parliamentary maneuvering and the deliberate omission of the words "in law school."[55]

From the start the Section of Legal Education was a great success. Attendance remained high at Section meetings, no doubt both because of the eminence of the gentlemen who presented papers and because there was opportunity for discussion, a luxury no longer possible at the sessions of the annual meeting. The Association's Committee on Legal Education virtually "surrender[ed] the field to the Section." However, the usefulness of the Section to the educational elite was vitiated by this same success. The Section remained a "Teachers' Association" only briefly as other members of the ABA crowded in.[56]

In 1899 the professional academics, still casting about for a more restrictive forum, had the Section issue a call for a joint meeting of the Section and delegates from the "reputable law schools." Two days before the scheduled meeting in August 1900, the representatives of thirty-five law schools organized the Association of American Law Schools--the name being suggested by the Association of American Medical Colleges, founded in 1890.[57] Membership in the AALS was open only to law schools rather than individuals and only to such law schools as complied with AALS requirements regarding admission of students, length of academic course work, and adequacy of the library. At the Section meeting there was sharp criticism of the AALS resolution that no law school would be permitted AALS membership after 1905 unless it offered a three-year curriculum. George Sharp, now Secretary of the Section, reminded it that it did not have authority to interfere with an independent organization like the Law School Association and cautioned that negative comments by the Section might "discredit" the AALS just as it began "what promise[d] to be a most useful work."[58] While Sharp was successful in deflecting immediate criticism of the AALS, the episode marked the beginning of more than fifteen years of strained relations between the two organizations.

Echoes of the squabble over the case method of instruction were occasionally heard at annual meetings after 1900, but the focus of the legal education debate now shifted elsewhere. By the turn of the century most elite law schools had adopted the Harvard system, Simeon Baldwin's Yale being the most conspicuous exception. Despite the anti-humanistic tendencies of the case method, the ABA no longer even hinted at opposition to it. One reason for this change of sentiment was the influx into positions of Association leadership of men who had been converted to, and even trained under, the Langdellian system. Another was the decline in the number of elite practitioners who were also part-time law instructors and the rise in the number of proprietary law schools where the use of the lecture-textbook method continued. By the turn of the century, it had become clear that the case method was the university system, while the use of textbooks was more frequently encountered in the proprietary schools .[59] Finally, the Association could hardly discountenance a method of legal instruction that discriminated against the mediocre intellect. In 1889, Henry Wade Rogers had opposed the Harvard system because it "was quite unsuited to the average student." But once "overcrowding" became a chief source of concern to the elite, this alleged unsuitability

of the case method became more of an asset than a liability.[60]

While relations between the "law school men" and the old ABA elite were never entirely harmonious, both groups after 1900 had the same priority--to reduce the number of entrants into the legal profession. As a rule the two elites stood together on issues affecting legal education and admission to the bar.[61] The significant division was not that between the elites of education and practice but between the different strata of the legal profession itself. It must be remembered that while the ABA never included more than eighteen percent of American lawyers as members before 1929, Association membership grew dramatically during the first three decades of the century, and the aristocratic outlook of the organization, in nineteenth century terms, was significantly diluted. Slowly a chasm opened between the urban corporation lawyers more typical of the old ABA leadership and the newer members who were representative of professional and popular sentiment in the nation's heartland. As has been previously noted, some of these locally influential but nationally unknown gentlemen acceded to positions of responsibility within the Association by dint of their conspicuous industry on behalf of the organization. Given the natural tendency of the Association towards inertia when no

consensus could be reached, the presence of only a few such men, with the implication of much wider support among non-members of the Association, could not help but retard attempts by the elite to support the schoolmen in restricting admission to the bar by raising educational standards.

Many of these newer members, representative of towns and smaller cities, were suspicious of the emphasis suddenly placed upon "raising standards." Their status had not been disturbed by the country doctor. Their professional environment was still molded by the kind of informal professional controls which had prevailed in the early nineteenth century. Their legal business had remained fairly stable; and they were not forced to compete for either clients or judgments with the immigrants whom the urban elite found so distasteful. "It was inevitable," admitted an editorial in the ABA Journal, "that some who achieved professional success without such educational advantages should feel that [raising educational standards for bar admission] involved an unspoken reflection on their standing."[62] For instance, one Victor Kulp of Oklahoma pointedly defended his apprenticeship training before a meeting of the Section of Legal Education, asserting that while his town had "quite a number of graduates from

Harvard and Yale, [the] half dozen leading lawyers [had] obtained their legal education in a law office."[63]

Greatly to the annoyance of the urban elites, "the forces of prejudice and obscurantism" (as ABA historian Max Radin called the opposition) were able to bring to bear against them the potent weapon of democratic ideology. U. S. Attorney General Judson Harmon mentioned to the Section of Legal Education that when he had tried to persuade an influential lawyer, a member of the Ohio legislature, to support a measure extending required length of study before bar admission, his friend replied, "How long did you and I study for the bar?" Harmon guessed about thirteen months. His friend then declared "that it was not fair to the rest of the boys, we having got in, to endeavor to shut the door on them."[64]

The Horatio Alger myth in general would have been difficult enough to counter. But the legal elite had an even more serious problem dealing with the historical reality of Abraham Lincoln. As William Howard Taft once stated the argument in order to refute it, "Look at Abraham Lincoln. He never had any education of any sort. He educated himself, and note his greatness...as a lawyer, statesman and man."[65] The elite tried various replies. One bar examiner argued before the Section of Legal Education that Lincoln was such a great man that under

"present conditions" it would have been "no trouble" for him to "have secured adequate training before he began to practice."[66] Nicholas Murray Butler, speaking at the annual meeting of 1922, suggested that taxpayer-supported junior colleges were the answer to those who protested that more required training would "shut out--and I use the name because I have heard it so frequently in these discussions --Abraham Lincoln. My reflection upon that is that as we produce Abraham Lincolns, we shall doubtless be able to deal with them without public damage."[67] H. Claude Horack, the paid "Advisor" to the ABA in the matter of rating law schools, basically shrugged off the charge by insisting that "if the bars are let down for the occasional Abraham Lincoln, there is let in a herd of untrained young men."[68] Some years later, Max Radin asserted that the basis of opposition had been simply one of sentiment--"the stereotyped picture of the backwoods boy pouring over Coke and Blackstone by the light of a blazing pineknot." Still, Radin was forced to admit that this sentiment had been "so vigorously expressed and so successfully presented to a group of lawyers" that it demonstrated just "how deeply rooted the public feeling was which demanded the utmost freedom of access to the profession."[69]

Thus, despite widespread interest in both legal education and the reversal of the perceived trend towards

"overcrowding" in the legal profession, the American Bar Association passed no important resolutions regarding legal education from 1892 until the approval of eight rules for admission to the bar in 1918. And the latter had been a project of the Section of Legal Education since 1906.[70] The AALS, on the other hand, gradually required a more and more rigorous standard for its members. In 1900, students at member schools were required to have a high school diploma, take at least a two-year course, and have access to a library with both the federal and the appropriate state reports. In 1907, the Association required a three-year law school program; in 1912, it refused to accept members whose day and evening sessions were of equal length. In 1916, the Association demanded that its schools have three "substantially" full-time faculty members.[71]

The AALS, however, was faced with serious handicaps in its attempt to raise the formal standards of legal education. One was that during the first quarter of the century, the AALS represented "a steadily smaller proportion of the total law school population, partly through losses as member schools, which could not keep up with requirements, were dropped, but mainly through the growth of non-member proprietary and part-time schools."[72] A second factor was the growing estrangement of the Law School Association and the ABA. During the first few

years, feeble attempts were made to hold joint sessions of the AALS and the Section of Legal Education. Meanwhile, the AALS held separate meetings of its own as well. Despite the belief that these "involved a wasteful duplication of functions," the AALS and the Section "were able to find no practical arrangement by which they could successfully cooperate in respect to their meetings." Between 1906 and 1912, totally separate programs were organized, although the AALS met at the same time and location as the ABA annual meeting.[73] In 1914, William Howard Taft, as ABA president, scheduled "his" convention for October in order to take advantage of working Washington to provide suitable "big names" for the program and to swell the crowds. October was an extremely inconvenient month for academics to leave the classroom, and Henry Bates, dean of the University of Michigan Law School, wrote Taft a huffy letter inquiring "if the meeting of the American Bar Association was set in October for the purpose, among others, of bringing about the divorce" of the two organizations.[74] Taft denied the charge. Nevertheless, the AALS set its meeting for the Christmas holidays and "ceased to have any organic connection with the Bar Association."[75] Harry S. Richards, dean of the Wisconsin Law School, complained that the AALS had "lived with [the ABA] for fifteen years. What did they do for us?

They gave us a poor place on the program, and then often after a fight, and paid no attention to us, so we took our things and moved out."[76]

During the same decades in which the concern of the organized bar for legal education was best epitomized by petty squabbling, the American Medical Association worked to consolidate its power and assert its influence over the direction of medical education. While the ABA remained a small, voluntary organization of individuals, the AMA in 1901 reorganized itself into a federal system representative of state and local medical associations. In 1904 it established a Council on Medical Education to act in its behalf in matters regarding professional training, and two years later the Council began a survey of all medical schools in the country which resulted in a system of ranking.[77]

Simultaneously the Council proposed to Henry S. Pritchett, President of the Carnegie Foundation for the Advancement of Teaching, that the Foundation conduct a "disinterested" report on the status of medical education. Pritchett, who had been a leader in the successful fight to establish a national Bureau of Standards, had independently decided to investigate educational conditions in the three traditional professions of law, medicine and theology--apparently in that order. However, according to the

minutes of his meeting with the Council on Medical Education, Pritchett asserted that he had found "no efforts being made by law to better the conditions in legal education and had met with some slight opposition in the efforts he was making." He therefore declared himself to be "agreeably surprised" with the work of the Council on Medical Education and promised to study medical education first. Furthermore, he agreed that while the proposed report of the Foundation

> would be guided very largely by the Council's investigations, to avoid the usual claims of partiality no more mention should be made in the report of the Council than any other source of information. The report would therefore be, and have the weight of, an independent report of a disinterested body, which would then be published far and wide. It would do much to develop public opinion.[78]

The Carnegie Foundation study became, of course, the famous Flexner Report of 1910, which Abraham Flexner himself acknowledged had "produced an immediate and profound sensation."[79] The report was front page news in the Chicago Tribune and the Los Angeles Times; the New York Times praised it in an editorial.[80] With vivid and unsparing language, Flexner described various medical schools as "disgraceful," "utterly wretched," and "indescribably filthy."[81] Although his specific charges brought death threats and libel suits, Flexner's study was welcomed by the medical elite, who used his phrase "fewer

and better doctors" as a "rallying cry of the profession."[82] Flexner agreed with professional leaders that medical school should consist of a four-year course following at least two years of college. Furthermore, he "considered a system of education substantially maintained by proprietary institutions wholly indefensible, particularly when such schools operated solely for profit." He concurred with the medical elite that medical schools ought to be integrated with the university and its scientific departments.[83]

The immediate effects of the Flexner Report seemed dramatic to contemporaries. The number of medical schools dropped forty-seven percent in twenty years, from 160 in 1900 to 85 in 1920; the number of medical students fell forty-five percent in the same period. However, it now seems probable that the Carnegie Foundation study may have "taken on more significance in myth than it in fact deserves."[84] Flexner himself chronicled some of the trend, and eleven medical schools collapsed in the year between his investigation in 1909 and the publication of the report in 1910. The earlier work of the Council of Medical Education combined with the "spectacular success" of the medical profession in eliciting public support was one important factor. Perhaps even more significant in the shake out of medical schools was the increasing need for

expensive instructional facilities such as laboratories and teaching hospitals. Such costs strained the budgets of proprietary schools to the breaking point or at least resulted in their being ineffective competitors with eleemosynary institutions endowed by philanthropy.[85] "Nothing has perhaps done more to complete the discredit of commercialism," wrote Flexner, "than the fact that it has ceased to pay."[86]

The situation in the legal profession was entirely different. A law school composed of a few moonlighting practitioners meeting in the local YMCA might be highly cost effective. Such schools were, in fact, being established all over the country even before the turn of the century; but after 1900, there was a "massive expansion of part-time legal education, especially in schools unrelated to universities."[87] The legal elite were well aware of, and alarmed by, the trend represented in the following statistics:[88]

	Law		Medicine	
Year	Schools	Students	Schools	Students
1889-1890	61	4,486	133	15,404
1899-1900	102	12,408	160	25,171
1909-1910	124	19,498	131	21,526
1919-1920	146	24,503	85	13,798

Simply stated, while the number of medical schools and medical students declined during the first two decades of the century, the number of law schools and law students

rose dramatically. Furthermore, while the AMA was able to squeeze commercial medical schools out of the marketplace, the greatest growth in legal education during the same period occurred in proprietary schools that catered to the urban lower-middle classes. For instance, Gleason Archer's Suffolk Law School in Boston, founded in 1906, had 460 students in 1915, 1512 in 1922, and 2018 in 1924. "By 1928 Archer could still claim that Suffolk was the largest school of law in the world, boasting nearly 4,000 students." Yet Archer was forced to compete with the Boston YMCA school (now Northeastern), which had a head start and a more elite faculty.[89]

On occasion the animus of the elite towards the part-time schools might be quite stridently expressed. William Draper Lewis, dean of the University of Pennsylvania Law School, once referred to the night law schools as "a grotesque perversion" of a progressive idea and asserted that many of the schools were "created and maintained by charlatans for the fees."[90]

Unlike the medical profession, which enjoyed success after success in promoting restrictive legislation, the legal profession found lawmakers unresponsive and even hostile to the suggestion that educational standards for admission to the bar ought to be raised, especially when the graduates of part-time schools began "appearing in

increasing numbers in state legislatures."[91] For the latter to withhold degree granting powers from non-elite law schools was tantamount to admitting that they themselves were not qualified to be lawyers.[92] "Make haste slowly and keep away from the legislature as much as you can," said one influential member of the Section of Legal Education in 1920. "Let the doctors go there all they want to, but the moment lawyers start in and ask special privileges, the old antagonism rises up."[93] Whatever the true relationship between the Flexner Report and the imposition of higher educational requirements in the medical profession--and there "is no doubt...that Flexner helped the movement along"--the leadership of both the ABA and the AALS were "greatly impressed by the investigation."[94] In February 1913 the ABA Committee on Legal Education and Admission to the Bar, under the chairmanship of Henry Wade Rogers, addressed a "most anxious" request to the Carnegie Foundation for a study of legal education as "searching and far-reaching [as the Flexner Report] and one equally frank and fearless in its statement of the facts which the investigation may reveal."[95]

To make the survey of legal education, Pritchett appointed Alfred Zantzinger Reed, the son of a country doctor from Colorado, who had joined the Foundation staff

shortly after receiving his Ph.D. in politics from Columbia. Flexner and Reed had a great deal in common. Neither man had been born into the Eastern intellectual establishment, neither had any teaching experience at the university level, and neither was a member of the profession which he examined.[96] Nevertheless, the differences between Flexner and Reed were to prove more significant. Although Flexner's report had wit and bite and made good newspaper copy, Flexner had made his examination of medical schools in such haste--sixty-nine schools in twenty-two states in not more than seventy-eight working days--that his published report was justly criticized for ignoring the very scientific standards which his report attempted to impose on the medical schools. Most importantly, Flexner had begun his task with "a feeling of inadequacy" and was therefore all the more willing to follow the lead of the professional elite.[97]

Reed felt no such compunction. To him the legal profession was merely a "technical subdivision" of political science, his own specialty; therefore, he had no difficulty considering "himself qualified to inform the legal profession what it must do to reform itself."[98] And far from rushing his study to completion, Reed worked at such a deliberate pace that Pritchett was driven to exasperation. Granted that Reed's progress was impeded by

the refusal of some law schools, "with memories of Flexner's exposé" to cooperate with him, the fact remained that the Reed survey took seven years to complete as against Flexner's thirteen months.[99]

When the report was finally printed in 1921, the ABA elite found that they had been presented with something both more and less than they had hoped for. Reed had produced a book of nearly five hundred pages, for which the Carnegie designation, "Bulletin Number Fifteen," seems a ludicrous euphemism. Most of the report was a history of American legal education, and even today it remains generally a very good one. But as one recent critic has put it, the "congeries of facts and many digressions robbed the manifesto of punch."[100] Reed's volume also lacked the critiques of individual schools which had made Flexner's work a popular as well as a profession success. Pritchett promised in the preface that another bulletin "dealing with the contemporary situation in greater detail" would appear in a "short time," but true to form, Reed took another seven years to complete Present-Day Law Schools in the United States and Canada.[101]

What the legal elite most objected to in the Reed Report was the author's refusal to fully endorse their own elitist vision of legal education. Reed was a Ph.D., and he had been a teacher. He certainly did not advocate lower

educational standards or even a laissez-faire attitude towards the part-time schools. Reed's view of the case method was at least appreciative if not wildly enthusiastic, and he believed that the future of legal education lay with the Harvard-model law school tied to a university. But Reed recognized that there were differences in the problems facing medical education and those facing legal education.

> The largest difference which he identified was wrapped up in the title he gave his first book: Training for the Public Profession of the Law. The important word was Public. He believed that lawyers were an integral part of the process of government; that the creation and enforcement of the law--public and private--required the active involvement of lawyers. That being so, the profession must be open and accessible to people of all classes and kinds or else the promise of democracy would fail.[102]

In Reed's view, the public nature of the law necessitated that part-time legal education be made available to those financially unable to attend college and a full-time school. Graduates of the part-time schools would remain ineligible to perform all the functions of a more broadly trained lawyer, but they would be capable of discharging more mundane tasks in such areas as, for instance, probate, conveyancing and criminal law. The formal recognition of a "differentiated" bar, Reed believed, would only ratify the de facto division of the profession, but it would also provide a means for elevating

requirements for the inner bar. Otherwise it seemed unlikely that state legislatures would cooperate in raising standards and, by so doing, cut off access from the profession to the underprivileged.[103]

Reed indicated that bar associations in general, and the American Bar Association in particular, might play a substantial role in the reform of American legal education if they would pattern themselves after the vigorous professional organizations of the medical men. Reed recommended that bar associations shed their image as social clubs and form federated societies encompassing a much greater percentage of lawyers as members and having an "organic connection" with the elite law schools. Ironically, Reed also favored selective bar associations requiring "stiff educational qualifications for admission." But regarding the associations as they existed in fact, Reed was frank. Many bar associations, he said, exerted "no influence," and he claimed that it "would be a hopeless task to attempt to catalogue...the associations that deserve to be taken seriously."

> The diffusion of professional responsibilities among national, state and local organs has made it no one's especial business to initiate a needed reform....The associated lawyers, having no single recognized mouthpiece, would set up a discordant clamor if they really raised their voice. This is one of the reasons why, so often --let it be said without offense--they emit only a gentle buzz, made up in large part of platitudinous generalities.[104]

The truth of Reed's criticism of bar associations seemed undeniable even to spokesmen for the ABA--although Reed did suspect that some quotes "which might be regarded as derogatory to bar associations" were reprinted in one review so as to prejudice readers against his work in general.[105] It was, however, Reed's proposal that the bar be divided into two classes that came under sustained attack from the ABA elite. In all three of the fairly lengthy reviews of his book published in the ABA Journal, the reviewers announced their opposition to the notion of a "differentiated bar."[106] Two of the reviews, one by John B. Sanborn and the other by William Draper Lewis, were, in Reed's words, "fair and even generous in tone;" but the third and longest review by Harlan F. Stone, Dean of Columbia University Law School, was barely civil. Stone declared haughtily that Reed's conclusions differed widely from "those [of] individuals who by special study or experience might be deemed to speak with some authority on the problems of legal education." What especially irritated Stone was that in the past, "low grade" law schools had "not sought to justify their existence by an appeal to any profound political or social philosophy." Now Reed had formulated one, "ready to hand...justifying and in fact commending their existence."[107]

The orthodox answer to Reed's differentiated bar was that the "intellectual processes necessary for efficient work in all branches of professional activity are so essentially similar that all members of the bar should have as a foundation a like cultural and technical training."[108] "The suggestion that the less educated might suffice to counsel the poor is so dangerous," wrote Herbert Harley, "that it must be condemned outright. The poor, the ignorant, the unsophisticated most need all the protection that can be thrown about them."[109] Charles Evan Hughes, in his presidential address before the Annual Meeting of 1925, declared that there was "no guaranty of liberty in any true sense in putting the community in bondage to the ignorant....High standards of admission to the Bar will mean less ill-advised litigation and fewer hardships for trustful clients."[110] Supreme Court Justice Pierce Butler even argued that higher admission standards served "to benefit those who are thereby excluded, those who ought not to become lawyers."[111]

Reed himself observed that the idea of the differentiated bar was "the one feature of the Bulletin that [had] been almost contemptuously dismissed."[112] But at least part of the blame rests with Reed himself and the ambiguousness and inconsistency with which he presented his views. Like a politician who promises more revenue from

less taxation, Reed had suggested that somehow low entrance requirements would result in higher educational standards for the legal profession. Not surprisingly, the professionals were more than skeptical. Under criticism Reed protested that he had only intended to formulate "certain general principles" not "a comprehensive programme of reform." Another failing of Reed's was that as a typical progressive, he was overly sanguine about his ability to persuade and direct the American Bar Association with logical arguments buttressed by statistics, a notion which he should have abandoned by the time he had completed his historical research. Even when his position was flatly repudiated by the Root Committee (of which more below), Reed announced that its report showed an "entire sympathy" with his views.[113] Finally, whatever chance the "differentiated bar" had of professional acceptance was lost through Reed's delay in publishing his Report. In short, events ran ahead of him.

No sooner had the AALS taken its marbles and gone home, snubbing the 1914 annual meeting, than its leadership began to have second thoughts about the wisdom of self-exile. With few representatives of the AALS now in attendance at ABA meetings, the Section of Legal Education fell under the influence of the part-time law schools.[114] As early as 1915, one AALS representative, William R.

Vance, warned that this "inferior element" posed a "grave danger...to those interested in legal education."[115] Privately, Roscoe Pound dismissed the Section as "a clearing house for cranks."[116] William Draper Lewis, an influential figure in both the ABA and the AALS, strove to bring about a reconciliation between the two organizations in order to achieve the "gatekeeping" goals of the professional elite. "I do not know whether we can accomplish in the next few years, working with the American Bar Association, what the American Medical Association has accomplished for the medical profession and medical schools," said Lewis, "but I think we can go a very long way."[117]

The success of the AMA and its Council of Medical Education in forcing proprietary schools out of the market was both an encouragement and a matter of sober concern to the AALS. In 1915 AALS President Harry Richards discussed with admiration the effective "weeding out" of medical schools by the AMA and he urged an "aggressive and sustained effort" to achieve the same results in the legal profession. But how, he asked, could law teachers overcome "the indifference or actual hostility" of a "large section" of the organized bar? Richards suggested that the Section of Legal Education might be abolished and be replaced by the AALS itself: "It may seem unnatural for the child of

the Section...to demand the death of its parent, but the efficiency expert cannot allow himself the luxury of the softer emotions."[118]

Even more influential was the presidential address delivered to the AALS in the following year, 1916, by Walter W. Cook, a Yale Law School professor. Cook described in detail the success of the medical elite in reducing the number of medical schools and medical students. Only half in jest, he asserted that "nearly all the poorly prepared students who were prevented from studying medicine because of the higher standards in that profession transferred their allegiance to the law." While Cook noted that the changes in medical education were wrought not by the Association of American Medical Colleges--the counterpart of the AALS--but by a Council on Medical Education, he also argued that it made little difference since both organizations were agents of the medical school professors. Cook urged that "work similar to that accomplished by the Council on Medical Education must be undertaken and carried through" by an organization which would speak for the combined influence of both the ABA and the "experts in legal education." Specifically, Cook suggested that a Council on Legal Education be created by the ABA at its next annual meeting.[119]

Cook viewed the establishment of such a Council as a matter for negotiation between the ABA, the Section of Legal Education and the AALS; and he warned that to be effective, the Council could not be completely dominated by the AALS.[120] What actually happened, however, was that at the next annual meeting, Henry Wade Rogers, Cook's erstwhile colleague at Yale and Chairman of the Committee on Legal Education, pushed through the authorization for the Council in the five minutes allotted to him on the convention floor. (Accompanying legislation abolishing the Committee on Legal Education was not considered, and so for one confusing year, the ABA had a Committee, a Council, and Section of Legal Education.) The Council was promptly stocked with five pillars of the law school establishment: Rogers (as chairman), Roscoe Pound, Harlan Stone, John Wigmore, and William R. Vance. In the following year, 1918, the Council reported the proposal to abolish the Section in favor of the AALS and a recommendation which would have required every applicant for admission to the bar to be a graduate of a three-year law school course (four years, in the case of night schools). Neither one of these time bombs was brought to a vote, although in the case of the latter proposal, Rogers reserved the "right to press it next year or the year after, as we may choose." Obviously, as Preble Stolz has written, "the 'schoolmen'

forces thought they were riding high and were in control of what the A.B.A. was likely to do with respect to legal education."[121]

They were wrong. In 1919 the Executive Committee, eyeing the Council with justifiable suspicion, refused to appropriate funds for its activities and later wrote it out of existence in a constitutional revision presented to the annual meeting. From the Council's own report, it is clear that the part-time schools "and the friends of those schools" had succeeded in swaying an Executive Committee already concerned with the ability of ABA creations to ride their own hobbies in the name of the Association.[122] The Council fought back with a petition from the deans of thirty-three law schools--all AALS members--and even a resolution passed by the leadership of the Section. Yet despite Rogers' reference to the strength of the medical profession and his warning that abolishing the Council would "estrange the leading law schools and law-school men of the country from the American Bar Association," the schoolmen and their supporters were voted down. The dénouement was worthy of a Greek drama; the Council survived but was made subject to the Section which it had earlier planned to eliminate.[123]

The next meeting of the AALS was a pretty gloomy affair with Harlan Stone, the president, and Professor

Joseph Beale of Harvard reflecting "profound disenchantment" with the ABA.[124] Draper Lewis, on the other hand, was ready to suggest another plan to accomplish the same objective. The Section of Legal Education, said Lewis, certainly did harbor representatives of schools which had a proprietary interest in keeping standards low. But he proposed that AALS members attend the next Section meeting in force and push through a resolution calling for a special committee to study legal education. "Less politely, they should pack the meeting and rig a Committee."[125] The AALS then called for a special session at the time of the next ABA convention, appointed a committee to "secure a large attendance," and appealed to their law schools to pay the expenses.[126]

As had historically been the case in the American Bar Association, it was the "big names" that counted. Lewis was able to win the cooperation of the venerable Elihu Root in becoming a candidate for the chairmanship of the Section, "a candidate so eminent that his election could not be denied." Once this business was taken care of, Root became the chairman of the Special Committee as well and wisely invited five non-law school men to join Lewis and him as members. In the spring of 1921, the Root Committee heard representatives of elite law schools, bar examination boards, and even a few carefully chosen night schools. It

obtained advance copies of Alfred Reed's long awaited report and invited him to appear, in part to disarm resistance which might later rally around his "differentiated bar."[127]

The resolutions which Root presented to the Section and then to the annual meeting were a compromise, but a compromise heavily favoring the elite law schools. The Committee reported that "every candidate for admission to the Bar" should "give evidence of graduation from a law school" of the proper type and that two years of college ought to be required before admission to law school. It was implied (but not explicitly stated) that part-time law schools would be legitimatized if they would consent to lengthen their courses to four years. Finally, a revived Council on Legal Education was directed to publish lists of law schools complying with the established standards and was instructed to urge adoption of them upon state authorities as minimum legal qualifications for admission to the bar.[128]

Chief Justice Taft was shrewdly importuned to second the Committee resolutions before the Section, and Root blandly announced to the annual meeting that the proposals were not really new, only clarifications of "expressions" previously approved by the ABA "in perhaps less positive form."[129] Opponents of the report worked at a distinct

disadvantage. When such distinguished gentlemen as Taft and Root stood for the propositions, "who can withstand them?" asked Edward T. Lee rhetorically. Lee, dean of John Marshall Law School and one of the most articulate foes of the AALS, then answered, "No one, unless he is clothed with truth." Reading from a pamphlet he had written, "Is there a Greek horse at the A.B.A. Gate?" Lee exposed the "scheme" of Draper Lewis with precision. Lee further ridiculed the notion that anyone could easily obtain a college education and argued that the imposition of a college requirement would discriminate against urban residents and those of foreign extraction--the former because state universities were so "frequently situated in remote towns." He mocked the conservative's hatred of unionism by imagining a union leader's retort to the ABA: "You have applied in your profession by more clever means than we can adopt, the principle that we apply...with the strong arm." Lee even attacked the shibboleth of the legal elite that law must follow the lead of medicine in raising academic standards. A rural doctor, said Lee, must be ready for the most serious emergency, but the country lawyer did not have to act on a moment's notice, nor was he usually called upon to deal with complicated legal problems.[130]

George E. Price, a member of the Root Committee from West Virginia, replied that the college requirement would not "shut out many...American youths," and he doubted that the ABA would "want to let down the tests simply to let in uneducated foreigners." A young man, said Price, needed "to be segregated at least for two years under a different atmosphere in a college...where the proper principles are inculcated, and where the spirit of the American government is taught."[131] "Times have changed," added corporation lawyer Nathan William MacChesney. In earlier days "members of the Bar were looked up to as the intellectual and moral and political leaders of the times. The real question at issue is whether we are to maintain our comparative standing in the United States, or whether we are to take second place."[132] The resolutions of the Root Committee were easily approved on a rising vote.[133]

One further recommendation of the Root Committee was the call for a "conference on legal education in the name of the American Bar Association" to which state and local bar association representatives would be invited. About 150 delegates appeared at the two-day session held in Washington on February 22 and 23, 1922.[134] Since the legal profession lacked the integrated professional associations of medicine, the Special Conference was contrived by the legal elite as the next best thing, "a publicity

device...to energize the local bars and thus state governments" to adopt ABA educational standards as their own.[135] Predictably, the program was loaded with "big names" whose responsibility it was to declare the official position which the delegates were expected to ratify. Attorney General Harry Daugherty (who later barely escaped preceding John Mitchell into prison from that office), vaguely endorsed "any effort that might tend to enhance the standards of the bar." Chief Justice Taft emphasized "overcrowding." Former Attorney General George Wickersham and Root himself made barely veiled references to ethnic fears.[136] The Conference did not go altogether as planned. For instance, two delegates turned the tables on the organizers by suggesting that there was not much "moral benefit" in college training when so many universities were centers of "radicalism and socialism."[137] In the end, the conference modified the ABA standards slightly by endorsing "equivalent training" for the two years of college. Nevertheless, when it appeared that the college requirement might be eliminated altogether, Root made a short but dramatic speech, and the elite proposals sailed through.[138]

As Jerold Auerbach has correctly noted, "the fight for higher standards was mostly sound and fury" if measured only by state statutes passed in the aftermath. Four years after the Washington Conference, not a single state had

adopted the ABA-AALS standards of two years of college and a law degree before admission to the bar.[139] Yet 1921-22 actually marked the turning point for the elite position. While enrollment at non-AALS schools continued to climb for another half dozen years, the alliance of practitioners and teachers began to produce, almost immediately, the kind of results the elite professionals had intended. As early as 1923, Roscoe Pound assured Harlan Stone that part-time schools were "on the run....We [have] only to stand by our guns a little longer to see everything we have been struggling for...realized."[140] At least in the field of legal education, the American Bar Association now commanded what ABA President Walter George Smith had called a "position of recognized power and prestige"; though, as Smith hastened to add, this influence was "necessarily exerted with none but moral sanction."[141]

One indication of this power was demonstrated when the first list of ABA-approved schools was issued in 1923. Marquette Law School, which had agreed to require two years of college work by 1925, appeared neither in the category of law schools that had accepted ABA standards nor in the category of those which had announced their intention to do so. The reason given by John Sanborn, Secretary of the Council, for the intentional omission was that Marquette's night school did not require two years of college, and the

Council had decided to classify any school with both day and night divisions "according to the standards of the lower of these two." The upshot was that Marquette discontinued its evening division.[142] Another indication of the Association's influence was the coast-to-coast coverage and editorializing that the adoption of the legal education standards received in the press.[143] Finally, there was the reaction of spokesmen for the part-time schools, who fought the requirements and their proponents with increased ferocity and heightened rhetoric--an unlikely development had the Association's actions been only brutum fulmen.

In 1927, the Section of Legal Education, meeting by prearrangement with a "selected group of men" at a different time than was usual, discussed the hiring of H. Claude Horack, secretary (and shortly, president) of the AALS, as a paid advisor to the ABA in the matter of ranking law schools. At the same meeting William Draper Lewis was elected Chairman of the Section. The Secretary-Treasurer remarked on the unusual harmony of the meeting; the Section, he said, had met "as a happy family," and the resolutions offered "seemed to meet with no opposition."[144] But Gleason Archer was furious. The dean of Suffolk Law School wrote an open letter to ABA members charging that developments in the Section were "only one phase of the

struggle, now a quarter of a century old, in which the university law schools are seeking to duplicate in the legal profession what the university medical schools have already accomplished in the...medical profession."[145] Archer continued to vent his spleen at the Section meetings of 1928 and 1929. During the latter he noted that the ABA had provided the Section with $15,000 in the year that Lewis was chairman.

> Now, what is the Section of Legal Education doing with this lavish contribution from our treasury?...The present Chairman of this Section, but for twenty years the guiding spirit of the Association of American Law Schools, and in 1924 its President, has hired H. Claude Horack, the present President of the Association of American Law Schools, at a $10,000 a year salary as field agent to capture the various states of the Union for the college monopoly.[146]

At the same meeting Edward T. Lee called the law school men "educational racketeers" who were using the "American Bar Association as an annex to the Association of American Law Schools," and who were "boring from within our Association in the interest of their own."[147] For good measure, one James Brennan of Massachusetts charged that the ABA--"this great big organization"--was "attempting to divide our schools into groups, using may I say, the blacklist--one of the most damnable and dangerous things in American life--the blacklist and the boycott."[148] The elite let them talk; the ABA leadership now knew that when the questions

were put, the supporters of the part-time schools would lose.[149]

The question is, of course, why did they lose? What had changed between 1919, when the Executive Committee scuttled the Council on Legal Education, and 1928, when the ABA began marching in virtual lockstep with the AALS? The answer is difficult to document statistically but seems to be congruent with Robert Stevens' assertion that "[x]enophobia, economic concerns, and professional vanity, coupled with genuine concern for the public interest," proved stronger than the democratic ideology offered by Archer and Lee.[150] There is no question about the xenophobia, for which the post-World War I years are notorious. In 1922, Elihu Root might discuss, with euphemistic indirection, the "scores and hundreds" coming to the bar with no "conception of the moral qualities that underlie our free American institutions"; but at the end of the decade, an influential member of the Law Association of Philadelphia spoke openly of the danger to the profession posed by "Russian Jew boys."[151] The same decade saw the development of trade associations and their price and policy restrictions which were upheld by the Supreme Court. Even the middle levels of the bar "in small towns and cities began to see an important economic dimension to the complaints of unethical practice."[152] Finally, there was

the example of organized medicine, now unquestionably first in prestige and political power among the professions. Only those, such as Archer, Lee, and to a lesser extent, Reed, who had a personal interest in alternate visions of the legal profession dared question the model that elite lawyers had chosen to emulate. "'Science' and the orthodoxy of the case method had given them a solid base for their pride, and anyone who did not follow the new religious creed was robbing them of their solidity and standing."[153]

Aside from educational requirements, two other "gatekeeping" devices seemed at least theoretically available to the elite of the American Bar Association in its quest for greater control of the legal profession: bar examinations and professional discipline based upon prescribed rules of conduct. However, neither of these tools proved to be very useful to the ABA in the period before 1930.

By 1898, all the states had licensing requirements for physicians, although in only half of these did licensing require examination as well as a medical school diploma. Gradually, as the scientific basis of orthodox medicine became apparent to state legislators, more states established boards of medical examiners to administer such tests. Abraham Flexner had been quite frank about the

purpose of licensure examinations, calling them "the lever with which the entire field may be lifted; for the power to examine is the power to destroy." In 1915, the American Medical Association organized a National Board of Medical Examiners, and shortly thereafter, its examinations achieved such wide acceptance that arrangements for establishing some degree of reciprocity were concluded with the qualifying boards of England and Scotland.[154]

State examination boards for lawyers were much slower to develop, the first being established by New Hampshire in 1878. By 1890 there were still only four jurisdictions out of forty-nine that maintained bar examination boards. Somewhat prematurely the ABA called a conference of state law examiners in 1898, when only twelve states had such officials, and for a half dozen years the representatives held sessions in conjunction with the Section of Legal Education. However, when on three separate occasions--in 1900, 1904, and 1914--attempts were made "to vitalize the Conference as an independent organization," the efforts failed. Not until August 1931 was a permanent National Conference of Bar Examiners established.[155]

The seeming indifference of bar examiners to organizing their own professional association was symbolic, not only of the amateurish nature of early bar examinations, but also of the states' diverse admissions

policies. Once again the federal system of American government had complicated the task of the national bar. The most serious impediment to the usefulness of bar examinations in "gatekeeping," however, was the underlying hostility that existed between law school teachers and the examiners. Not that anyone publicly argued that the previous system of bar admission was preferable. Bar association members seemed to agree that a "lazy and timid examination" by "a sudden committee drafted from a reluctant bar" was deleterious to the dignity and standing of the legal profession.[156] "The creation of state examining boards," said Herbert Harley in 1922, "marked a great step forward, for it centralized responsibility in officers who were impersonal and relatively independent....The bar, without realizing the fact, had gained possession of the gateway to the profession."[157] But unlike medicine, where educational requirements and licensure examinations were perceived as complementary, in the legal profession they were soon deemed antagonistic to one another.

Obviously, bar examiners opposed the "diploma privilege" whereby graduates of a law school approved by the legislature were admitted to practice without further testing. Elite law schools usually paid lip service to opposing such legislation, in part because state

legislatures rarely distinguished between "good" and "bad" law schools. Nevertheless, it was noted that while the better schools might denounce the privilege in theory, they would not renounce it once it had been bestowed upon them; nor were they overly solicitous in lobbying their legislatures about the matter.[158]

More significantly, bar examiners and legal educators differed radically on how best to restrict entry to the profession. Bar examiners insisted that their tests would accomplish the purpose which the schoolmen believed could be achieved only by higher education. "'Examination' was a word to conjure with....Both in the universities and in governmental administration, written tests were thought by many to be infallible means of determining proficiency."[159] Perhaps I. Maurice Wormser presented the most exaggerated statement of this belief to the Section of Legal Education in 1914:

> Better bar examination questions mean raised standards of admission to the Bar. Raised standards of admission to the Bar mean better lawyers. Better lawyers mean a better brand of social and individual justice. Better justice means a nearer approach to a millennium of sweetness and light.[160]

The legal elite were appalled, for they realized that bar examiners were playing into the hands of the part-time schools. The latter had consistently argued that the disadvantaged ought not to be penalized for their lack of

formal education. "Make your examinations as stiff as you please," said a sympathetic newspaper editorial, "but test the candidate's ability and knowledge fairly without requiring him to go through an expensive and apparently a magical process."[161] The democratic ring of that argument vexed the legal elite, and they found it difficult to frame a convincing reply for the consumption of laymen. Yet they understood that legislative commitment to bar examinations would inevitably reduce their ability to control entrance to the profession of the law. They believed, as had Langdell, that bar examinations could not be "at once rigorous and just. They must admit the undeserving or reject the deserving; and in the long run they will be sure to do the former."[162]

If bar examinations rather than law school graduation were required of applicants, there was nothing to prevent law school students from taking the exam, entering practice--and leaving school. The examination might even discriminate against graduates of elite schools by emphasizing arcane aspects of local practice, as indeed had occurred in the case of some of Langdell's graduates.[163] Worse, the elite feared that bar examinations would admit precisely those applicants whom the upper strata of the profession most wished to eliminate. At the Washington Conference on Legal Education, Elihu Root complained that

bar examination could not measure the "moral quality of a man."

> The young men that I have been talking about, whom we have to see with doubt going through the examination and into the Bar were acute, subtle, adroit, skillful. They had crammed for their examinations. They could trot around any simple-minded American boy from the country three times a day. But the thing that we were troubled about in that Character Committee was: Have they got the moral qualities? And we had no evidence that they had. And the evidences are coming in all the time of a great influx into the Bar of men with intellectual acumen and no moral qualities. How are you going to get them? Not by an examination; not by going back to the law office. That is impossible.[164]

ABA committeeman Edmund F. Trabue seemed to disagree. In 1914 he had admonished his listeners at the Section of Legal Education meeting to eliminate "an element which is so pernicious" to the legal profession. "It all depends upon Bar Examiners," he concluded. "They can put up an examination that would be sufficient and that can control the question of the moral character of the applicant to a great extent."[165] If Trabue spoke of intellectual tests, then the testimony of his contemporaries weighs heavily against him. But perhaps he was thinking of the kind of "moral examination" attempted by the New York City and Philadelphia bars. In Pennsylvania, for instance, "the examination tested neither character nor ability, but background" and was conducted <u>before</u> law school admission, so that "no record of excellence there [might] overcome the

handicap of inferior social origins." The Pennsylvania Association did reduce the proportion of immigrants admitted to the state bar from 76 to 60 percent of the total admissions each year; but compared with say, Jim Crow laws in the South, this attempt at ethnic discrimination can hardly be considered effective. The lot of those Russian Jews actually admitted to the bar was probably made that much easier.[166]

In any case, the American Bar Association had to sell its restrictive educational standards to a public suspicious of its motives. It had to insist that its standards were egalitarian except in matters of intelligence and character. Higher educational requirements might be advanced, as one friendly newspaper put it, as "the trend of modern thought."[167] But openly biased practices were not acceptable even in the xenophobic Twenties. Thus, bar examiners and law teachers remained at odds, the former capturing the Section of Legal Education, the latter, the AALS; and the immigrants and the children of immigrants rushed through the breech.

As with its interest in legal education and bar examination, the concern of the American Bar Association for establishing a code of ethics represented a complex jumble of economic, social, and professional motives

mingled with genuine solicitude for the public welfare. And as in the other areas, the Bar Association looked to organized medicine as a model for its own development. The American Medical Association had adopted a code of ethics in 1847, partly as a public relations device, partly as a guide to intragroup etiquette for practitioners making their way in a hostile professional environment. As early as 1880, the president of the New York State Bar Association could point to the state medical society's "rules of professional etiquette" as the basis for "substantial gain in that profession" and assert that the code was "a good omen for us."[168] After the turn of the century, organized medicine was able to push past voluntary controls and write parts of its code into various state laws. Meanwhile, the AMA, in 1903, renamed the "code" the "Principles of Medical Ethics," presumably to elevate the rules into Higher Law as well.[169]

Codes of ethics in the legal profession have "a history that almost parallels that of the medical code."[170] The first rules of conduct were adopted by the Alabama State Bar Association in 1887, but they in turn had been based upon the influential Essay on Professional Ethics, first published in 1854 by George Sharswood, a Philadelphia judge and law teacher. As had been the case with the early medical rules, the Alabama code resembled "more a code of

etiquette than a code of ethics." For instance, it advised the attorney to be punctual, refrain from displays of temper, and provide services to families of deceased lawyers without charge. Ethics proper were not totally ignored, but when the code did venture into a discussion of such topics as the lawyer's sometimes conflicting duties to his client and the state, it did so with "bombastic ambiguity."[171] Sharswood pictured the lawyer in the traditional nineteenth century fashion as an independent, small-town litigator, not as a subordinate adviser to a corporation or (at a different social level) as an ombudsman for the ethnic poor. In the next twenty years, codes similar to that of Alabama were adopted by the bars of ten other states, all non-industrial, primarily rural, and mostly Southern.[172] Apparently the more homogeneous and traditionally-minded bars found Sharswood reasonably congruent with reality in their own states.

Although Sharswood's Ethics could not have become an appropriate guide for the urban bar, the widening social and financial spectrum of the profession in the major cities prodded the elite to consider the promulgation of ethical codes as well. Usually the movement to establish these codes was described by contemporaries as an attempt to counter-balance the growing "commercialization" of the bar. "Commercialization" had varied meanings depending

upon the speaker and the context.[173] Most often the term referred to the activities of "shysters" and "ambulance chasers" from the lower strata of the profession--those described as shysters tending "overwhelmingly to be Irish Catholics or Jews from eastern Europe."[174] Such lawyers, said one speaker at the 1904 annual meeting,

> can scent a law suit in an Easter morning sermon. In resourcefulness of evil and varied and ingenious rascality nothing has yet surpassed the shyster-at-law. It is he who has brought a great and noble calling into disrepute, and caused many a man to regard the name of lawyer as a synonym for legal brigandage and slick dishonesty.[175]

"We owe it to ourselves, to the profession and to the State," asserted the president of the New York State Bar Association in 1888, "to secure the discipline and punishment of those offenders who, by their immorality and illegal and dishonorable practices, have brought the legal profession into disrepute and who are dragging or holding it down from the lofty position which it should enjoy in public esteem."[176]

It is true, as Richard Hofstadter has argued, that "[m]uch of the talk in bar associations about improving legal ethics represented the unsympathetic efforts of the richer lawyers with corporate connections to improve the reputation of the profession as a whole at the expense of their weaker colleagues."[177] On the other hand, the elite intermingled praiseworthy motives with their self-interest.

It is possible to portray the ambulance chaser as a somewhat sympathetic figure in the abstract--"the new-immigrant neophyte in a large city where restricted firms monopolized the most lucrative business," the counselor of "the urban poor, new immigrants and blue-collar workers."[178] But as an individual, he was much less attractive. Consider, for instance, the practitioners at the notorious New York City firm of Howe & Hummel or, to be more specific, Joseph McCarthy.[179] At best, such enterprisers might send "cappers" and "runners" after possible clients, pay policemen and hospital personnel for information regarding accident victims, hound widows for powers-of-attorney before the funeral, scrutinize scandalous episodes in the lives of wealthy men in the preparation of divorce and breach of promise suits, and meticulously examine property titles for flaws which might serve as an excuse for litigation. At worst, shysters might dabble in blackmail, fraud, and perjury.[180]

Some of the elite also recognized a species of "commercialization" in the behavior of the new corporation lawyer. They argued that with "the rise of corporate industrialism and finance capitalism, the law, particularly in the urban centers where the most enviable prizes were to be had, was becoming a captive profession."[181] Legal writer Frank Gaylord Cook blamed the lawyer's "partner-

ship...with modern industrial combinations" for the legal profession's loss of "moral stamina" and "public respect."[182] George Bristol, writing in the Yale Law Journal, suggested that the "lawyer's former place in society" had been usurped by the corporation, an "artificial creature of his own genius, for whom he is now simply a clerk on a salary."[183] Though some attempt was made to argue that this development was only a response to technological improvement, even proponents of this latter view were made uneasy by the "growing tendency among the profession to desire big fees, and seek after a large income rather than to pursue the law as a science."[184] Occasionally, technological improvements themselves shared the blame for the lawyer's loss of professionalism. Walter George Smith, Chairman of the Section of Legal Education and a future ABA president, spoke with nostalgia of

> the old fashioned law office, where the accomplished lawyer and gentleman of the old school set an example of dignity and courtesy as well as of learning and was in close daily contact with the young men who were fortunate enough to be under his preceptorship....The times have changed completely. The modern law office, with its stenographers and typewriters and all the equipment of a counting house impressed the lesson. A sure, confident and speedy decision of questions involving interests of great magnitude is demanded of the metropolitan lawyer, and little by little the commercial spirit pervades his entire activities.[185]

It was even noticed that there was a certain similarity between the methods of the corporation attorney

and his shyster colleague. One anonymous lawyer writing in 1906 observed that in

> cases of personal injuries the person injured...had a hard course to steer between the Scylla of the attorney sent by the corporation to settle with him for a nominal sum before he should ascertain what his legal rights were, and the Charybdis of the professional brother who followed the ambulance to the hospital in order to be the first applicant for the job of bringing suit against the corporation.[186]

"We have in our ranks the ambulance chaser," said ABA committeeman Andrew A. Bruce at a meeting of the Section of Legal Education. "We have lawyers of great talent and attainment, but who are merely hired men...employed on a salary by great corporations....Above all," he warned, "we need to reassert our position as the members of a profession."[187]

Yet, despite extensive discussion of "commercialism" in both popular and legal periodicals, it is highly improbable that the American Bar Association would have adopted a code of ethics in the first decade of the twentieth century had it not been for an address delivered on June 28, 1905, at Harvard University by President Theodore Roosevelt. Roosevelt, whose experience in New York politics had not engendered an overly reverent view of the legal profession, used the occasion to arraign "the most influential and most highly respected members of the bar in every centre of wealth" who made it

> their special task to work out bold and ingenious schemes by which their wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth. Now, the great lawyer who employs his talent and his learning in the highly remunerative task of enabling a very wealthy client to override or circumvent the law is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and of disbelief in their efficacy.[188]

"Judging by the American Bar Association's twitch, Roosevelt had plunged deeply into a nerve."[189] At the annual meeting two months later, millionaire lawyer and former ABA Executive Committee member Alfred Hemenway flatly denied the truth of the President's charges. While Hemenway saw the ambulance chaser as a serious problem, his vision of the legal elite was beatific: "We are not degenerates. Today is better than yesterday....As to the legal profession, its learning is broader and deeper than ever before, its ethics more exacting."[190] ABA President Henry St. George Tucker took a more moderate tack, acknowledging that the "serious charge" of President Roosevelt "must give us pause" as it

> forces upon us, willingly or unwillingly, as an Association, the inquiry, not only whether the charge be true, but also the broader inquiry whether the ethics of our profession rise to the high standard which its position of influence in the country demands.[191]

The annual meeting approved an Executive Committee resolution establishing a committee to investigate the

"advisability and practicality" of adopting a code of legal ethics. In the following year, this committee, chaired by Tucker, pronounced the drafting of a code of ethics as "of very great importance." While the report referred vaguely to the types of "commercialization" which could be attributed to the legal elite, it dealt quite specifically with the sins of those at the other end of the profession. The "shyster, the barratrously inclined, the ambulance chaser," reported the Committee,

> pursue their nefarious methods with no check save the rope of sand of moral suasion....These men believe themselves immune; the good or bad esteem of their co-laborers is nothing to them, provided their itching fingers are not thereby stayed in their eager quest for lucre....Never having realized or grasped that indefinable something which is the soul and spirit of law and justice, they not only lower the morale within the profession, but they debase our high calling in the eyes of the public.[192]

A larger committee was then approved to draft the code, and those appointed to it were uniformly prominent members of the bar: corporation lawyers such as Jacob M. Dickinson, George R. Peck, Thomas H. Hubbard, and Francis Lynde Stetson; appellate judges such as Alton Parker, Thomas Goode Jones, and Justice David Brewer; and law teachers Ezra Thayer and Henry St. George Tucker. When compared with the usual dawdling of ABA committees, this one went about its work with uncommon dispatch and seriousness of purpose. At one point a three-day meeting

of the Committee was held in Washington, and almost every member attended. A draft was submitted to the membership, and a thousand letters of criticism were tabulated by that lover of statistics, Lucien Hugh Alexander, before the suggestions were incorporated into later versions.[193]

Characteristically, Oliver Wendell Holmes expressed "skepticism as to the advantages of abstract exhortation" and urged that the code at least be made "short and pungent...omitting all moral platitudes."[194] It is doubtful that he was much pleased with the final draft, presented to the annual meeting of 1908, for it was frankly based on Sharswood's Essay. In fact, Sharswood's original book was reprinted as Volume 32 of the ABA Reports at the expense of Committee member Thomas H. Hubbard, president of the International Banking Corporation.[195] As in the medical profession, the rules of conduct were given a high-sounding title: "The Canons of Legal Ethics." There is little doubt that the use of the word "canons," which had always been associated with ecclesiastical law, was an attempt to infuse these largely hortatory statements with some pseudo-religious gravity.[196] "The public and press expect that we shall formally promulgate some decalogue," said one member. "The time is opportune if we wish to maintain the traditional honor and dignity of our profession."[197] Thirty one of the 32 canons drawn up by

the Committee were then formally approved by the Association without change.[198]

Only Canon 13, which dealt with contingent fees, "aroused a long and bitter discussion."[199] Sharswood had argued strongly against the propriety of fees paid to an attorney only in the event that a case was won; and Sharswood's opinion was shared by most influential members of the American Bar Association in the late nineteenth century. For instance, in 1879, Calvin Child referred to the evils of contingent fees as "self-evident"; three years later, Gustave Koerner pronounced them "gambling contracts"; and in 1891, Alfred Russell blamed such "mercantile usages" for bringing down "the profession from its high place as a chief agency in our Christian civilization and [making] it a trade."[200] The contingent fee was, of course, a device frequently employed by the ambulance chaser and viewed with repugnance by the elite for that very reason. In a letter to Lucien Alexander concerning the proposed canons, Philadelphia Common Pleas Judge William H. Staake complained that contingent fees allowed men "of mediocre ability [to] acquire wealth--if not reputation--while the learned, conscientious practitioner, who would not accept a case upon a contingent fee is delayed, hindered and debarred from practicing his profession."[201]

Yet even within the leadership circle of the American Bar Association there were those who believed that the contingent fee had a legitimate place in legal practice. With the dramatic increase in the industrial accident rate at the turn of the century, the contingent fee was often, in the words of Simeon Baldwin, "the only protection for persons having meritorious causes of action to command the aid of competent counsel."[202] What gave the drafting committee the greatest pause, however, was the very ubiquitousness of the practice in the early decades of the twentieth century. A committee of the Massachusetts Bar Association studying the same question a few years later announced that contingent fees were "too usual in the practice of the Bar in this country to justify us in assuming a superior virtue about them."[203]

In the end the ABA Committee waffled. Canon 13 read: "Contingent fees may be contracted for, but they lead to many abuses and should be under the supervision of the court."[204] Future Montana senator Thomas Walsh, in a long and strongly worded statement, warned his colleagues that if the canon were to imply that the practice of accepting contingent fees was "discreditable," such business would then be thrown "into the hands of the very lawyers whose reprehensible practices have brought contingent fees into so much disrepute."[205] Eventually cosmetic changes were

made, and Canon 13 was amended to read: "Contingent fees, when sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges."[206]

In one respect, the Canons of Legal Ethics went beyond the strictures of Sharswood and ordinary professional practice before the turn of the century. Although Sharswood strongly endorsed the view that business should seek the lawyer and not the other way around, his Essay did not even mention much less condemn advertising by lawyers. Morever, the Alabama code of ethics, upon which the ABA canons were based, sanctioned "tendering professional services to the general public" through newspapers and circulars. Only the "special solicitation of particular individuals" was a practice "to be avoided."[207] But both advertising and the idea of professionalism had changed dramatically between 1887 and 1908, and the ABA canon on the subject specified that lawyers not advertise beyond the distribution of ordinary business cards. Significantly, the language of the canon "seems to have been taken bodily, even in its phraseology, from the ethical 'principles' of the American Medical Association."[208]

Undoubtedly the drafting and approval of the advertising canon reflected the xenophobia and economic concerns of the elite. A report of one ABA committee in

1888 blamed the "evils of the American system of divorce" on the existence of "a small and unscrupulous class of practitioners in the larger cities...whose advertisements and circulars are a disgrace to the profession."[209] Likewise, in 1897 the Committee on Legal Education noted that "professional advertising" was "notoriously common" along with a "consequent scaling down of profession charges, not because they are excessive, but solely because of a natural fear of a loss of business."[210] Recently, however, too much emphasis has been placed upon these more obvious motives for the restriction of professional advertising.[211] The same canon which was directed at the ambulance chaser went on to condemn the advertising sins of the elite as well--"furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the magnitude of the interests involved, the importance of the lawyer's position and all other self-laudation."[212] Furthermore, unlike the persistent support given to the contingent fee, there was little theoretical justification advanced for legal advertising. Nor, for that matter, was there much philosophical defense of its exclusion. "Indeed, it is strange," wrote Herbert Harley (an exception to the rule), "that so many lawyers themselves cannot explain why advertising is tabu among lawyers."[213] It is more than

likely that the success of the medical profession's campaign against medical advertising spilled over into the legal profession. The middle class was now convinced that quacks advertised and professionals did not. Even in divorce hungry Nevada, at least one lawyer was suspended by the state Supreme Court for advertising, in Eastern papers, the easy terms on which marriages could be terminated.[214]

Appropriately, therefore, the greatest hullabaloo over professional ethics in the American Bar Association before 1930 was occasioned not by the activities of some obscure ambulance chasers but by the antics of a federal district judge, Kenesaw Mountain Landis, whose face was "almost as familiar to the public as that of Charlie Chaplin." If Landis had set out to aggravate the worthies of the ABA, he could not have done a better job. First, he was a high school dropout who had attended a YMCA law school in Cincinnati for one year and Union College of Law in Chicago for another. Second, he was a Progressive who had no difficulty ignoring the law "in the interest of what he conceived to be justice." For instance, he relished fining Standard Oil of Indiana the unheard of sum of $29 million, even though the Circuit Court of Appeals shortly revoked the penalty and reprimanded the judge. A petty thief might be set free or fined one cent. "The bootlegger--for Landis was an ardent prohibitionist--went summarily to jail

for the maximum term." Third, and most importantly, Landis was "grand-stand judge" who thrived on publicity and enjoyed making a scene for reporters. Of him, Heywood Broun wrote, "His career typifies the heights to which dramatic talent may carry a man in America if only he has the foresight not to go on the stage."[215]

After the notorious "Black Sox" scandal of 1919, Landis was invited by team owners to become the first baseball "commissioner" (a title chosen by Landis himself) at a salary of $50,000--$42,500 more than his judicial salary. Landis accepted, but anxious to retain his public forum, refused to resign his judgeship. Despite criticism from Congress, Attorney General Palmer ruled that Landis' decision violated no law. The new commissioner might have weathered the storm of criticism had it not been for his native injudiciousness. In February, 1921, Landis paroled a bank teller who had pleaded guilty to embezzling $96,000 from his employer, blaming the bank for paying the man only $90 a month in wages. Impeachment proceedings were shortly commenced in the House of Representatives.[216]

At the annual meeting of 1921, former ABA president Hampton Carson, a leader of the Philadelphia bar, introduced a resolution pronouncing the Association's "unqualified condemnation" of Landis for "accepting private

emolument while holding the position of federal judge....Of what use is it, my fellow members," Carson continued,

> for us to prescribe canons of ethics for the regulation of the conduct of ourselves as active practitioners if we know that a man on whom the judicial ermine has fallen has ethically failed by yielding to the temptations of avarice and of private gain? That a federal judge...should yield to the solicitation and the enticement and the practical deception of his own moral character and the sapping of his judicial strength, by taking $42,500 a year from the allied clubs of baseball players is simply to drag the ermine in the mire....[T]here rises up the withering scorn of the profession against the man who has thus stained its honor.[217]

"Stormy debate ensued, interrupted by applause as speakers in all parts of the convention hall arose to support or denounce the resolution."[218] Eventually the commissioner-judge was censured by voice vote, the only individual so reprimanded in the first fifty years of the Association's history.[219] The story was front-page news across the country, and the Association received much publicity, both favorable and unfavorable, from newspaper editorials.[220] Still, there seemed to be little immediate effect on Landis. Congress shelved its investigations, and Landis continued to hold his two jobs. Washington attorney E. A. Harriman grimly assured the American Academy of Political and Social Sciences that the inaction of Congress was due to the greater sympathy of the American people for "the standards of judicial conduct endorsed by the National Baseball Association than with those endorsed by the

American Bar Association." Harriman even found a melancholy precedent "in Roman history as to the effect of a popular belief that amusements are more important than laws."[221]

On February 18, 1922, however, Landis resigned as district judge to devote his "attention in the future entirely to baseball."[222] That same year the Association appointed a blue-ribbon Committee on Judicial Ethics to draft a code of conduct for judges, believing "it would be much fairer and better if the Association, instead of picking out individual cases for condemnation, should express its opinion of what the members of the American Bar Association expect from those who sit upon the Bench."[223] These canons were adopted by the Association in 1924.[224] Clearly, if Landis had not been Landis and had made his money in stock speculation, law school teaching, or Chautauqua lecturing, he would have been ignored by the ABA. What made Landis déclassé was his personality, his association with sport, and the large sum that rewarded his rejection of elite norms. None of these were compatible with the ABA's notion of "upholding the honor of the profession of law."[225]

It was one thing to write codes; it was another to enforce them. There was a brief attempt to bring about uniformity between the ABA's Canons and the codes of the

various states, thus approximating the centralized power of the American Medical Association; but this endeavor was soon abandoned. States adopted codes more suited to their own needs. "There is no national Bar," announced the ethics committee of the Massachusetts association when it specified its departures from the ABA model; "every state bar is independent of every other."[226] Once more the American Bar Association found itself recommending actions to state associations that it had no means to enforce. A contemporary French observer, who held the Association in great esteem, nevertheless noted that the ABA was hardly able to go much further in the implementation of its ethical code than to answer a few questions about it in the Journal.[227] Of necessity, the practical work of enforcing ethical standards had to be left to local associations, especially those in New York. For instance, the Association of the Bar of the City of New York and its less exclusive sister organization, the New York County Lawyers' Association, together contributed up to $25,000 a year during this period to prosecute "delinquent members of the profession."[228]

Even when state and local associations followed the lead of the ABA in adopting a modified version of Sharswood, they discovered that those canons which were not dated when adopted by the ABA in 1908 quickly became so as

a result of changing economic conditions. In 1922, the Chairman of the ABA Committee on Professional Ethics and Grievances frankly admitted that the

> ever increasing complexities of modern business, the rapid changes in its methods, and the relations of lawyers thereto, are constantly raising questions concerning proper professional conduct that were not contemplated--or even dreamed of--when the canons were prepared. As a consequence the committees of local bar associations find that the canons are not only silent on many of the questions they are called upon to answer, but do not even furnish any general principle applicable thereto.[229]

Likewise, Charles A. Boston, who more than any other member of the American Bar Association had promoted the idea of adopting codes of legal ethics, stated that few of the questions submitted to the ethics committee of the New York County Association, of which he was chairman, could "be answered by any provision of the canons."[230]

Furthermore, bar associations became increasingly aware of an ironic, but easily predictable, consequence of their prohibitions against advertising--the "increasing encroachment on the practice of the law by lay agencies." Accountants, real estate brokers, and trust and title companies all solicited business and set competitive fees unencumbered by the codes of legal ethics. It vexed lawyers from every strata of the profession to see a placard in a trust company window inquiring, "Have you drawn your will?" Julius Henry Cohen, chairman of the New

York State Bar Association's Committee on Unlawful Practice of the Law, urged the ABA to fight this growing source of competition, warning that "if we do not set our teeth firmly against this effort of laymen throughout the country to commercialize what is the practice of law we shall find that we have handicapped ourselves by our own standards."[231]

Perhaps the most surprising and, in the end, most telling comment on the effectiveness of the ABA's Canon of Legal Ethics is the fact that until 1922 the American Bar Association had no means of enforcing the code's standards on its own members. Until that date, the Committee on Professional Ethics and Grievances (and its predecessors) could only collect information and make recommendations to the Association. The Association had no procedure to expel members. Needless to say, in the words of one ethics committee chairman, this deficiency "led to much embarrassment and the necessity of constant explanation."[232] Another chairman discovered that an ABA vice-president was "one of the worst offenders against the spirit of a certain canon." The chairman could do nothing, of course, but worried that "if it should become generally known...the moral sanction of the Code of Ethics" would be completely destroyed.[233] In 1922, the ethics committee was finally given the authority to bring charges, hold

hearings, and (subject to the approval of the Executive Committee) provide for the forfeiture of ABA membership. In 1928, for the first time, disciplinary proceedings against offending members were published by the Association, and the lawyer employed by the ABA to handle such affairs was authorized to "bring the matter to the attention of local authorities who have the power to disbar."[234]

It would be unwise to be too skeptical of the effectiveness of the ABA canons. By 1928, for instance, a group of Reno divorce lawyers held a closed-door session to decide how best to answer an ABA request for copies of an advertising brochure which they had produced.[235] The Association, like the Pope, had no legions, but its disapproval now carried more weight than it had at the beginning of the century. Still, it cannot be said that the canons, even when they were relevant and could be enforced by state and local bar associations, were very effective as "gatekeeping" devices. Rigorous enforcement of the rules of conduct would have required much time, expense, and the distasteful airing of unseemly conduct by professional brethren several cuts above the social level of the archetypal ambulance chaser. In 1914 a speaker before the Alabama Bar Association vividly described ambulance chasing in Birmingham and added that his

listeners "would be shocked beyond expression if [he] were allowed to tell [them] of the prominent law firms who are guilty of the practice."[236] No wonder a member of the ABA Committee on Professional Ethics found it "quite difficult to get information and action on matters involving violation of professional ethics because of a fraternal feeling which exists among members of the profession."[237] When the bar associations did find unpopular practitioners to investigate, like the Reno divorce lawyers, the significance of their censure was often negligible. "The work thus far done has helped," wrote Herbert Harley, "but after all it is more like bailing the boat than stopping the leak."[238]

In fact, all the "gatekeeping" activities of the American Bar Association during its first fifty years, including its attempts to promote restrictive educational requirements, have an element of "boat bailing" about them. It was not the ABA requirements but the Great Depression which stimulated state legislatures to tighten educational standards, their reluctance to do so overcome by economic collapse.[239] Meanwhile the Depression also struck hard at non-elite schools, lowering enrollments significantly, while "total attendance at AALS-member schools dropped less than two percent between 1928 and 1931."[240]

In the short run, the medical profession lost financial ground to the legal profession during the Depression. One might postpone a hernia operation but not a bankruptcy proceeding. In the long run, however, the American Medical Association was much more successful in reducing physician "overcrowding" and thus in raising both the status and income of doctors, because the AMA had early consolidated its power over the medical schools. When during the Thirties, "the Council on Medical Education and Hospitals wrote a letter to the various medical schools saying [that they] were admitting more students than could be given the proper kind of training....every school reduced the number it was admitting."[241] Such a course was impossible in the legal profession. The American Bar Association was forced to rely on market forces that were only slightly skewed by state laws and professional suggestion. Many factors provided medicine with its position of advantage: an unchallenged grip on first position both in status and income after World War II. Perhaps most important was its ability to convince laymen and legislatures that the foundation of its expertise rested upon the kind of higher authority which had been claimed by theology in the seventeenth and eighteenth centuries and by law in the nineteenth.

CHAPTER 8

THE HARDENING OF CONSERVATIVE ATTITUDES, 1911-1919

In the introduction to The End of American Innocence, an intellectual history of the period 1912-1917, Henry F. May questions a widely held belief that World War I precipitated the great American cultural revolution of the twentieth century. While recognizing "much truth in this as in most popular myths," May, nonetheless, argues that the years immediately preceding the war also demonstrated the same tendencies that have become associated with the twenties. The prewar epoch, he believes, was the true "time of beginnings," the time when "people were always talking about the New Freedom, or the new poetry or even the new woman." Thus May concludes that the earlier period provides the best ground from which to view "both the end of Victorian calm and the beginning of cultural revolution...the massive walls of nineteenth century America still apparently intact...[and] many different kinds of people cheerfully laying dynamite in the hidden cracks."[1]

May's thesis seems strikingly appropriate to the history of the American Bar Association. Beginning in the

second decade of the century, Bar Association leaders became increasingly perplexed and irritated by the sudden acceptability of ideas but lately considered radical. If for every action there is an equal and opposite reaction, then it is not surprising that the ABA reacted to this unexpected rejection of its ideals with a "hardening of conservative attitudes."[2] The Association soon tested its ability to influence public opinion and public policy and was even modestly successful within a limited sphere. Yet despite its growth in membership and prestige, the Association was powerless to halt the increasing divergence of American political and social life from the path into which the legal elite had hoped to direct it. The onset of World War I raised false hopes among bar leaders that the moral crusade of war might simultaneously purge the nation of its alien accretions and raise the prestige of the legal profession at home and in the post-war world. The legal elite soon discovered, however, that the war only intensified the very trends it so despised and feared.

Before the first inauguration of Woodrow Wilson, the mood within the Association was ambivalent. The crusade against "judicial recall" had already begun, but forthright progressivism was still endorsed by major speakers at the annual meetings. For instance, shortly before his election as president of the Association in 1912, Frank Kellogg

delivered an address consistent with his reputation as a "trust buster." He expressed support for anti-trust actions, workman's compensation and the federal regulation of hours and conditions of labor. He denied that the Constitution was "a commandment of divine origin." "I am an optimist," Kellogg declared,

> I have great faith in the intelligence and believe in the high destiny of our people. I recognize the wisdom of our constitutional representative democracy, and I believe the best way to preserve it is to welcome these changes....These movements are not the work of demagogues, nor flotsam and jetsam upon the tides of human history. They are deep-seated. They spring from the great mass of the people. They are movements of the public conscience and never have been and never will be checked or stopped.[3]

The outgoing president in 1912, S. S. Gregory, likewise expressed confidence in progressive trends.

> Let us not take counsel of our fears nor share the dark forebodings of some of those elderly gentlemen, and their satellites, located at the lower end of Manhattan Island, who occasionally pause...from their laudable occupation of clipping coupons, to emit a few hoarse and dolorous prognostications, bewailing the prevalent "spirit of unrest" and declaring the outlook for the future to be most gloomy and portentous.[4]

At about the same time, however, the leadership of the American Bar Association did, in fact, begin to share these "dark forebodings" as it grew increasingly more disillusioned with the direction of the reform impulse. The legal elite had earlier imagined itself guiding progressivism into channels beneficial to the profession.

For instance, it had reason to hope that contemporary enthusiasm for organization, expertise and efficiency might strengthen the public influence of bar associations while simultaneously reducing that of "reckless politicians." To its dismay, the elite discovered that the latter manifestations of progressivism tended to produce more legislative experiments, some of which threatened to politicize sectors of the judicial system heretofore firmly controlled by legal professionals. The dividing line between the American Bar Association's earlier, more sympathetic attitudes towards progressivism and the later stereotyped conservatism which the Association displayed in the Twenties and Thirties is indistinct. But, it is clear that after 1912, ABA speakers grew increasingly pessimistic about the future of the nation and more frequently challenged Association members to stand against contemporary assaults upon traditional legal order.

In the same year that Kellogg and Gregory assured the annual meeting of their confidence in the progressive spirit, Henry D. Estabrook, corporate solicitor for Western Union, attacked the "crass misrepresentation of current muckrakers" in regard to the judiciary. "Why," declared Estabrook, "do the heathen rage and the people imagine a vain thing? What awful cataclysm has happened in our republic that any patriot should thus disparage the work of

those who founded it?"[5] Attacks upon lawyers as a conservative class and upon injustice committed in the name of law were hardly a recent development, yet the elite of the bar now believed themselves (perhaps rightly) to be more threatened by such criticism. Even William Howard Taft, who spoke judiciously by nature, defended the legal profession from contemporary censure with uncommon vigor. In a speech to the Association of American Law Schools in 1913, Taft declared that American lawyers were "not opposed to progress, real progress" but he avowed that they had been "driven by circumstances into an attitude of opposition. The proposals made for progress have been so radical, so entirely a departure from all the lessons of the past...that we have been forced to protest."[6]

The rhetoric of lesser men turned this restive dissatisfaction with progressive trends into a shrill <u>la patrie en danger.</u> For instance, in his presidential address to the National Conference of Commissioners on Uniform State Laws of 1913, Charles Thaddeus Terry admonished his colleagues to set their "faces, inflexibly and sternly...against the onrushing horde of those who would overthrow our system of government and reverse the precepts of our fathers."[7] Likewise, at the ABA banquet of 1914, former Texas Senator Joseph W. Bailey gravely contemplated "the forces of disorder" and charged his

listeners to stand against them with all their might. The occasion is worthy of note for two reasons. First, Bailey had not always been a defender of the status quo; he had helped pass the Hepburn Bill and had initiated legislation in 1909 which eventually resulted in the adoption of the Sixteenth Amendment. Second, it was customary for ABA banquet speakers to make jokes, not calls to action. Bailey, however, warned his colleagues that there was "a spirit of restlessness and discontent" abroad in the land.

> Not merely a spirit of criticism [but] a spirit of leveling destruction. While we sit here tonight around these boards where the innocent mirth of social enjoyment expands into the warmth of social virtue, the enemies of this government are digging at its very foundations; and it is the duty, as it will be the glory of American lawyers, if they can, to save it from the enemies who assail it....The danger of the republic is not from without. It is from within....In the elder days the imperishable principles of liberty and independence were a theme in every public assembly. Yet the man who dwells upon them now is stigmatized as a reactionary. A reactionary in modern phrase means, and only means, a man who believes in the constitution of his country.[8]

The causes of this comparatively sudden discomposure on the part of ABA leaders are varied and not completely subject to analysis. A simple weariness with the earnest remedies of the recent past should not be dismissed out of hand as one possible factor. "I live in a state where we have had two decades of reform," said Colorado Bar Association president T. J. O'Donnell to the ABA convention of 1916, "and I have been for all reforms, one reform one

year and another reform another year, until they were all tried out. And now I think I am against them all."[9] The following year ABA president George Sutherland criticized the "diffused desire to do good" as "an indefinite, inarticulate yearning for reform and uplift...an uneasy, vague state of flabby sentimentalism about things in general." Progress, Sutherland asserted, was "not a state of mind" but a condition that was capable of analysis.[10]

Of course, psychological ingredients were as much the effect as the cause of the legal elite's disenchantment with the progressive spirit. The elite certainly could not ignore the significance of recent political developments. Only a few years before, William Howard Taft had inherited the progressive mantle from Theodore Roosevelt; and Taft's variety of progressivism, judicially minded and cautious, was typical of the slow, deliberate change preferred by the American Bar Association leadership. It is not coincidental that Taft was elected president of the Association in the year following his national defeat. By 1912, however, Roosevelt had denounced Taft as a reactionary. ABA leaders were appalled at Roosevelt's campaign rhetoric (of which more below), but they must also have been sobered by the election results themselves. Of the fifteen million votes cast, Roosevelt, Wilson, and Debs received over eleven million. The leftward shift in

national sentiment was undeniable, and whatever designations now seemed appropriate to describe the ideological stance of William Howard Taft and the American Bar Association, "majority" was not one of them.

Furthermore, before 1912, progressivism was never strong enough to threaten the legal status quo. Despite Roosevelt's extraordinary energy, his practical legislative achievements were modest. In part, this was because conservatives in Congress were too entrenched to permit passage of much of his proposed liberal legislation. The situation was somewhat reversed in the Taft Administration with an increase in the number of congressional progressives but a lack of energy on the part of the White House. Suddenly, with the inauguration of Woodrow Wilson, Congress and the President found themselves in general agreement, and a number of progressive measures became law within a few months: the Underwood Tariff, with its income tax provision; the Federal Reserve Act; the Federal Trade Commission law; and the Clayton Anti-Trust Act. These were followed in 1915 and 1916 by the LaFollette Seaman's Act, the establishment of the U. S. Shipping Board, a system of federal farm loan banks and the Keating-Owen child labor bill. While this small flood of legislation is insignificant by New Deal standards, its psychological

impact upon contemporary Bar Association leaders should not be underestimated.

Peter Meldrim, ABA President for 1915, spoke grimly of certain unnamed legislation which had been enacted "under the guise of police power or public policy" and which had affected affairs "long since in all civilized lands regarded as outside governmental functions." These laws, he said, had established "commissions exercising powers of sovereign States" and had encouraged "the Demos...to destroy the limitations of the Constitution."[11] The next ABA president, Elihu Root, a more sophisticated observer of the political scene, expressed a greater sympathy with current trends. Yet he too feared that "the rapidity of change" might spawn "injurious error" as legislatures came under the control of "[a]rdent spirits" who wished to "impose upon the community their own more advanced and perfect views for the conduct of life." He warned his audience not to forget that "every increase of governmental power to control the conduct of life [was] to some extent a surrender of individual freedom" and urged that regulatory agencies, which carried "with them great and dangerous opportunities of oppression and wrong," be themselves regulated.[12] With less equanimity, Walter George Smith, president in 1918, expressed alarm that "Socialistic theories [had] warped the former attitude of large bodies

of voters." These groups, he said, now believed that opposition to paternalistic government had been a mistake and that competition ought to "give place to governmental regulation."[13]

In 1916 former Secretary of War Lindley M. Garrison devoted his entire address to an attack upon progressivism. Garrison had served in the Wilson Cabinet from 1913 until February, 1916 when he resigned on account of his advanced preparedness views. (There is, of course, a delicious irony in the spectacle of Garrison resigning his cabinet post because of strong convictions in regard to conscription and a federally-controlled military reserve, and then, a few months later, making his way to the ABA convention to denounce the growth of the national government. This variety of tunnel vision was, however, common to many contemporary conservatives.)[14] Garrison charged that "the modern tendency of casting innumerable duties upon the federal government which it was never intended" to bear had brought the individual under the jurisdiction of "anomalous bodies that have jurisdiction to regulate, prescribe and practically to prohibit." Garrison was especially annoyed that efficiency and the public welfare seemed the twin justifications for "every novel exercise of governmental power," when it was clear to him that "real efficiency and real public welfare" could only

be achieved by keeping the government "within its proper confines and bounds." With a pessimism that seems a hallmark of most of these speeches, Garrison envisioned the coming era as one ripe for "the demagogue and the charlatan." These, he believed, would "urge on the people from one excess to another in the abuse of power," sweeping over any opponent who had only "cold reason and right to support him." Garrison mournfully concluded that it was "almost a reproach to refer to constitutional limitations. Impatience is the reward of those who try to urge them."[15]

While Garrison accurately captured the gloomy tone of the period, it was George Sutherland, Senator from Utah and ABA president in 1917, who delivered the most articulate and reasoned exposition of contemporary conservatism. Sutherland was a sort of scholarly Taft who did not shrink from describing himself as a conservative, acknowledging "a perverse tendency to put a good deal of faith in experience and very little in mere experiment." It is, however, unfortunate that Sutherland was later lumped with Justices Pierce, Butler, and Van Devanter as one of the "Four Horsemen" of the New Deal period since he was no hidebound reactionary and freely admitted the necessity for flexibility in the interpretation of the Constitution.[16] Sutherland's position was typical of other ABA leaders in that he argued for a slow and cautious response to new

social conditions. His speech of 1917, "Private Rights and Governmental Control," was a small masterpiece of conservative exposition which could, with appropriate downgrading of the vocabulary, be passed off as the work of some ideological brother in the 1980's. Sutherland did not argue that legislators were vicious or revolutionaries, just naive and inexperienced. The average law maker, he said, sowed an unknown seed which frequently produced a harvest "of strange and unexpected plants whose appearance is as astonishing to the legislator as it is disconcerting to his constituents." Sutherland accepted the growing power of administrative bureaus as "inevitable and necessary" but he argued that "governmental incursions into...new territory [were] being extended beyond the bounds of expediency into the domain of doubtful experiment." Sutherland believed the protection of traditional liberties necessitated the separation of the law-making and judicial functions of bureaucratic agencies.[17]

In all probability, Sutherland was elected president of the American Bar Association in 1917 because of a service he had rendered to the organization five years before. In 1912, as a non-member, he had agreed to deliver a speech to the annual meeting which all but demolished the arguments of progressives who advocated the institution of

judicial recall--the removal of a judge and/or the overturning of his decisions by popular vote.[18] For a half dozen years or more, progressive disenchantment with the courts had been growing. Critical of appellate decisions rendered in cases such as Lochner v. New York (1905) and Adair v. United States (1908), progressives argued that undemocratically appointed judges should not be allowed to further retard legislative advance through "judicial legislation." Extremists denounced the courts as "tools of the trust," stooges of "entrenched corporate interests," and the "enemies of the working man." More sophisticated critics condemned the uncertainty implicit in closely divided decisions, argued that judges were unsuited by training and temperament to render decisions in the light of social needs, and even attacked the legitimacy and historic basis of judicial review.[19]

For instance, in 1907 J. Allen Smith, a professor of economics, anticipated Beard in portraying the Constitution as a document deliberately designed to foil the will of the people. "Selfishness and greed," said Smith, were now "securely entrenched behind a series of constitutional and legal checks on the majority."[20] The outraged leaders of the Seattle bar immediately branded the author of The Spirit of American Government an "anarchist" and claimed that his attack upon the Supreme Court "would make good

evidence to substantiate a plea of insanity."[21] Not all critics were laymen, however. Progressive members of the legal profession also added their voices to the growing chorus of complaints about appellate decisions, men such as Judge Kenesaw Mountain Landis, Chief Justice Walter Clark of North Carolina, and William Trickett, dean of Dickinson College School of Law.[22] Even members of the American Bar Association leadership like Roscoe Pound and Andrew A. Bruce produced solid critiques of "judicial legislation."[23]

Unfortunately for conservatives, the progressive cause was championed by an influential individual most unsympathetic to the legal mentality, the President of the United States, Theodore Roosevelt. In 1906, he attacked Illinois District Court Judge J. Otis Humphrey for ordering the dismissal of charges against participants in the creation of the monopolistic National Packing Company. (The defendants had successfully claimed immunity from criminal prosecution on the questionable grounds that they had previously been compelled to testify against themselves by officials from the Bureau of Corporations.) In a special message to Congress, the President described the ruling as "miscarriage of justice" which came "measurably near making the law a farce."[24] Mildly rebuked by Associate Justice Edward D. White in a speech shortly thereafter, the President characteristically escalated the

controversy by including in his annual message to Congress comments disparaging "the growth of an absurd convention which would forbid any criticism" of the judiciary.[25]

At the American Bar Association meeting of 1907, soon-to-be Secretary George Whitelock moved that the President be censured for claiming the right to publicly criticize the judiciary. The motion, however, "created instant disapproval from all parts of the hall," probably because such an action could be interpreted as a partisan attack. Doubly embarrassing to the Association was the fact that Roosevelt's erstwhile political opponent, ABA president Alton B. Parker, was in the chair. Although Whitelock refused Parker's repeated requests to withdraw the motion, it was finally tabled after an hour's debate.[26] Clearly, Association members were not yet united in the belief that criticism of the judiciary--even by the President of the United States--threatened the status of the legal profession.

Roosevelt never recanted his belief in the righteousness of rebuking judges whose decisions were not in line with what he considered to be the public interest. The "courts need to have a little rapping now and then," he wrote privately in the aftermath of the Humphrey controversy.[27] But as President, Roosevelt thereafter restrained himself from any further public criticism of the

courts until his last annual message to Congress. Even then he referred to the matter only in general terms.[28]

As an ex-President, though, Roosevelt felt less compunction about airing his views, especially as the rift between the conservative and progressive wings of the Republican Party widened. In September 1910, Roosevelt made two speeches explicitly criticizing the judiciary. In the first of these, before a joint session of the Colorado legislature at Denver, Roosevelt referred to those Supreme Court justices who had composed the majority in the Knight and Lochner cases as "perfectly honest, but...absolutely fossilized of mind." Two days later at Osawatomie, Kansas, he implied that the courts were the most serious obstacle to progressive reform. In response to extensive criticism, Roosevelt backed off a bit, complaining to Henry Cabot Lodge that his remarks had been "twisted out of connection."[29] Indeed, his actual commitment to the notion of the recall of judges remained ambivalent at least until the New York Court of Appeals announced its decision in the case of Ives v. South Buffalo Railway Co. on March 24, 1911. Not only did this opinion rule the state employers' liability act unconstitutional under the Fourteenth Amendment but, by a quirk in federal law, the case could not be appealed to the U.S. Supreme Court where it might well have been overturned. The Ives decision received a

great deal of criticism, both because the principle of workman's compensation had been widely endorsed and also perhaps because critics found it politically less risky to castigate an appellate court other than the Supreme Court of the United States.[30]

Generally speaking, criticisms of the courts by the legal professionals, if not gladly embraced by conservatives, were at least given a respectful hearing and aroused minimal intraprofessional discord. For instance, as had been previously mentioned, Roscoe Pound's address to the 1906 annual meeting of the ABA was taken in stride by the Association leadership.[31] Conversely, criticism of the bench by the laity seems to have generated increasing hostility from the bar during this period. Two years after Pound's speech, one C. C. Flansburg told the Nebraska State Bar Association that "public criticism of the courts" was almost always "unwarranted...improper and inexcusable."[32] The same contrasting attitude between popular and professional criticism of the judiciary is obvious in an exchange of letters between Senator Elihu Root and President William Howard Taft shortly after Roosevelt delivered his Osawatomie and Denver speeches. Root, trying to put the best face on the matter, argued that there was not really much new in the New Nationalism, "nothing more than we learned in the law school." Furthermore,

Roosevelt's "grumbling at the decisions of the Court" was not offensive *per se*.

> We all do that....The question as to how and when and in what words a man expresses such an opinion about a decision of the Court depends very much on temperament and training. I don't suppose it would occur to you or me to select the Colorado Legislature as the recipient of our confidences upon such a subject.[33]

Taft, though more pessimistic than Root, generally agreed with his friend. "The difficulty about the speeches," said Taft,

> is their tone and the conditions under which they are delivered....I am the last one to withhold criticism from the Supreme Court, and in the two [cases] that Roosevelt selected for his criticism I fully agree with him....The whole difficulty about the business is that there is throughout the West, and especially in the Insurgent ranks to which Theodore was appealing, a bitterness of feeling against the Federal Courts that this attitude of his was calculated to stir up.[34]

Taft was more charitable to Roosevelt than was the legal press. *Bench and Bar* advised that while Roosevelt's ideas about the independence of the courts had "always been more or less heretical," they now seemed on the verge of "becoming revolutionary, if not anarchic." The periodical further warned that no one of the ex-President's views should "ever again [be] entrusted with the power of appointment to the Federal Bench."[35] The *Virginia Law Register* termed Roosevelt's comments "presumptuous" and the "horseback opinion" of a layman.[36] *Case and Comment* published a defense of the *Lochner* decision by an ex-

president of the American Bar Association, Alton B. Parker, and a negative assessment of Roosevelt's remarks by the current president, Edgar H. Farrar.[37]

Conservative alarm intensified when in the following year the principle of judicial recall was actually incorporated in the proposed constitution of Arizona. In an impassioned speech to the Senate, a speech which his biographer noted "differed widely from his calm analytical discussion of the tariff, reciprocity and many other bills," Elihu Root strongly opposed admitting Arizona to statehood.[38] Root asserted that judicial recall struck "at the very heart of our system of government" and was "not progress [but] degeneracy." He claimed its proponents preferred a legislature "controlled by Marat and Danton and Robespierre [to] a Supreme Court presided over by Marshall." And he orated that the "most arrogant majority" could not override justice since God and "the eternal laws" stood behind it.[39] When the resolution passed the Senate, it was vetoed by President Taft on August 15 in less dramatic but nonetheless determined language.[40]

The Arizona controversy only augmented the concern of the legal elite with the growing popular interest in judicial recall, and it further stimulated the flurry of law journal articles and bar association discussions on the

topic.[41] With few exceptions, speeches to state bar associations flayed the proposed reform, and one law journal went so far as to carp at critical remarks once directed at the courts by President Taft.[42]

Taft's veto of the Arizona resolution occurred only two weeks before the ABA annual meeting, and there, as might have been predicted, the topic of judicial recall was not neglected. In his presidential address, Edgar H. Farrar took aim at the "virus" which had been so quickly transmitted from the territory of Arizona to the state of California and wondered if "the disease [would] progress further." The recall of judges, declared Farrar,

> drags down the Goddess and sets the hydraheaded Demos on the throne of justice and enables the ignorant suffragan to ostracize a judicial Aristides because he is tired of hearing his judgments called just....The wise and brave words uttered by President Taft in his veto...will pass into the political classics of our country and, if reason has not gone from the minds of the people, will act as a complete antidote to this new social poison.[43]

Farrar, though a prominent Gold Democrat and a corporation lawyer, was not a reactionary.[44] Neither was retired Associate Justice Henry B. Brown, who in addressing the Association in 1893 had suggested advanced labor legislation, government ownership of utilities, and a million dollar limit on inheritances allowed to any one individual.[45] Speaking before the ABA in 1911, Brown

referred to the recall generally as "a somewhat expensive and clumsy devise" which might nonetheless "turn out to be of great service in disposing of unpopular officials." But of course, he continued, it was hardly necessary to tell such an audience that recall was "inapplicable to the judiciary and utterly subversive of its independence....The very idea that a judge could be compelled to descend from the Bench and vindicate his right to retain his seat by an appeal to the public is the last recourse of political folly."[46]

The ABA leadership came prepared for this meeting with more than speeches. At the almost certain instigation of the Executive Committee and charter member Francis Rawle, Secretary George Whitelock (who had unsuccessfully attempted to censure Roosevelt in 1907) moved that a committee of six ex-presidents of the Association be appointed to formulate an official ABA position on judicial recall.[47] Not surprisingly, the ex-presidents, chaired by Rawle, returned two days later with a resolution that denounced judicial recall as "destructive of our system of government" and established an ABA committee "to expose the fallacy" of the doctrine.[48] Charles M. Woodruff, moving adoption of the measure, warned his colleagues that if they planned "to save the country from the dangers" which threatened it, they would have to do so "not as modest

lawyers but as energetic publicists."[49] Only one obscure member, J. Aspinwall Hodge, verbally opposed the resolution, complaining that the courts were generating an increasing amount of judicial legislation and protesting the extremist language of the statement, which implied that the government would "crumble and fall" if judges were recalled.[50]

Such objections were swept aside by the Association. For once it had reached a consensus, a unity born of concern that the political innovation of judicial recall might threaten the status of the legal profession as well as the public weal. Alton Parker reported later that no more than three of the more than six hundred members attending the ABA convention had voted against the ex-presidents' resolution.[51] In 1912, the young Felix Frankfurter declared himself reluctantly ready to vote for it again.[52] Frank Kellogg, a "trust buster" during the Roosevelt Administration and a moderate progressive, was appointed chairman of the Committee to Oppose the Judicial Recall.

With considerably less fanfare, the Association also approved in 1911 a draft bill intended to extend the jurisdiction of the Supreme Court to cover appeals from decisions of state courts in which state legislation had been struck down under the federal Constitution. The

purpose of the bill was to prevent the constitution from being interpreted differently in different states--and, more importantly, to prevent reactionary state judges from embarrassing their professional brethren, as had occurred so palpably in the Ives decision of the New York Court of Appeals. Despite the sponsorship of Senator Elihu Root and the approval of all three political parties, the bill moved through Congress "with tallow legs," not becoming law until December 1914.[53]

Within a few months of the Association meeting, Theodore Roosevelt made a final decision to challenge his protégé Taft for the Republican presidential nomination of 1912. The issue of judicial recall proved to be the sharpest ideological division between the two candidates and became inextricably intertwined with this bitter struggle between the two former friends. Roosevelt was sensitive to the criticism he had received after his earlier cuffing of the courts, and he also seemed uncomfortable with the radical allies he had made in the process. In October 1911, the former President told a fellow progressive that he had "been forced into...taking the very unpopular position of criticizing the judges."[54] Gradually he felt his way to a different, though not necessarily less advanced, position: judges need not be recalled if their decisions could be reversed by popular

vote. Roosevelt published his views in The Outlook at the beginning of the new year and then again shortly before declaring his intention to run for President. On February 12, 1912, before the Ohio Constitutional Convention in Columbus, Roosevelt boldly advocated the recall of judicial decisions on the grounds that the existing system had perverted the Constitution into "an instrument for the perpetuation of social and industrial wrong and for the oppression of the weak and helpless."[55]

The New York World asserted that this "Charter of Democracy" speech might better have been called "the charter of demagogy." Not a few of his political enemies whispered that he had gone mad. Henry Cabot Lodge admitted that his friend's action had made him "miserably unhappy," and "Taft, of course, was horrified to his very marrow."[56] Years later, the progressive William Allen White was still agitated. The Columbus speech, he wrote, "probably crippled [Roosevelt] more than any one thing that he did in his life" because he "was forced to a position much farther to the left than he would have taken naturally if in the back of his head he was not always trying to justify the 'recall of judicial decisions' to a public that challenged it."[57]

Roosevelt's friends tried to talk some political sense into him, but he brushed them off. "You say," he replied brusquely to H. H. Kohlstatt,

> that in the West there is no sympathy with the recall of judicial decisions. In that case the West needs to be educated and you need to be educated. My position in the Columbus speech was absolutely straight, and the man is a poor American who does not support it.[58]

A month later, Roosevelt charged that an association to combat judicial recall, organized by Joseph Choate and other eminent New York lawyers, had as its real purpose the sustaining of "special interests against the cause of justice and against the interest of the people as a whole."[59] Finally, in an article for The Outlook written before but published after the ABA's annual meeting of 1912, the ex-President attacked bar associations generally and the American Bar Association in particular. Early in his essay, Roosevelt portrayed Association members as "honest men who are deluded into opposing us in this matter," but on the final page he censured them for flying "to the defense, not of justice, but of the betrayers of justice!"

> At least let any man who votes as the papers say the members of the Bar Association propose to vote cast off hypocrisy. Let it be understood distinctly that such a vote as I speak of will be a vote against the enactment of an eight-hour law for women, a vote against workmen's compensation laws, against prohibiting the labor of children, against laws for safety appliances, in short,

against all legislation aimed to secure social and industrial justice.[60]

The reaction of legal professionals may be imagined. Roosevelt's advocacy of judicial recall alienated lawyers even among the Republican insurgents.[61] Judge Learned Hand, whose support of Roosevelt in 1912 later cost him a seat on the Supreme Court, first urged the former President not to advocate the recall of judicial decisions and then, when the die had been cast, convinced him to limit his proposal to constitutional decisions made by state courts.[62] In all, the number of influential lawyers who followed Roosevelt could be numbered on the fingers of one hand. Among them were William Gaynor, mayor of New York; William Lynn Ransom, author of a book sympathetic to the recall of decisions; and William Draper Lewis, dean of the University of Pennsylvania law school and the only member of the American Bar Association leadership to wield his pen against the professional consensus.[63]

The ABA's Committee to Oppose Judicial Recall, which included a member from every state and territory, exhorted each bar association to make recall the subject of a regular or specially-called meeting. It was hoped that such meetings would take specific action against the proposal that would influence public opinion by being reported in the press.[64] With the advertisement of

Roosevelt's noisy campaign, the associations would have had difficulty overlooking the issue in any case. Thirty state associations featured judicial recall at their 1912 sessions, and in twenty three of these meetings only opposition was voiced.[65] Typical of the latter was the convention of the Maryland State Bar Association. There, Frank Kellogg, Chairman of the ABA's Recall Committee, delivered an address on the subject; a local progressive provided further negative comment; and the Association passed a resolution condemning the recall of both judges and judicial decisions.[66]

Feelings ran high at the ABA annual meeting held in Milwaukee during the last week of August 1912. Francis McGovern, the progressive governor of Wisconsin, brought a few words of greeting to the assembly which certainly must have been unwelcome. McGovern complained of the "judicial usurpation of legislative power," argued that the recall of judges entailed "some danger...but not much," and virtually advocated the recall of judicial decisions.[67] If his words had any effect, they only hardened professional feeling against the proposals. The annual meeting featured six speakers from different segments of the political spectrum, and each, regardless of party or the stated topic of his speech, alluded to and condemned the recall.

ABA President S. S. Gregory and his successor, Frank Kellogg, were openly sympathetic to progressivism, and they sought to counter the growing undercurrent of conservative sentiment within the Association by their explicit support for reform. In regard to judicial recall, however, they were adamant. Gregory announced his opposition to the proposal "in any form or under any conditions."[68] Kellogg warned that judicial recall would destroy the independence of the judiciary, which in turn would jeopardize the "integrity of our system of government."[69]

Not surprisingly, conservative speakers denounced the recall at greater length and with more enthusiasm. George Sutherland claimed not to question the "good faith of the people" in accepting radical change in their government, but he doubted their "wisdom in having lent a too ready ear to the professional demagogue whose strident voice has filled the land with his ill considered and impractical theories." The demagogue in question was not mentioned by name, but later Sutherland did specifically condemn Roosevelt's recall of judicial decisions as "mischievous unwisdom...which in effect would...render a judicial decision by what practically amounts to a show of hands at the polls."[70]

Even more revealing were the comments of Henry D. Estabrook, solicitor for Western Union, who after praising

the work of Roscoe Pound took swipes at the initiative and referendum as well as the recall. Estabrook observed that while lawyers and judges had "been pegging away as usual" the

> people of the United States have discovered, suddenly as it were, that a court of justice is not a Joss-house or a dagoba, but an instrument of their own government; that a judge is not a divinity, but a very fallible human being in nature no wise different from themselves. Of course you and I knew this all the while, so what of it? you will say. Nothing--nothing serious--except that all of the people have not yet assimilated the idea and it has set a few of them crazy. Having discovered that a judge is not an icon to be worshipped, except as their imagination made him such, they are trying to drag him from his niche with the whoop and savagery of real iconoclasts:
>
> The shouting and the tumult grows,
> The gust of passion swells and flows--
> Lord God of Hosts, be with us all
> Lest we recall, lest we recall![71]

Estabrook thus acknowledged that a significant change had occurred in the popular perception of the judicial function and that this more accurate understanding was endangering professional control of the legal process.

In comparison with the speeches of Sutherland and Estabrook, the report of the Committee to Oppose the Judicial Recall was moderate in tone. Quite sensibly it emphasized that "the same law which would deny protection to the rich or confiscate the property of the corporation, might [also] take the cottage or the liberty of the humblest citizen." The report requested support for

measures which would remove the causes of popular discontent with the courts. On the other hand, it also made clear that recall sentiment was continuing to grow among state legislatures and that the Committee was willing to help opponents of the proposal where it could. In response to a request for aid from influential ABA member Everett Ellinwood of Arizona, the Committee had sent more than twenty-five thousand anti-recall speeches to the "entire electorate" of that state. Fortunately, Chairman Kellogg was spared the embarrassment of knowing that on November 5 the people of Arizona would endorse a constitutional amendment approving judicial recall by a vote of 16,272 to 3,705.[72]

The pronouncements of the Association and its convention speakers were generally well received by the press. For instance, the Independent referred to Association members as "the choice of the legal profession, selected out of the select" and declared that their judgment on the judicial recall question ought to be decisive. "That Mr. Roosevelt and his Progressive party should have against them the total weight of the American Bar Association is a fact of great importance." The Independent further predicted that judicial recall would not be "strongly urged" during the remainder of the campaign, and this proved to be the case.[73] Roosevelt

continued to refer to the recall obliquely, and legal periodicals published articles--mostly negative--regarding the proposal, but the issue aroused little popular interest in the final months of the campaign. In Colorado, where the recall of judicial decisions was approved by a slim margin in November 1912, a majority of the voters simply ignored the question on their ballots.[74]

Still, the fervor with which the reform had been argued pushed the peak of interest in judicial recall past the Progressive defeat in the 1912 elections. By September 1913, the recall had been adopted in the five Western states of Oregon, California, Colorado, Arizona, and Nevada and had begun to move eastward. The legislatures of Kansas and Minnesota had approved constitutional amendments which would have established judicial recall, and Arkansas voters had also ratified such an amendment--though the state supreme court promptly ruled that it had been improperly submitted. The ABA's Recall Committee acknowledged that judicial recall had "received surprisingly strong support" during the 1913 sessions of state legislatures. In North Dakota it had lost by only one vote. East of the Mississippi, considerable support for recall existed in Wisconsin, Illinois, Ohio, and even Massachusetts.[75]

The American Bar Association's campaign against judicial recall took on a more openly anti-progressive

stance when Frank Kellogg was succeeded as Recall Committee chairman by Rome G. Brown (1862-1926). In energy, diligence, and raw intelligence Kellogg and Brown were of a piece; in everything else, they were polar opposites. Whereas Kellogg excelled at political fence-straddling and diplomacy, Brown, a hard-line, laissez-faire conservative, seemed determined to personally affront all his ideological opponents. Fifty years old in 1912, Brown had graduated magna cum laude from Harvard before moving from his native New England to Minneapolis. There he became an expert in riparian law and federal water power regulation. He enjoyed performing the uncompensated duties that professional organizations require and had already served as president of the Minnesota State Bar Association and as a member of both the ABA's Executive Committee and the National Conference of Commissioners on Uniform State Law. A nominal Unitarian, Brown approached his politics with a zeal usually reserved for propagating religions or their profane substitutes. "Heresy" and "apostate" were two of his choice epithets for judicial recall and its supporters.[76]

Under Brown the recall Committee became an aggressive outlet for the growing conservative sentiment within the Association. As the ABA Journal editorialized some years later, the "work of the committee carried on under the

chairmanship of Mr. Brown was in no sense dilettante or academic. It got right down to business."[77] In the name of the committee, Brown promoted "special campaigns" against recall in states which seemed especially likely to adopt the measure. In one year alone he distributed over 350,000 anti-recall pamphlets--mostly reprints of speeches delivered by Association leaders--to newspapers, libraries and public officials and to every law school student in the country.[78] (So much of this literature was mailed under the frank of sympathetic senators that progressives in Congress threatened an investigation, and Brown found it inadvisable to continue the practice.)[79] Brown also arranged for judicial recall to be selected as a high school debate topic in the Northwest and then "furnished ammunition for the opposition." The result was that the negative won more than ninety percent of the several hundred debates held. Later, Brown sponsored contests among the high school and law school students of Minnesota for the best argument against the proposed recall amendment in that state and had the winning essays published in Minnesota papers and in Green Bag as well.[80]

Finally, Brown provided speakers for universities, law schools, bar associations, and business groups, especially in states where the proponents of the recall seemed vigorous. Brown did much of the speaking himself,

delighting in his new-found celebrity status and in the opportunity to flay his enemies from the platform. If notable recall advocates were present, so much the better. Brown boasted to Taft of his "put-down" of one "unpopular Populist judge" in Colorado. On another occasion he rejoiced in the conversion of a prominent lawyer who had come to the state bar association meeting "determined to stand alone, if necessary, against [him] but who afterwards announced that he should henceforth preach against Judicial Recall as a socialist instrument of disruption." After speaking to the bar associations of Texas and Indiana in 1914, Brown bragged that the lawyers present

> liked the stuff that I gave them and the way in which I gave it. What is better, they admitted that they needed punching up upon these matters and that they had been too slow in putting this matter right before the voters. They will now go out and spread the gospel.[81]

At the 1914 meeting of the North Carolina Bar Association, Brown exceeded all bounds of propriety. He included in his address a scathing denunciation of Chief Justice Walter Clark, an eminent progressive, though not a supporter of judicial recall. Clark's attacks upon the Constitution, said Brown, had "never been surpassed in malignant vituperation by that of any socialist doctrinaire." Brown went on to compare Clark with muckrakers, socialists, and anarchists. The association sat stunned, for the fiery Clark was in the audience.

Though Brown's address was omitted from the association's proceedings, Clark was still furious that no resolution condemning the "imported Yankee [for] villifying and abusing one of the Judges of the State and a Southern soldier" had been introduced during the meeting. Brown prepared to publish his vituperative message in the ABA Reports but finally relented "as an act of courtesy" to the member of his committee from North Carolina. He remained unrepentant, however. To a supporter of Clark's, Brown wrote that the Chief Justice could not be treated in a civil manner because he was like "a rabid animal running amuck....One cannot treat a man attempting to apply a firebrand to his house as he would treat a citizen who merely criticizes...the architect."[82]

In the earlier days of the Association, before ideological lines had hardened, a member of Brown's ungentlemanly temperament would not have been allowed to address the annual meeting, let alone hold an important committee chairmanship. And if he had managed to gain the floor, his remarks would have been well edited by Francis Rawle. Now the most influential leaders of the Association, including Rawle and William Howard Taft, urged Brown on. In a sense, he became their cat's-paw to express an antagonism towards progressives and progressivism which they felt but did not dare reveal in such an ungentlemanly

fashion. A few months before Brown's attack upon Clark, Taft wrote the Recall Committee chairman that the North Carolinian was an "old anarchistic crank...utterly out of the question for any purpose."[83] Three weeks after the speech, Taft both encouraged Brown not to be "weary of well doing" and urged ABA Treasurer Francis Wadhams to give Brown's committee an extra $500. "He has done more work than anybody connected with the Association," said Taft, "and he has done it well."[84] Brown craved stronger public commendation from Taft, but the former President was too shrewd to give it.[85]

By 1915 Brown announced that "judicial recall had passed its climax." Kansas had adopted the recall in 1914, but Brown correctly predicted that it would be the last state to do so. Still, the chairman recommended eternal vigilance. "Keep your eyes open," he told the annual meeting of 1914. "[A]t every place where it shows any signs of life, be prepared to 'swat this bug.'"[86] By the summer of 1914, even Roosevelt had all but given up on his version of the doctrine. To Hiram Johnson he wrote that "under the most advantageous conditions we could as yet obtain little popular support for...my own favorite plank...the recall of judicial decision."[87] Another measure of declining interest was the number of major addresses made to state bar associations on the subject.

In 1913 fifteen such addresses were delivered, in 1914, seven (including four by Rome Brown), and in 1915, five.[88]

The exact cause for the decline of the judicial recall movement awaits further research. It would be pleasant to believe that the electorate looked behind the rhetoric of recall advocates to note the non-progressive aspects of the proposal--that, for instance, Roosevelt was just as impatient with judicial "leniency" toward radicals as he was with judicial support for "liberty of contract."[89] There is, however, no indication that this more perspicacious objection to judicial recall played any important role in its disappearance as a live political issue. Of more significance was that early attempts to recall public officials revealed a great deal of special interest and self-seeking but little concern for the public good. Even proponents advised that if the people wished to "preserve this very useful instrument for their protection, they must awake to the necessity of putting it above motives of malice, revenge and club wielding."[90] Perhaps most importantly, the recall proved to be both a cumbersome and frequently unsuccessful method of achieving progressive ends. The situation was summarized by an Illinois legislator who had favored judicial recall but who in 1915 admitted, "We have got done doing that sort of thing."[91]

The role played by Rome Brown and the American Bar Association in the demise of recall sentiment is uncertain but should not be underestimated. Clearly, the activities of the Recall Committee accelerated trends already at work in the larger society. A progressive with any political discernment realized that there was nothing to be gained from advocating a measure which generated little popular support, aroused violent and persistent antagonism, and had virtually no practical effect when adopted. As one of Brown's committeemen put it in 1915, the supporters of judicial recall in his state were so few that it was "difficult to find them with a microscope, except one or two of the leaders of the Progressive Party, and they are so mum about it that it would seem as if they had forgotten there was ever such an issue."[92]

Whatever the actual impact of the Recall Committee's campaign upon the judicial recall movement, it was quickly hailed by lawyers as a great victory for the profession and for the American Bar Association. In a florid banquet speech at the Association meeting of 1915, Senator Hamilton Lewis of Illinois lauded his colleagues for having marshalled "the forces of justice and the wisdom of conservatism against the late crusade that, like hurled brands, went flaming through the nation--against all courts, all law and all justice."[93] James Grafton Rogers,

reviewing the first fifty years of the Association's history in 1928, proclaimed the recall defeat as one of the "great achievements" of the Association. Rome Brown, he said, had fought recall sentiment with the "whole strength of the American Bar Association" behind him, and he had "swept it away as a possibility in America."[94]

The conflict and apparent victory stimulated a growth in ABA membership and produced a heady psychological effect as well. One of Taft's correspondents pledged support for the membership campaign because he was certain that "united professional action [was] needed to protect our courts from foolish attack."[95] Gone was the timid attitude of the late nineteenth century when ABA members had feared that "political agitation initiated by the Bar Association would be fruitful of [little] but noisy and angry rhetoric."[96] The defeat of judicial recall was now used as an illustration of what lawyers could achieve through professional solidarity.[97]

To a vain and opinionated man like Brown, the recall victory was only a prelude to a higher mission. The real enemy of the legal profession and of constitutional government, Brown concluded, was not recall itself but the larger socialist menace of which recall was only one manifestation. As early as January, 1914, Brown confided privately that "Roosevelt's propaganda for judicial recall

was "precisely a propaganda of socialism." Shortly thereafter he expressed the same sentiments in public.[98] As interest in judicial recall declined, the stridency of Brown's rhetoric grew. In a 1917 speech reprinted in the ABA Journal, Brown blasted judicial recall, the economic interpretation of the Constitution, attacks upon judicial review, minimum wage laws, the government of North Dakota, and the Adamson Act, all as evidence of the encroachments of socialism upon American institutions. The Adamson Act, Brown charged, was the product of "the menacing monster of Socialism, stripped of its mask of peace, showing its brutal teeth and its iron hand fully armed in preparation for violence and bloodshed."[99]

In 1917 the first internal criticism of Brown and his vision of an anti-socialist crusade appeared in a minority report written by Recall Committee member H. A. Bronson of North Dakota. Bronson argued that the committee's attempt to "enter upon the political field" might backfire and subject the judiciary to "the same political propaganda that may be urged against the legislative and executive branches." Bronson was simply repeating in more diplomatic language what one of Brown's correspondents had told him two years before: that judicial recall was a dead issue "unless the old time reactionaries, pure and simple, [became] overconfident and invite[d] renewed disturbance."

Undeterred, Brown succeeded in having the name of his committee changed to the Committee to Oppose Judicial Recall and Allied Measures.[100]

Dissatisfaction with Brown's position continued to grow, both from within the Recall Committee and from the Association's Executive Committee. To the latter, Brown had become a potentially embarrassing freelancer using an Association office for personal gratification. However, bringing him to heel might have been more difficult had he not been in the habit of running up unauthorized expenses--mostly for the printing of his own speeches--and then blithely presenting the bills to the Executive Committee for repayment. In the spring of 1919, the committee refused to pay.[101]

Brown fumed and sputtered to Frederick Wadhams and the members of the Recall Committee. He boasted of his single-handed efforts against judicial recall--"I went ahead and I got results and I brought credit to the American Bar Association and our Committee." He compared A. C. Townley of the Nonpartisan League to Lenin. He compared himself to Jesus Christ. When he tried to call a meeting of his committee at the annual meeting in Boston, three members appeared, two of whom opposed him. When he appealed personally to the Executive Committee, they stood firm against him.[102]

On the convention floor, Brown presented a resolution which would have authorized the committee to "continue its campaign of education against the subversive doctrines of socialism." He argued that as the committee had "naturally drifted into" the work of opposing socialism, it should be given an Association mandate to fight the revolution which currently threatened the nation.[103] Brown believed that he had hundreds of friends and supporters at the convention and was shocked when none of them came to his defense. Instead, his archenemy William Draper Lewis, a supporter of the recall of decisions, arose to deliver a clever reply. Lewis praised the committee's success in defeating "one of the worst propositions ever presented to the American people, the recall of judges," but he suggested that it was unwise to give committee members carte blanche "to fight anything and everything that in their opinion may be revolutionary." Any piece of social legislation, Lewis said, was "always fought on the ground that it is subversive of the constitution, that it is an attack on our institutions, that it is revolutionary."[104] Eventually the convention approved only a continuation of the Committee's existence with no further instructions.[105]

The volatile Brown, "disgusted, mad, grieved [and] beaten," immediately resigned both as the Chairman of the Recall Committee and as a member of the American Bar

Association, vowing to continue his fight against "socialism and Russian Sovietism."[106] Some months later he accused his enemies in the ABA of being "parlor Bolshevists" and of having been jealous of the "position of prominence" to which he had been raised by the recall struggle. Brown served for nearly two years as president and executive manager of the Minneapolis Tribune, (which gave him the opportunity to write editorials), but in the fall of 1921 he was ousted in what he called a "conspiracy" led by "a little Sheenie...so boastful and presumptuous that he is disgusting."[107] Brown seems to have suffered both a physical and mental breakdown at this time. He promised Taft that he would be back to "fight, fight, and fight." In 1922 he quietly rejoined the Association and seems to have made one final bid to regain the chairmanship of an ABA committee. Brown died in 1926 from complications of diabetes.[108]

Though a majority of the ABA leadership were glad to be done with Brown, he had taught them an important lesson: the name of the American Bar Association might be lent with effect to a political cause if that cause were plausibly related to the legal profession and if it were one upon which lawyers had achieved a reasonable degree of unanimity. However, the first attempt to use this newly discovered power was made not by the Association itself but

by six former ABA presidents acting in a highhanded fashion without a professional consensus.

On January 28, 1916, President Woodrow Wilson nominated the progressive Louis D. Brandeis to be an Associate Justice of the U. S. Supreme Court. Wilson had earlier considered Brandeis for an appointment as Attorney General, but conservative opposition had been strong, and Wilson had dropped the idea. Now the President determined both to honor his economic adviser and to portray himself as a true progressive. The nomination precipitated a four-month long confirmation debate ostensibly about Brandeis' ethical qualifications for office but actually over the future ideological composition of the Supreme Court. As Brandeis biographer Melvin Urofsky has written, "the lineup of supporters and detractors was a clear demarcation of progressives from those opposed to the reform movement [and] the major issue at all times remained whether or not to admit a radical into the sacrosanct--and conservative--citadel of the law."[109] Although the ABA itself took no official position on the nomination, the obvious distress of some of its leaders at the Brandeis nomination was a further confirmation of the "hardening of conservative attitudes" within the Association.

There was certainly no doubt as to whom the ABA leadership wished to have appointed to the seat vacated by

the death of Justice Lamar. When the Executive Committee met for its midwinter session with the committee chairman on January 7, the conference quickly approved a letter written by Alton B. Parker to President Wilson "earnestly but respectfully" urging him to name William Howard Taft to the Court. All twenty-nine members present signed the letter--fourteen Republicans, fourteen Democrats, and "one who had voted for Roosevelt in...1912." Parker had it photographed before ex-ABA president Edgar H. Farrar personally delivered it to Wilson.[110]

Taft was disappointed at being passed over for the appointment, though as a man of political sophistication, he could hardly have been surprised. There is no reason, however, to doubt the sincerity of his declaration that the nomination of "such a man as Brandeis [was] one of the deepest wounds" he had ever received "as an American and a lover of the Constitution and a believer in progressive conservatism."[111] If Taft's opposition to Brandeis was motivated in the least by anti-Semitism, such prejudice remained well below the threshold of his consciousness. Nor did Taft exhibit personal antagonism for Brandeis. They had met on only one occasion, and when they next chanced upon each other on a Washington street in 1918, Taft went out of his way to be cordial.[112]

Of course, as is typical of nominations for the Supreme Court, ideological differences between the nominee and his opponents were discussed as little as possible at the confirmation hearings. Instead, Brandeis' detractors charged him with unethical behavior, and his supporters retorted that the critics were motivated either by a personal animus or by the desire to even the score for some legal defeat suffered at the hands of their champion. In the end, despite a well-organized campaign led by Wall Street attorney Austen G. Fox, the opposition was unable to prove a single instance of unethical behavior, at least under the standards prevailing in 1916.[113]

As a final gesture Taft urged the publication of a statement written by Elihu Root and signed by several ex-presidents of the American Bar Association some weeks before. "I presume we cannot defeat the confirmation," Taft wrote to former Attorney General George Wickersham, "but I think we ought to go on record."[114] On March 14, Fox read the "communication" to the Senate subcommittee:

> The undersigned feel under the painful duty to say to you in their opinion, taking into view the reputation, character, and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States.[115]

The letter was signed by Taft, Root, Simeon Baldwin, Francis Rawle, Joseph Choate, and Moorfield Storey. (A similar statement with different wording was received from

Georgia Democrat Peter Meldrim.) The communication did not mention the American Bar Association nor the office to which the signers had been elected, but Fox encouraged his listeners to draw improper conclusions by mentioning that each had been president of ABA.[116]

The "painful duty" of the presidents was front-page news across the country. The St. Louis Globe Democrat, for instance, viewed this negative assessment of Brandeis as one which could not "be waived aside with an epithet. All [the signers] are great lawyers, who realize the significance of their act....Any intimation that they are moved by racial prejudice is absurd....Nor can the protest be ascribed to 'the interests.'"[117] As A. L. Todd has written in a book devoted to the Brandeis confirmation, the authority of the letter was probably enhanced by the fact that "no such rallying of the leaders of the American bar had been seen in the capital before on any issue."[118]

Although the presidents' protest was of doubtful probity, at least its signers were under no illusion that an attack upon such an influential Supreme Court nominee could be made without personal cost. In other words, signing the statement was neither a rash nor a cowardly act.[119] Brandeis was not at all disturbed by the letter and privately declared that "if properly used," it "might be of great political importance."[120] At his suggestion,

Walter Lippmann wrote a biting editorial in the New Republic pillorying Taft as "the last man qualified to express a judgment on Mr. Louis Brandeis." Other attacks from progressive publications were directed against Root, Choate, and Meldrim as well as Taft.[121]

Apparently, few contemporaries were misled into believing that the American Bar Association itself had pronounced judgment upon the ethical character of Brandeis--something which cannot be said of historians who have studied this period.[122] Ironically, had progressives attacked the ABA as an organization, several curious facts about the Brandeis incident might have come to public attention. First, Brandeis had been a member of the Association for over a decade, had attended several meetings, and had served as a member of the Committee on Uniform Judicial Procedure.[123] Second, the seven ABA presidents who signed the protest against Brandeis were only a minority of the seventeen living presidents, all of whose signatures had been avidly sought by George Wickersham. Wickersham's lack of success with progressives such as Frank Kellogg and Stephen Gregory is hardly surprising, but it would be interesting to know why a superfluously wealthy traction magnate like Charles F. Libby refused to participate. Neither Alton Parker nor J. M. Dickinson signed the presidents' letter, though both had

lobbied vigorously for Taft's nomination. Dickinson frankly told Wickersham that he would not lend his name to the affair because he believed that ABA members would resent the appearance of the presidents acting "representatively" for the Association in a controversial matter.[124] Some of them did.[125] Stephen Gregory and Roscoe Pound both testified before the subcommittee in Brandeis' behalf, and Pound later helped Felix Frankfurter round up seven Harvard Law School professors to sign a counter-petition "testifying to Brandeis' legal ability and integrity."[126] Most of the ex-presidents were probably unenthusiastic about the Brandeis nomination, but they represented an older, more tolerant, ABA tradition of non-involvement in politics. Conservative attitudes were indeed hardening during the second decade of the century, but certain senior members of the legal elite remained influential enough to slow the trend.

Although the aftermath of World War I was to augment the anti-progressive trends already manifest in the American Bar Association, the entrance of the United States into the war ushered in a brief but exhilarating interval of bar association unity both internally and with the nation as a whole. Before American entrance into World War I, the ABA leadership had been no more bellicose than that

of the American Library Association. Taft told Whitelock in 1914 that he was opposed to Association consideration of a member's proposed "rules of civilized warfare. I think," said Taft, "the less we stick our nose into the contest the better. Inter arma silent leges."[127] Even in 1916 when one Bernard Selling offered some anti-British resolutions to the annual meeting, there was no debate. The resolutions were simply shunted into the dead end of a committee, frustrating Everett P. Wheeler who had hoped to make a reply.[128] According to James Grafton Rogers, the "membership was really in active ferment by this time, and there was bitterness and some talk of resignations, but the official record reveals nothing."[129]

The fortieth anniversary meeting of the Association at Saratoga in September 1917 was an entirely different matter. The conclave resembled less a professional meeting than a cross between a revival and the Fourth of July. At the opening session, Elihu Root presented a series of strongly worded resolutions which went considerably beyond patriotic necessity. "Gray-haired men," the New York Times reported, "stood in their seats and shouted with the vigor of schoolboys."[130] Root's final resolutions condemned "all attempts in Congress and out of it to hinder and embarrass the government of the United States in carrying on the war with vigor and effectiveness" and flatly declared that even

criticism made under "cover of pacificism or technicality" was "in spirit pro-German and in effect giving aid and comfort to the enemy." All the resolutions were approved unanimously by a rising vote.[131]

The speeches that year were mostly in the same vein. Former Supreme Court Justice and Republican presidential candidate Charles Evans Hughes delivered a well-constructed brief for the constitutionality of the measures being used to prosecute the war: conscription, federal control of the militia, taxation, and the extraordinary powers of the President. When Hughes concluded his address with the words, "So the Constitution fights," the audience broke into "a wild burst of applause."[132] Gaston de Leval, a Belgian attorney who had unsuccessfully attempted to represent Edith Cavell before a German military court, spoke to the assembly on "Prussian Law as Applied to Belgium." De Leval was a personal friend of George Whitelock, and the ABA Secretary assured Taft that the Belgian would produce "the desired patriotic thrill." The address was satisfactory in that regard, although de Leval expressed a curious respect for the "Kriegsgerichtsrate" who had accompanied German troops into his country. In ordinary life, said the Belgian, these judge advocates had been "judges and lawyers, and the war had not entirely wiped out of their minds and hearts those principles of

justice for which we all fight." In fact, he admitted that most of the German military judges had "a clear, judicial and fair mind."[133] Apparently the only good German was a German lawyer. Another attempt to produce the "patriotic thrill" was made by Robert McNutt McElroy, an historian and an official of the National Security League, who was developing into a master of oratorical propaganda.[134] McElroy began his speech temperately enough with even a nod toward scholarship, but he soon dragged in a catalog of German war crimes to demonstrate the essential difference between the enemy and the freedom-loving descendants of Simon de Montfort, Pitt, Washington, and Lincoln. McElroy assured the assembly that the racial ancestry of the Prussians should be no embarrassment to Anglo-Saxons because the former were "a mixture of many races, with more Slavonic than Teutonic blood."[135]

The only unwelcome speaker was Senator Thomas W. Hardwick of Georgia who, after accepting an invitation to address the annual meeting, had become a foe of Administration foreign policy. On the evening before his scheduled speech, there was serious talk among ABA leaders of "disinviting" him. Eventually they contented themselves with an early presentation of the Root resolutions. Moorfield Storey gave Hardwick a one sentence introduction, and the senator expounded a typical "states' rights" view

of the Commerce Clause. A number of leading members boycotted the session.[136]

Of course, ABA members shared the same patriotic (and chauvinistic) motives for endorsing the nation's war effort as did their fellow Americans from all walks of life. Still, there were several additional factors which strengthened the Association's identification with the war. First, the war seemed to provide the legal elite with an excellent vehicle for demonstrating altruistic professionalism. After the recent sustained criticism of the courts and lawyers as obstacles to change, the agitation for judicial recall, and the appointment of the "radical" Brandeis to the Supreme Court, the legal elite welcomed the opportunity to give unqualified endorsement to the war effort in exchange for the restoration of some of its nineteenth-century prestige. Future congressman Henry Rathbone, moving adoption of the Root resolutions, was quite clear about his motive for doing so:

> Let us show that we are not mere money grabbers. Let us show that the lawyers of the country are as capable of unselfishness and patriotic devotion as any people in the land. The medical profession, the businessmen are doing their share. Shall it be said of the legal profession that we did not play our part in the great cause of liberty and humanity?[137]

The war, Jerold Auerbach, has written, was a "professional godsend" which "provided lawyers with an opportunity to regain lost status and cohesiveness."[138] No wonder that

lawyers who challenged the constitutionality of conscription or who voluntarily defended those accused of disloyalty were so universally condemned by the legal elite. If public criticism of lawyers were to be reduced, the profession had to appear as nearly monolithic in its support of the war as possible.

A second reason for the ABA's enthusiastic endorsement of the war was the bond which the legal elite felt for England. For forty years, speeches at the annual meeting had included reverent allusions to "the mother country" and "good old England." Leaders of the British bar, including the Lord Chief Justice and the Lord Chancellor had addressed the assembly, emphasizing "the unseen crimson thread of kinship stretching from the mother Islands to your continent."[139] In 1907 James Bryce had referred to the relationship between British and American lawyers as "a bond of union and of sympathy whose value can hardly be overrated."[140] In 1913 Taft even suggested privately that the next meeting of the Association ought to be held in London.[141] Certainly there was snobbery involved and a barely concealed desire for respectability in English eyes, but neither the perception of brotherhood nor its effect upon foreign relations was rendered any less real thereby.

Finally, ABA conservatives, like their progressive opponents outside the legal profession, believed the war to

be pregnant with "social possibilities."[142] The dean of the Cleveland bar, Andrew Squire, welcomed the Association to his city in 1918 with the comforting thought that the war had forced government to "override and sweep aside....statutes strangling cooperation...and regulating in the smallest detail many little things." Now, said Squire, the nation was able to use its resources efficiently.[143] Then too, Henry Rathbone saw the war as an excellent opportunity for lawyers to take the offensive against "anarchy" and "the men that are speaking the doctrine of despair."[144]

At a deeper, almost spiritual, level, some prominent conservatives maintained that the war would purge the United States of the materialism and socialism with which she had been blighted since the turn of the century. One reason why James M. Beck became such a tenacious conservative in the 1920's was that he firmly believed that the Great War had been "fought for the preservation of traditional values."[145] At the annual dinner of 1917 both Elihu Root and New York corporation lawyer Job Hedges emphasized the spiritual rejuvenation which they believed was being accomplished through war. Root, speaking with unrestrained passion, pictured the United States as a nation which had been "sleeping in wealth and ease and

comfort" until the war had come. Since that time, said Root, she had been "growing real instead of superficial."

> It has come not too soon. It was at the eleventh hour that we came into the vineyard. The great opportunity of the American people was slipping away before they could grasp it--the opportunity to make themselves into the image of our fathers....We have grasped the opportunity for that sacrifice and suffering through which we shall find our souls again.[146]

Hedges denied that the United States had even had the moral courage to enter the war voluntarily: "God Almighty took America by the scruff of the neck and threw her in. Our soul was saved by an act of Providence." The remark was followed by five minutes of applause and cheering.[147]

While cheering and shouting were undoubtedly gratifying, the American Bar Association found it more difficult to demonstrate its support for the American war effort in more practical ways. Senator Edgar T. Brackett, in welcoming the ABA to Saratoga, frankly expressed the

> sense of the uselessness of the profession generally...in time of war. The other learned professions all outdo our own in direct immediate value to a nation in arms. The engineer, the surgeon, the physician, the divine--it is given to all these to render service of practical value. But to those of the greatest profession of them all, save only the few to whom the study of international law is their line of work, must come the realization that valuable immediate active service is denied.[148]

Fifteen years later James Grafton Rogers also commented upon the "odd sense of helplessness" that hung about the 1917 meeting. The Association did pass some patriotic

resolutions, invested its funds in Liberty Bonds, and urged local bar associations to aid conscription boards, furnish patriotic speakers to government agencies, and conserve the practice of lawyers in military service. It also appointed two special war committees--though one of these exhibited little activity and the other none.[149]

Perhaps the most significant service rendered by the Association was in lending its name to the activities of John Lowell, Chairman of the ABA's War Service Committee. Lowell, an energetic and personable gentleman of means, volunteered his services to head a clearing house for such lawyers as were required by the federal bureaucracy during the war. Under adverse physical conditions, he provided suitable lawyers to the Shipping Board, the Housing Corporation, and the Department of Labor, as well as to semi-official bodies such as the Y.M.C.A. and the Committee on Training Camp Activities. The Bureau of War Risk Insurance alone obtained three thousand lawyers from Lowell, and he was also able to furnish Military Intelligence with men who spoke the less familiar European languages.[150]

Such service to the government was usually both reasonably compensated and ideologically innocuous. In fact, even when the time of bar association members was donated to local draft boards, the government paid the

clerical, printing and other expenses connected with the work.[151] The problem with this wartime alliance between the legal profession and the government was, of course, that it made the defense of war critics by elite lawyers extremely unlikely. For its part, the organized bar seemed oblivious to the axiom that one of the lawyer's major responsibilities to the democratic state in wartime is to slow summary dispositions of justice. Before the war, ABA leaders had made no secret of their desire to find the limits of governmental regulation, but during the conflict, there was little if any interest in investigating the limits of political dissent. For instance, Selective Service regulations declared it "inconsistent" for lawyers to act in "any other way than as disinterested and impartial assistants of the Selective Service System."[152] Far from challenging this subservient role, elite lawyers eagerly abandoned professional shibboleths about representing unpopular defendants in order to demonstrate their patriotic orthodoxy.[153] The Illinois Bar Association passed a resolution declaring that it was both unpatriotic and unprofessional for a member to represent a man seeking to avoid the draft.[154] A. E. Bolton, president of the California Bar Association, warned his members that the nation was now filled with "loyalty and devotion to, and sacrifice for country. Professionally we must absorb this

atmosphere, or we will slip backward as a profession and others will take our places."[155] Attorney General Thomas Gregory urged the ABA Executive Committee to "bring all [the] power and influence" of the American Bar Association to bear against that "greatest menace" to the nation--pacifists.[156] And ABA committeeman William A. Hayes asserted that it was to the credit of the bar that the few lawyers who opposed the war did so out of "ignorance or perversity."[157]

Although Association leaders never questioned the validity of the war, by 1918 they began to doubt its utility for accomplishing conservative ends. Randolph Bourne might well have repeated to conservatives the query he posed to progressives: "If the war is too strong for you to prevent, how is it going to be weak enough for you to control and mold to your liberal purposes?"[158] At the annual meeting of 1918 ABA president Walter George Smith noted with apprehension the sudden increase in federal regulation. Smith refused to criticize wartime emergency measures directly, but he expressed concern at "certain elements who are seizing the opportunity to force changes in our fundamental law."[159] Soon ABA leaders realized that for all their good intentions and for all the trumpeting of membership chairman Lucien Hugh Alexander that lawyers had won the war, the organized bar had played

"no great part in a crisis that really negatived most of the concepts and machinery with which the profession deals."[160] The leadership of the American Bar Association discovered that the trends which they had feared before the war had only been intensified by the conflict and that the legal elite were becoming even more alienated from the American society which they had hoped to direct.

CHAPTER 9

THE ASSOCIATION BECOMES A STEREOTYPE, 1918-1928

According to conventional wisdom, the decade between the Armistice and the Great Crash should have been the heyday of the American Bar Association. The Republican Party had captured both houses of Congress in 1918 and the Presidency in 1920. In 1921 former ABA president and President of the United States William Howard Taft was installed as Chief Justice of the Supreme Court. These were the years of Harding and Coolidge, of Andrew Mellon and Bruce Barton, of Normalcy and the Fordney-McCumber Tariff, the years when the business of government was business. Theoretically the legal elite should have rejoiced at the prospect of a nation now returned to its conservative moorings after two decades of progressive experimentation. Elite lawyers should have perceived themselves as squarely representative of an older America reborn and enjoyed (as Jerold Auerbach believes they did enjoy) "unchallenged professional hegemony and unsurpassed opportunity to articulate their wishes as professional values."[1]

In actuality, ABA leaders viewed post-war America as a nation out of joint, threatened by radicals and socialist theories, by big government and labor unions, and by a growing disrespect for the Constitution, the judiciary, and the legal profession in general. They found surprisingly little to applaud in the "prosperity decade." Recent historians have emphasized that "the national progressive movement survived in considerable vigor" during the 1920's, controlling Congress during most of the period and even "broadening its horizons" in some areas.[2] The leaders of the American Bar Association were well aware of this continuing progressive strength.

At the turn of the century the legal elite had cautiously approved tendencies similar to those which it firmly opposed in the 1920's. Earlier it had seemed reasonable to suppose that progressive trends might prove beneficial to or at least controllable by the legal profession. By the end of World War I, Association leaders had been disabused of that notion. They vaguely realized that the United States had become a nation other than the familiar Anglo-Saxon Protestant society of their youth with its comparative deference for the law and the legal profession. Benjamin Cardozo, who welcomed the growing liberalism, noted in 1921, that the "new spirit [had] made its way gradually; and its progress, unnoticed step by

step" had become visible only in retrospect. "The old forms remain," said Cardozo, "but they are filled with a new content."[3] During the 1920's the American Bar Association effectively determined to refill the old forms with the old content, a goal both reactionary and unattainable. Ironically, as a nineteenth century social club of limited official influence, the ABA had shared a host of common values with the mainstream of American political life. Then as the number of common values began to decline, the Association developed the professional influence, the financial capacity, and the desire to become a political pressure group. Clearly, the Association was embarked on a course which would make it a stereotypical conservative organization during the New Deal and for a score of years beyond.

The reaction of the American Bar Association to the nation's immediate post-war military and diplomatic controversies was indicative of this conservative trend, although in this regard the Association did not go much beyond the consensus of American opinion. Once the Armistice had been signed, the enthusiasm of ABA leaders for their erstwhile crusade waned markedly. Elite lawyers had compromised their professionalism during the war in order to enlist as self-confessed agents of the federal government. Now they had second thoughts. Everett P.

Wheeler privately informed his Committee to Suggest Remedies that he had received many complaints about Washington bureaucrats who were attempting to discourage the employment of lawyers in their war-related departments. Roscoe Pound, a member of the committee, suspected that "a certain type of high-handed, subordinate official" resented the presence of lawyers because "certain things will not go with a vigilant lawyer scrutinizing them." Eventually, though, Wheeler's committeemen decided to refrain from formally investigating the matter on the grounds that it was "not a proper subject" for them to consider.[4]

Other second thoughts about the Association's haste to abandon professional conventions during the war were aired publicly. For instance, a minority of the Committee on the American Law of Courts Martial somewhat gratuitously announced that under precedent of international law, Edith Cavell had been properly tried and executed by the Germans.[5] More significantly, the majority and minority reports of the same special committee stimulated a heated debate over the profession's relationship to the military justice system.

The Committee on Courts Martial had been established in the spring of 1919 by President George Page, partly in response to hundreds of private complaints registered with the ABA and partly because congressional attention had been

drawn to the matter by the charges of ABA member Samuel T. Ansell, acting Judge Advocate General.[6] After making an investigation, committee members clearly revealed their displeasure with the military justice system, a legal system operated by laymen. They recommended that the army institute more thorough preliminary investigations before trial, that an appellate tribunal be established in the Judge Advocate General's office, and that the accused be provided with professionally trained counsel of field-grade rank. The only significant difference between the majority and minority reports was that the latter endorsed the inclusion of privates on court-martial boards sitting in judgment of their peers. The right to trial by one's peers was, of course, a canon of English common law, but in the midst of the Red Scare this suggestion was dismissed by former ABA secretary John Hinkley with the words, "That spells Soviets."[7] Though the differences between majority and minority seemed small, the debate at the annual meeting became an unofficial test of strength in an ongoing dispute between Ansell and Secretary of War Newton Baker over who should control the military justice system. War Committee Chairman John Lowell, believing it unwise "for the Association to put itself on record at this time," moved that both reports be "returned to the Executive Committee for such action as it may deem proper." The

Executive Committee deemed proper that the subject never be raised again. Nevertheless, Congress agreed with Ansell, and the needed reforms were enacted the following year.[8]

On the matter of United States' entrance into the League of Nations, the American Bar Association followed the trend of national sentiment from 1918 to 1920. At the annual meeting of 1918, three speakers made complimentary reference to the idea of a strong association of nations. Future ABA President Hampton Carson argued that there "must be and will be a House of Shelter against violence....[a] means of centralizing worldwide authority."[9] John H. Clarke, Associate Justice of the U.S. Supreme Court, entitled his address "A Call to Service: The Duty of the Bench and Bar to Aid in Securing a League of Nations to Enforce the Peace of the World," and he was forthright in urging that the League be given authority to use its members' military and economic resources in order "to compel...obedience to all of its commands."[10]

By the annual meeting of 1919, however, enthusiasm for U.S. membership in the League had noticeably diminished. President George Page appointed a committee to study the question but also expressed vague doubts as to the utility of the strong surrendering their power for the good of the weak. More significantly, the Association leadership enlisted David Jayne Hill, a former ambassador to Germany

and noted critic of Woodrow Wilson, to deliver an attack on the Treaty of Versailles. Since Hill was not a lawyer, ABA leaders must have been certain as to the message he would bring. On the last day of the meeting, the assembly was also addressed by Secretary of State Robert Lansing, who had been a delegate to the Paris Conference. Despite his position in the Wilson Administration, Lansing was at best unenthusiastic about the League of Nations, and he agreed with Hill that the key to international peace lay in the "juristic approach" of a world court.[11] As for the Committee on a League of Nations, it divided three to two in favor of American membership, but action on its report was delayed until the following year. By the summer of 1920, after the Versailles Treaty had been twice rejected in the Senate, the majority recommendation proved an embarrassment to the Association leadership, and the ABA Executive Committee barred discussion of the report on the grounds that the subject "had become a political issue."[12]

In any case, the leadership of the American Bar Association had traditionally taken the position that world peace would be better secured by an international court than by a politicized association of nations.[13] Perhaps Supreme Court Justice David Brewer articulated the sentiment best in his 1895 address to the Section of Legal Education:

> The final peace of the world will be wrought out through our profession. I know the poet sings of the day "When the war drum throbs no longer and the battled flags are furled/ In the parliament of man, the federation of the world." But the poet is mistaken. The legislator will not bring the day of universal peace....Out of the rich brain of our profession shall be wrought the form and structure of that court, its fashion and its glory, and the lawyers shall be the judges thereof.[14]

The problem with the League of Nations, in the view of most elite lawyers, was that it reminded them too much of a state legislature. An editorial in the ABA Journal comparing the League of Nations with the World Court declared that the lawyer had "learned the difference between political agencies and judicial tribunals" and realized that "with very rare exceptions the ruling passion of the judge is for justice and that he is a ministering priest in its temple."[15] A speaker before the annual meeting of 1921 suggested that the way to correct the "failings and shortcomings of the League" was to subject that body to a "common standard of international justice" formulated by lawyers, "whose sense of fairness and deep experience and learning are peculiar to them."[16]

Not surprisingly, therefore, the ABA stood at the forefront of the movement to have the United States give adherence to the Permanent Court of International Justice, which had been created in accordance with Article 14 of the

League Covenant. In fact, two influential members of the Association, Elihu Root and James Brown Scott, the chairman of the Committee on International Law, helped to frame the protocol under which the Court began operation in 1922. By voice vote the annual meeting of 1923 endorsed U.S. membership in the Court, subject to the reservations drawn by Charles Evans Hughes. Only a few scattered noes were heard in the hall.[17] In 1924 Manley O. Hudson, himself later a member of the tribunal, began publishing summaries of World Court opinions in the ABA Journal.[18] Yet despite repeated endorsements of the Court by the Association, the United States did not become a member until after World War II.[19]

United States membership in the World Court was, in any case, of relatively minor concern to a professional elite troubled by the numerous disquieting changes in American life which seemed to suddenly manifest themselves after World War I. The name of these changes was legion, but they included such diverse trends as the rise of revolutionary socialism, the quickened growth of the federal government, the developing importance of statutory law, and even the increased popularity of sensational journalism. The legal elite viewed all such tendencies as antithetic to the rule of law and opposed them as movements detrimental to "American institutions" or subversive of the Constitution.

Beyond these more obvious sources of professional antagonism, Association leaders were further dismayed by the same cultural changes that shocked other conservative Americans of the same period. For instance, in 1920 an editorial in the ABA Journal bemoaned "a generation which, to a rather alarming extent, has forgotten and ignored the good old-fashioned ideals of thrift, economy, conscientious performance of duty and thorough-going efficiency."[20] Another commentary of the same year advised that the "great need" of the nation was "for better discipline in the home; children of the present generation are not taught the importance of respect for...parental authority."[21] At the annual meeting of 1921, James M. Beck, the Philadelphian whose status in Association affairs rose as his conservatism deepened, unloosed a torrent of melancholy cultural criticism in a speech entitled "The Spirit of Lawlessness." Beck declared that the spirit of revolt against authority was not confined to the realm of politics.

> In music, its fundamental canons have been thrown aside and discord has been established for harmony as its ideal. Its culmination--jazz--is a musical crime.
>
> In the plastic arts, all the laws of form and the criteria of beauty have been swept aside by the futurists, cubists, vorticists, tactilists, and other aesthetic Bolsheviki.
>
> In poetry, where beauty of rhythm, melody of sound and nobility of thought were once regarded as the true tests, we now have the exaltation of

> the grotesque and brutal; and hundreds of poets are feebly echoing the "barbaric yawp" of Walt Whitman without the redeeming merit of his occasional sublimity of thought.
>
> In commerce, the revolt is one against the purity of standards and the integrity of business morals. Who can question that this is preeminently the age of the sham and the counterfeit? Science is prostituted to deceive the public by cloaking the increasing deterioration in quality. The blatant medium of advertising has become so mendacious as to defeat its own purpose.
>
> In the greater sphere of social life, we find the same revolt against the institutions which have the sanction of the past. Laws which mark the decent restraints of print, speech and dress have in recent decades been increasingly disregarded. The very foundations of the great and primitive institutions of mankind--like the family, the church, and the state--have been shaken. Nature itself is defied. Thus, the fundamental difference of sex is disregarded by social and political movements which ignore the permanent differentiation of social function ordained by God himself.[22]

Such a cultural reactionary was Beck that he believed mechanization itself threatened society, and he even asserted that "it would have been better for the world if the motor car had never been invented."[23]

In contrast to the hopeful evolutionary progress envisioned by the legal elite at the turn of the century, many of the speakers before annual meetings of the early Twenties were as pessimistic as Beck about the future of American civilization. "We are told by the optimists," said F. Dumont Smith in 1922,

> that this is the richest, the greatest, the most powerful nation the world ever saw. And that is true....We are rich. But wealth is not all.

> There is such a thing as fatty degeneration of the soul, and this nation shows every symptom of it. It is true we saw in 1917 that the fire on the altar could flame as brightly as of old. But fitfully, not steadily--and it has died down....Remember, other nations, as great and strong as we, comparably to their times, have trodden the path we tread today and gone down to ruin and death.[24]

"The tendency everywhere, in vegetable and animal life," another speaker bleakly noted, "is to revert to original primitive types. In the absence of mental and moral training, the human biped steers constantly and inevitably backward to his cave ancestor."[25] James Beck expressed the same sentiment in colorful hyperbole: "Man has danced upon the verge of a social abyss, and even the dancing has, both in form and in accompanying music, lost its former grace and reverted to the primitive forms of uncivilized conditions."[26]

Undoubtedly Beck, as well as other ABA leaders, had been profoundly shaken by the Russian Revolution and the wide acceptance with which revolutionary dogma had been received in eastern Europe. In 1921 Beck pronounced the Bolsheviks "a possibly greater menace to western civilization than has occurred since Attila and his Huns stood on the banks of the Marne."[27] But his was not the only voice, and the high seriousness with which elite lawyers viewed the new international threat should not be underestimated. They were men who firmly believed that

ideas had consequences, and they instinctively understood that revolutionary socialism had no place for the rule of law, or as the more cynical might say, the rule of lawyers. "Russia is giving the world many object lessons," observed a Journal editorial of 1921. "[U]nless judicial tribunals are available to administer prompt and impartial justice, there is no possibility of the peace and order essential to the life of every social organism."[28] Worst, the socialists were not harbingers of the future but of the past returned, when priests, not lawyers, held sway. British Ambassador to the United States Sir Auckland Geddes told the annual meeting of 1920 that the Bolsheviks were attempting

> to establish a privileged class which they call the proletariat but [which is] a select body of their own supporters. Their whole creed is to force on society a Great Idea which has been revealed to them and to them alone and, like it or dislike it, society is to swallow it whole--and that is nothing but pure theocracy.[29]

The fear of revolutionary socialism became so great that a few (though not many) bar leaders were even willing to speak kind words of another "Great Idea," fascism. In "The Spirit of Lawlessness," James Beck expressed a certain rough respect for the fascisti, "a band of resolute men" who had preserved the Italian government from overthrow by taking "law into their own hands, as did vigilance committees in western mining camps."[30] And when the

Association made its official visit to Europe in 1924, a delegation of members headed by Supreme Court Justice Edward T. Sanford paid a courtesy call on Mussolini and "expressed admiration for Italy's prosperity and progress."[31]

It was a serious enough matter that the superiority of the rule of law should be so quickly doubted in a Europe recently saved from German autocracy; but conservatives were even more disconcerted by what seemed to be the rapid spread of socialist doctrine in the United States as well. Bolshevik agents were blamed for much of the labor strife, race riots, and mysterious bombings that plagued the nation immediately following the war, and conservative fears were hardly quieted by the boasted support of domestic radicals for socialist revolution abroad.[32] It is not surprising, therefore, that the two men most often blamed for the excesses of the Red Scare of 1919, A. Mitchell Palmer and J. Edgar Hoover, were both lawyers; whereas the man perhaps most influential in deflating it, Warren G. Harding, was not.

A few silly statements were made at the annual meeting of 1919. For instance, Massachusetts Secretary of State Albert P. Langtry solemnly announced that ten per cent of the residents of Cleveland were Bolsheviks and that the I.W.W. had organized thousands of southern blacks "to kill

all rich men."[33] But generally speaking, if Association leaders were fearful, they were not hysterically so. It should be remembered that it was in the summer of 1919 that the Association called a halt to the red-baiting activities of Rome Brown.[34]

The legal elite was less concerned about an immediate danger from bushy-bearded saboteurs than with the long term consequences of failing to "Americanize" immigrants. By the 1920's Association leaders, along with other Americans from across the political spectrum, had become unabashed nativists.[35] In his presidential address of 1919, George True Page declared that Americans had "set up a melting pot under which we built no fires, or if we did, we let them go out many years ago." Page, who made no mention of his own Polish forebears, demanded that the fires be rekindled "until every man, whether born in this country or out of it, has either become thoroughly and wholly American...or is driven back to the country from which he came."[36] Three years later President Cordenio A. Severance asserted that the United States had too freely admitted as citizens

> men whose chief mission has been to plot and agitate against...free institutions....We have unloaded and turned loose in America great numbers of men whose departure from their native land was for their country's good. This must end....We still have room for the honest, industrious and law-loving from other lands. We have no place for any other.[37]

Judge Kimbrough Stone of the U.S. Circuit Court of Appeals, 8th Circuit, was confident as to who the unwanted group of immigrants were. "This difficult element," said Stone,

> comes almost entirely from Southern and Southeastern Europe. They are so different from us in experience and ideals, that they cannot be or are not easily assimilated....They confound license with liberty; they are not willing to accept our institutions; they often seek to substitute their own ideas and ideals of government, by fomenting discontent and advocating defiance of and resistance to existing law. They herd to themselves with no desire to mingle with the American mass. They come foreign and remain foreign. Wherever you find a sore spot they are sure to be.[38]

The elderly but influential J. M. Dickinson blamed an earlier migration of Germans for the current problems. Dickinson, who had served as ABA president in 1907-08, complained that these comparative newcomers had been influenced by "the disciples of Marx and Saint-Simon...and were responsive to all suggestions of overthrowing established order." Although the former Secretary of War admitted that the United States had nurtured its own "indigenous doctrinaires," he claimed their influence would have been negligible if they had not been "reinforced by the foreign invasion."[39]

Nevertheless, bar leaders were at least as concerned with the influence of the "indigenous doctrinaires" as they were with immigrant radicals. In warning the annual meeting of 1923 to counter current "agitation detrimental

to public welfare and good citizenship," Supreme Court Justice Pierce Butler reminded the assembly that such "false teaching" was "not confined to the alien and ignorant" but was to be found in colleges and universities, especially in the fields of political and social science.

> Professors, in many instances, spread discontent among the students. The things that are good and essential to patriotism are neglected and existing ills in political and economic conditions are magnified, and the Constitution is sometimes condemned as archaic, and by some of them it is believed that religion is a hindrance to social progress. Those who would tear down are much more diligent than those who support our form of government.[40]

Critics of the Constitution were attacked with special virulence. In a speech at Valley Forge, President Robert E. Lee Saner called them "ignorant, unpatriotic, unthinking disciples of communistic thought....Lilliputians of experimental schemes....[who] would destroy where they could not create."[41] Edwin S. Puller, "Lecturer on the Law of Citizenship" at American University, urged his colleagues to oppose all such "enemies of our form of government" whether they were "'reds,' communists, parlor bolshevists, half-baked economists, psychopathic college professors, or brain-muddled men in official positions."[42]

To combat unAmerican heresies of whatever origin, President Cordenio Severance and the Executive Committee established a Special Committee on American Citizenship at their midwinter meeting in January 1922. The chairmanship

was given to Robert E. Lee Saner, and members included influential Association figures, such as Andrew A. Bruce and past president Walter George Smith, who had been outspoken in their criticism of post-war trends. Although in some respects the Citizenship Committee was a reincarnation of Rome Brown's Recall Committee, the new body was more fortunate in its chairman. Unlike the irascible Brown, R. E. L. Saner had what James Grafton Rogers called "winning social qualities." Saner was a Mason, a Shriner, and a Methodist, and he had filled "nearly every subordinate post in the Association before coming to the presidency." Thousands of lawyers called him Bob. Saner used his influence, first as a member of the Executive Committee and then as president, to extract large appropriations for his Committee from the Association treasury. The Citizenship Committee had been established with only nominal funding, but by its second year it received an appropriation larger than any the Association had ever made to its other divisions. In 1924 its budget was $11,500, or thirty percent of the funds appropriated for all twenty-eight ABA committees. Even when the reins of leadership fell to lesser lights the Citizenship Committee continued to receive its hefty subsidies.[43]

In its first report, the Committee modestly defined its mission as an attempt "to stem the tide of radical, and

often treasonable, attack upon our Constitution, our laws, our courts, our law-making bodies, our executives and our flag, to arouse to action our dormant citizenship, to abolish ignorance, and crush falsehood, and to bring truth into the hearts of our citizenship."[44] To achieve this end, the Committee put its trust in the Socratic thesis that the solution to wrong action was correct knowledge--though the knowledge it promoted was as much mystical as intellectual. For instance, speaking before the convention of the National Education Association in 1923, Saner declared that there was "no room in the American conscience for the gospel of the socialistic agitator," that the schools "should no more consider graduating a student who lacks faith in our government than a school of theology should graduate a minister who lacks faith in God," and that "the schools of America must save America!"[45] The Committee also published an affirmation of political faith called "Our Citizenship Creed." In it, the confessor pledged to inform himself about "the United States Constitution and the application of principles therein contained to present-day problems." But he also swore to make patriotism "a constituent part of [his] religion" and the Constitution "as actual a part of [his] life and...religion as the Sermon on the Mount."[46] The same pseudo-religious emphasis is evident in the Committee's

oft-stated major objective: "To re-establish the Constitution of the United States and the principles and ideals of our government in the minds and hearts of the people."[47]

Pious references to the Constitution were not limited to the Citizenship Committee and were, in fact, more numerous in post-war Association speeches and literature than at any time since the decline of the "big bow-wow" school of oratory in the late nineteenth century. In 1918 Hampton Carson averred that in "so far as the thoughts of mortals can approach the Divine Mind, the architecture of our Constitution resembles that of the heavens."[48] Thomas J. Norton, the author of a popular exposition of the document, declared that the Constitution was "not of a past age but for all time. It deals with principles of government as unchangeable as are the principles of morals covered by the Ten Commandments."[49] Ben W. Hooper, Chairman of the Railroad Labor Board, stated that there was "no problem of society or industry that [could not] be solved within the four corners of the Constitution," and he urged lawyers to "thank Almighty God for the inspiration that guided the genius which fashioned it."[50] Even before the ABA Journal began a series on "Decisive Battles of Constitutional Law" in 1923, a reader complimented the editors for "hammer[ing] on the idea of Constitutional

Government. We need our people to understand the sacredness of the Constitution."[51]

Thomas Norton declared that it was the responsibility of the legal profession to compel the teaching of the Constitution in grade schools. He argued that if the Constitution were studied by children, eventually every citizen would recognize a violation of the document when he saw it, and some of the "lack of information which is exhibited in legislative halls" would be dispelled.[52] The Citizenship Committee (of which Norton became a member) worked with other organizations, such as the American Legion, to secure passage of state laws that would require the teaching of the Constitution in all schools and colleges supported by state funds. By 1928, thirty-seven states had adopted such laws. The Committee, however, never regarded the results as satisfactory. Teachers, it seemed, either resisted adding another subject to their curriculum or they taught the Constitution in such a mechanical way that it frustrated the conservatives' objective of gaining the children's hearts. "[B]efore we reach the children," Saner concluded, "we must reach and teach the teachers."[53] Bar association leaders suggested that "any lawyer would be glad to 'brush up' on the Constitution and conduct a class for the teachers once or twice a week."[54] But the Citizenship Committee discovered

to its "amazement" that only eight of the twenty-five leading law schools in the country required a study of Constitutional Law, and in two of these eight, the study was confined to commercial aspects of the Constitution. "I am not teaching my boys the Constitution," said one professor who had correctly gaged the spirit of the age;" I am teaching them how to get into the Supreme Court and win their cases." Nevertheless in 1927 the Committee recommended that boards of law examiners insist upon candidates for admission to the bar showing themselves "competent to 'support the Constitution' by expounding and teaching it."[55]

Saner had never believed that "anti-American activities" could be effectively combatted solely through the standard school curriculum. Like his predecessor, Rome Brown, Saner was fond of making public declamations. Not surprisingly he argued that Association-sponsored oratorical contests would "stimulate citizenship training" among students, propagandize adults, and thereby "stabilize public opinion on the governmental, social and industrial problems of the day." Saner had previously organized a similar contest in Texas under the sponsorship of the Scottish Rite Masons, and he boasted that there were "not less than forty thousand pupils from our public schools functioning as campaign speakers on behalf of good

citizenship." The Executive Committee, however, balked at Saner's request for a ten thousand dollar appropriation to fund the contest and voted only one-tenth of that amount as the Committee's budget. John W. Davis, ABA president in 1922-23, suggested that Saner try to raise additional money from private sources.[56]

Eventually the American Bar Association did make financial contributions to and supply literature for a series of nationwide oratorical contests; but these competitions, featuring ten minute speeches on the Constitution by high school students, were officially sponsored by some of the larger city newspapers. For the contests of 1924 and 1925, Supreme Court justices, including Chief Justice Taft and three of the four subsequent "Four Horsemen," served as judges, and large cash prizes were awarded to the winners. Saner rejoiced in the stated object of the contests, to "increase...respect for the Constitution and to counteract Bolshevistic tendencies in this country." Furthermore, he believed that if the competitions could be continued for a few years, the sentiment of the nation would be "revolutionized [sic] and the work of the Red and the Radical would no longer annoy us."[57] President Coolidge concurred, citing the participation of nearly a million and half children in the contest as an important factor in the voters' rejection of

the La Follette's Progressives at the election of 1924.[58] A Chicago daily, less impressed, doubted the wisdom of so conspicuously rewarding "the pleasant vocalizing of borrowed truisms."[59]

In 1925 Josiah Marvel, Saner's successor as chairman of the Citizenship Committee, decided to try a "unique departure in methods of bringing the Constitution home to the minds and hearts of the people." He persuaded AT & T to broadcast a series of radio addresses on its "connected up system." Speakers included John W. Davis, Governor Albert Ritchie of Maryland, ABA President Charles Evans Hughes, and both an Episcopalian and a Methodist bishop.[60] The Committee insisted that radio addresses by "distinguished lawyers on the Constitution [were] received with the greatest interest." However, its attempt to produce a second series in 1926 was a self-confessed failure because of the difficulty the Committee experienced in finding prestigious volunteers to make the speeches.[61]

Another important project of the Citizenship Committee was the promotion of patriotic holidays, not only the traditional Memorial Day and the Fourth of July but also Patriot's Day (April 19), Thanksgiving, and (appropriately) Constitution Week (September 16-22). The Committee urged lawyers to become "Minute Men of the Constitution" by serving as speakers on "all possible occasions." It

provided suggestions for organizing celebrations, printed "appropriate literature," and produced speech outlines. The Committee went so far as to specify for clergymen biblical texts "which would call attention to the blessings of our form of government" on Thanksgiving.[62] The "abbreviated address" published for Patriot's Day began with a recitation of Emerson's "Concord Hymn" and the Preamble to the "immortal" Constitution but quickly got down to business attacking the Russian government and "anyone [who] tells you that we have outgrown the Constitution, that the rich are grinding down the poor, that this or that class do not enjoy equality of opportunity, [or] that other governments are better than ours." In a forward to the document, the Committee cautioned that in "individual cases you may not deem it advisable to hand this outline to your prospective speaker; but we thought...it might save you the trouble of explaining the nature of the address desired."[63]

Besides the literature promoting patriotic holidays, the Citizenship Committee also produced pamphlets and booklets such as "The Story of the Constitution," "The Declaration and the Constitution," and "The Real George Washington." The latter was a lame attempt to provide the first President with a "press agent" so as to help him compete in popularity with the "leading actors of the

movies [and] the notorious figures on the stage."[64] By 1933 the Committee had distributed over 150,000 copies of these three pamphlets alone.[65] The ABA Journal supplemented the Committee's work by publishing what it grandiloquently called the "New Federalist" Series. These articles, written by elite lawyers and judges and "adapted to the fair intelligence of both native and foreign-born citizens," were distributed free to newspapers and magazines simultaneously with their publication in the Journal. The Citizenship Committee claimed that the articles had been "widely republished throughout the United States" but gave no specific figures and never repeated the experiment.[66]

One avid enthusiast of literature distribution was F. Dumont Smith, an obscure Kansas lawyer and the third and most reactionary of the Citizenship Committee chairmen. His "Story of the Constitution" was blatantly racist, as was the book-length version, The Constitution: Its Story and Battles (1923). The latter is probably the only American constitutional history having an entire chapter devoted to the exploits of Horsa and Hengist! In the book Smith condemned the Fourteenth, Fifteenth, Seventeenth, Eighteenth, and Nineteenth Amendments as "hasty [and] ill-considered." Specifically, he called the "wholesale enfranchisement of a servile race...a ghastly mistake" and

declared that many American women were as "backward, politically, as they were in the Middle Ages." He emphasized that representative institutions had been developed by men who were "tall, large-boned, powerfully built, fair-haired, blue-eyed, and very light-skinned."[67] When in 1926 the ABA Executive Committee was asked to provide a list of reference books for the newspapers' oratorical contest, Smith was appointed chairman of the special committee to draw it up. Not surprisingly, The Constitution: Its Story and Battles was cited as one of seven works considered "more or less indispensable for students of the Constitution."[68]

Negative reactions by more liberal ABA members to this growing conservatism within the Association were muted when they were expressed at all. Robert L. Hale, an instructor of legal economics at Columbia and a frequent contributor to the Journal, vaguely criticized the "pious and emotional and unthinking acceptance of 'fundamental principles'" as a "cheap substitute for...critical thinking."[69] Roscoe Pound was more specific. "It is not the business of the lawyer to fight an obstinate rearguard action in such a period of legal growth," Pound admonished the annual meeting of 1924. "Rather it is his business...to seek the causes of complaint...and to direct intelligently the shapings and adjustings of the

traditional legal materials that are certain to result." Then in the most direct attack upon the Citizenship Committee the Association was to hear during the Twenties, Pound declared, "We shall accomplish little through propaganda for respect for legal and political institutions. We shall accomplish less by repression of speech and opinion. We shall attain nothing by vain attempts to convince laymen that all things legal are in substance perfect."[70] Otherwise, liberals and moderates within the Association remained silent, tending their own more obscure committee gardens. They were well aware, as James Grafton Rogers has written, that there "was plenty of sentiment in the bar to support" the activities of the Citizenship Committee.[71]

The only real check upon the activities of men like Bob Saner and Dumont Smith was that exercised by the senior members of the Association leadership who were repelled by the exaggeration and boosterism--that is to say, bad taste--of the Americanization crusade. John W. Davis, for instance, confessed privately to Frederick Wadhams that one of Saner's schemes was "bizarre."[72] And when Saner tried to coax a "commendation" of his Constitution Week celebration from Simeon Baldwin, the venerable founder of the Association replied tersely that the Citizenship Committee had used the term "re-establish the Constitution"

to characterize its mission. "It implies," said Baldwin, "that a re-establishment is at present necessary, to which I could not agree."[73]

One unintentional beneficiary of the reactionary and nativist trends within the American Bar Association was the legal aid movement, hitherto a step-child of the profession. Legal aid societies had been first organized during the last quarter of the nineteenth century but with "no aid or support, moral or financial," from local bar associations.[74] Largely dependent upon charity and unable to fashion a strong national network, the individual agencies labored to provide free legal services to the meritorious poor. During World War I, the societies were even more hard pressed than usual to meet the demands placed upon them. Many legal aid lawyers entered the army, and the poor encountered more legal problems than would have been the case in time of peace.[75]

Meanwhile public criticism of the legal profession combined with nativist fears and the Red Scare spurred the legal profession to reconsider their responsibilities to the poor. In the past when legal aid officials, such as New York's Arthur von Briesen, had solicited funds from the wealthy, they had emphasized that justice for the deserving poor was "the best argument against the socialist who cries that the poor have no rights which the rich are bound to

respect."[76] By 1920 the ABA leadership was ready to take this argument seriously. In that year the Association sponsored a symposium on legal aid at its annual meeting. All speakers agreed upon the necessity for this service and disagreed mainly about whether it should be provided by the public or the private sector.[77]

Reginald Heber Smith, the nation's foremost expert on legal aid, argued that lack of legal redress for the poor would lead to a "dangerous sense of injustice, bitterness, and unrest."[78] Philadelphia lawyer Ernest Tustin told a story about an Italian immigrant for whom a misunderstanding with the local authorities had been cleared up by his city's legal aid society. That man, said Tustin, "might have become one of those implacable of all the enemies to the Government, an Italian Red. Instead we have a man who says, 'Mister, if your city needs anyone to fight for it, send for Dominick Rividi and his friends.'"[79] Charles Evans Hughes, who had recently defended the six Socialists expelled from the New York State Assembly, declared that there was

> no more serious menace than the discontent which is fostered by a belief that one cannot enforce his legal rights because of poverty. To spread that notion is to open a broad road to Bolshevism. We cannot, as Sydney Smith said, make those content whose game is not to be content, but we can remove every just ground for complaint of administration.[80]

In 1921 the ABA appointed a Committee on Legal Aid with Reginald Heber Smith as Chairman. Although the Committee's first report openly criticized the organized bar for its previous neglect of legal aid work, Chairman Smith was nonetheless gratified that the American Bar Association had finally taken the movement "under its shield." He hoped that the support of the legal elite would enable the movement to weather the "crisis" caused by the war and that the Committee would provide necessary leadership until legal aid bureaus were strong enough to maintain their own national organization. These expectations proved to be substantially correct.[81]

By 1925 the focus of American Bar Association apprehension had shifted away from the perceived threats of immigration and Bolshevism. The Johnson-Reed Act of 1924 not only reduced the numbers of American immigrants with its ethnically-based quota system, it also cut the ground from under the nativists. "Although no general revulsion disturbed the principles of 100 per cent Americanism, its spirit deflated."[82] In 1925 the National Americanism Commission of the American Legion complained that "Americans [had] become apathetic to the monotonous appeal of the patriotic exhorter" and that the "utmost ingenuity [was] frequently necessary to obtain publicity."[83]

At the same time, conservatives were heartened by the results of the 1924 election--not necessarily because Coolidge had been returned to office but because La Follette and the forces of "radicalism" had been so resoundingly defeated. The eloquent pessimist James M. Beck was momentarily confounded when he discovered that so many Americans "preferred the old order of things."[84] In his Citizenship Committee report for 1926, Dumont Smith flatly declared that the "menace of Bolshevism [had] passed." Furthermore, he rejoiced because "the demand that Congress be set in authority above the Constitution and the Supreme Court as the final interpreter was decisively and overwhelmingly vetoed at the last election." However, Smith had a new worry: "[t]he immediate danger recognized by lawyers everywhere...centralization, the destruction of local self-government and individual liberty."[85]

Actually, the level of concern among the elite lawyers over growing federal power may have declined slightly towards the end of the decade, in part because conservative anxieties had been so high after the Armistice. It has often been overlooked that while progressives mourned the rapid dismantling of federal controls after the war, conservatives feared the bureaucracy that remained. President Severance told the annual meeting of 1922 that following great wars there was

"always a tendency to an expansion of the governmental power, with the resultant increased interference with the freedom of the individual," and he warned his colleagues that if they did not "check the tendency to set up a bureaucratic government centering in Washington," they were inviting "disaster."[86] More perturbed was Floyd E. Thompson, an Illinois Supreme Court judge and Chairman of the Section of Criminal Law. Thompson charged that America was

> plunging headlong into the abyss of communism. The brave heart of American business is being broken by government intermeddling and the individual citizen is constantly reminded of the ever-ready jailer. Government job-holders are stepping on each other's heels and new jobs are being created daily....Tremendous as is the cost in millions and millions in treasure spent to maintain this hundred-headed bureaucratic monster, it does not begin to compare with the cost of the priceless fundamental principles destroyed. Americans! you must pull yourselves together! Awaken from your lethargy and defend your liberties against this octopus of paternalism or it will suck the very life blood of the nation![87]

Though Thompson's tirade was probably the most emotional pronouncement on government expansion published by the American Bar Association during the Twenties, the sentiment of the speech was echoed in many other addresses and reports of the decade.[88] The Journal did reprint one speech that disparaged elite fears of paternalism, but it emanated from an obscure attorney residing in Emmetsburg, Iowa. Furthermore, the author very carefully at the outset

denounced "Socialism, Communism, I. W. W.-ism, La Follette-ism or any other extreme radical proposal," and his enthusiasm for increased governmental regulation was predicated on a conviction that conservative courts would continue to stand between the people and their government to prevent any "aggression [or] illegal encroachment on...individual freedoms."[89]

Although numerous speeches expressed opposition to the growth of the federal government in general, few attacked specific measures or made suggestions as to where the federal bureaucracy might be trimmed. Both ABA President Chester I. Long and Columbia University President Nicholas Murray Butler (the latter writing for the Journal) denounced federal grants-in-aid. Long called them "vicious in principle [and] destructive of local self-government" but urged only that such legislation "not be extended into other fields not now occupied."[90] Curiously, the Child Labor Amendment sent to the states by Congress in June 1924 came under fire from a few ABA leaders even though it was "the only serious attempt of the era to expand congressional authority by formal constitutional process" rather than by the surreptitious methods the legal elite condemned.[91] However, the Association itself took no position on the question, and a 1922 Journal article even suggested that the passage of a child labor amendment would

not be difficult. Only when the amendment was revived during the New Deal did the ABA appoint a special committee to oppose it.[92]

In 1918, however, the leadership of the American Bar Association did make one serious effort to array the organization on the side of forces opposed to national prohibition. As with the opposition to other progressive reforms, opposition to prohibition developed only after the first decade of the century. Earlier leaders had cautiously approved of the temperance movement. Cortlandt Parker, in his presidential address of 1884, told the assembly that though he had not himself embraced the "theory of prohibition," yet he believed that the "grim earnestness" of state laws pointed to a "hopeful future." Alexander Lawton, president in 1882-83, called alcohol abuse a "crying evil" and hoped that temperance advocates would not "be discouraged by vast difficulties, both in principle and practice, which they encounter." At the same time he cautioned that "the intemperate pursuit of [prohibition] by its friends may trench so far upon individual rights as to produce reaction and ultimate failure." In 1888 President George G. Wright predicted that at the least the saloon was "doomed" and warned his colleagues that in the matter of alcohol restriction the people would have their way; "those opposed had as well get

off the track or be run over and injured pecuniarily, politically and every way by the oncoming train freighted with...temperance determination."[93]

Of course, in the 1880's the antiliquor crusade had concentrated its efforts on state and local laws. Only after 1913 did the Anti-Saloon League and its allies seek an amendment to the federal Constitution. It was at this point that elite lawyers began to join the opposition. They argued that legislative acts, especially sumptuary laws, should not be incorporated into the Constitution; that "centralization" and "paternalism," inherent in prohibition, would weaken both personal character and state sovereignty; and that inability to enforce the legislation would lessen respect for all laws. For instance, in his presidential address of 1917, George Sutherland censured the American "mania for regulating people, [forbidding] not only evil practices, but [also] practices that are at most of only doubtful character." He argued that the institution of prohibition would cause the loss of "that fine sense of personal independence which...has enabled the Anglo-Saxon to throw off the yoke of monarchical absolutism" and that such a curtailment of individual liberties would reduce "the reverence for law generally."[94]

The legal elite also opposed prohibition from motives less lofty. At the most basic level the elite both enjoyed

their social glass and were unaccustomed to others (especially those of lower status) attempting to regulate their lives. Elihu Root, a foe of the prohibition movement early and late, wrote to Everett Wheeler in 1919 that prohibition had taken away a simple pleasure of the working classes--not a group for whom Root usually expressed a great deal of sympathy. "You and I have our clubs," said Root with a tinge of guilt. "Answering the same instinct, millions of men who do the hard labor of the world have been in the habit of meeting their fellows over a glass of beer and finding in that way the chief relaxation and comfort of very dull lives." To another friend he grumbled that "the people of Iowa" should have no concern with "what the people of New York eat and drink. The personal habits of the people of any state are entirely a domestic affair."[95] No doubt had he lived in Iowa, Root would have argued that personal habits were entirely a personal affair.

In August 1918, nine months after Congress had approved the prohibition amendment, the Committee on Jurisprudence and Law Reform, at the suggestion of Everett Wheeler and Henry St. George Tucker, submitted a resolution to the annual meeting which would have officially placed the Association in opposition to both the women's suffrage and the prohibition amendments. Typically, committee

members claimed to be expressing no opinion as to the merits of either proposition but rather to be basing their opposition on the belief that the amendments would make national government "an instrument by which the people of some parts of the country may impose their ideas regarding the conduct of life upon the people of other sections." So convoluted was the language of the report that one member had to ask if he had understood it correctly. Once its thrust was clear the resolution encountered serious opposition. Following a single speech from the floor favoring women's suffrage, the assembly voted to postpone the matter indefinitely by a vote of 123 to 87. Such a vote would have killed any other measure before an annual meeting, but the ABA leadership evidently felt that it might win a second vote on prohibition alone.[96]

The next day, after the wording of the resolution had been tightened up and the reference to women's suffrage deleted, the measure was reintroduced to the assembly. Prohibition supporters protested on parliamentary grounds but to no avail. Anti-prohibitionists argued that the amendment purported "to confer concurrent jurisdiction upon federal and state authorities." Their opponents countered with attacks upon the liquor industry and the belief that the amendment would be "a great step forward for civilization." Most significant was the fact that not a

single member of the Association leadership stood with the prohibitionists. Everett Wheeler, George Sutherland, J. M. Dickinson, S. S. Gregory, Henry St. George Tucker, and Simeon Baldwin--all former presidents of the American Bar Association--spoke against the amendment. A letter from Elihu Root expressed the same sentiments. Henry St. George Tucker urged the rank-and-file not to ignore the advice of "the old landmarks...these old 'Fathers in Israel'...these men that we delight to honor and look up to." But, for once, the assembly did disregard the prestige of the leadership and voted the resolution down by a vote of 75 to 68.[97]

During the early years of national prohibition, the Journal exhorted Association members both to obey and to help enforce the law. As long as prohibition continued to retain wide public support, ABA leaders had little recourse. Lawyers had sworn to support the Constitution at their admission to the bar, and the American Bar Association could not simultaneously urge national fidelity to a sacred document while winking at its violation. A long editorial in a 1924 issue of the Journal excoriated a "lawyer of national prominence" who had attacked public officials for enforcing the liquor laws and had concluded his remarks with the statement, "Thank God for the bootlegger." The editor asked rhetorically what the effect

upon law-abiding citizens would be "when they hear lawyers who are supposed to know both the letter and the spirit of the law, openly advocate its violation, or evasion, or see them violate it in private?" Likewise, U. S. Circuit Court Judge Kimbrough Stone urged his hearers to consider the consequences of violating "an integral valid part of the fundamental and statutory law of the land....Respect for the law is the keystone of our social arch. When it crumbles we will be buried in the collapsing masonry."[98] Frederick Wadhams was horrified when he discovered that influential committee chairman Thomas Shelton had planned a small dinner in honor of a visiting representative of the British bar and had arranged for champagne and scotch to be sent to him via a foreign embassy. Wadhams immediately warned Shelton that he would be making a "great mistake" if he received any alcohol from such a source, "that the means employed to obtain it would surely leak out and subject the Association to very severe criticism."[99]

By 1926, however, attitudes within the Association had begun to reflect the changing mood of the nation. In that year the mayor of Chicago was invited to deliver an attack upon prohibition laws, though ostensibly his speech concerned the problems of urban law enforcement.[100] In 1927 a few elite New York attorneys founded an anti-prohibition society incorporated as the Voluntary Committee

of Lawyers. Joseph Choate, Jr., who served as chairman of the organization's executive committee, and Harrison Tweed, who was the treasurer, "typified the leaders of the bar who made up the membership."[101] The arguments of these gentlemen were variations on the theme heard in 1918. Frederic R. Coudert, a leader in both the VCL and the ABA, declared in a pamphlet that "American lawyers must assume the leadership in the struggle for the restoration of our Constitution."[102] The lobbying effort of the Voluntary Committee at the ABA conventions of 1929 and 1930 was so successful that the assembly of the latter year approved polling the membership on the prohibition issue. This referendum, in which a remarkable three-fourths of the membership participated, resulted in a vote of 13,779 to 6,340 in favor of repeal. As David Kyvig, a student of the repeal movement has said, the publication of these results "dealt national prohibition a severe blow by putting the largest, most inclusive organization in the legal profession on record as rejecting prohibition by a two-to-one margin."[103]

As if to confirm all that Association leaders suspected about the incompetence of federal bureaucrats, the Association was forced to defend itself during the winter of 1923-24 from politically motivated charges that it lacked "good taste and elementary patriotism." In

preparation for the ABA's ceremonial trip to London in the summer of 1924, Frederick Wadhams and Harold Beitler, secretary of the Executive Committee, negotiated with the U. S. Shipping Board for passage on the liner Leviathan. Because of the political conventions that year, some influential members of the Association wished to set up the sailing date to July 12. The Shipping Board manifested some hesitancy to move the time of the Leviathan's departure. On the other hand, the Cunard Line at once advanced the sailing time of its Berengaria by three days and offered a considerably lower rate. Later it was revealed that the Shipping Board had been playing the ABA against the Association Advertising Clubs, which also had a convention in London that summer. At the last minute, the advertisers too refused the Leviathan for another American ship, and the Shipping Board promptly complained of the ABA's action to senatorial friends of the merchant marine. Senator Duncan Fletcher of Florida said that he for one would have been "willing to pay a little bigger price to patronize an American ship." Senator Nat B. Dial of South Carolina pouted that "if enlightened people such as the members of the Bar Association do not patronize our ships, we might as well junk them and be done with it." Other senators suggested that the Association had decided on the Berengaria because it was "wet." There was even talk of a

Senate investigation. Association leaders countered the bad publicity as quickly as they could, though, as John W. Davis wrote to R. E. L. Saner, "truth rarely travels as fast as a lie." The "whole cry [of the Shipping Board]," Davis continued, "is simply a smoke screen to excuse themselves before the American public for failing to get this business. It is another illustration of what happens when the Government goes into business."[104]

Not only were the legal elite of the 1920's disturbed by immigrants, Bolsheviks, and the growth of the federal government, they also maintained a traditional solicitude for the prestige of the legal profession. Unfortunately, the best that may be said for the prestige of the legal profession in the Twenties was that it declined more slowly than that of the clergy. The decade opened with jeers at the exaggerated alarums of Attorney General A. Mitchell Palmer. Then Palmer's successor was forced to resign in disgrace. While running for President in 1924, John W. Davis discovered that his Wall Street practice was more a handicap than an asset, and for similar professional achievement Charles Evans Hughes received some rough handling from progressive senators before his confirmation as Chief Justice in 1930. Nor is it probable that the standing of the legal profession was enhanced by the

monkeyshines at Dayton, Tennessee, or by the Sacco-Vanzetti Case. In 1921 the ABA Journal itself printed Carl Sandburg's uncomplimentary poem "The Lawyers Know Too Much" (1920), which includes these now well-known lines:

> Why is there always a secret singing
> When a lawyer cashes in?
> Why does a hearse horse snicker
> Hauling a lawyer away?[105]

A new force lessening respect for the legal profession was the popular press. Of course, yellow journalism was not itself new in the Twenties, having grown up with the American Bar Association in the 1880's. As early as 1905, ABA charter member Alfred Hemenway had declared that "trial by newspaper [was] infinitely more harmful than government by injunction [and] as lawless as the shameful trials of witches in Massachusetts."[106] But during the next two decades, the legal elite began to realize that journalists and editors were no longer paying homage to the collective wisdom of the bar and bench as they had in the past. In an address entitled "Has the Lawyer Lost Caste?" (1917), influential ABA figure Thomas J. O'Donnell went so far as to call contemporary newspapers "lawless, licentious," "unbridled," and "criminal controlled."[107]

Guy A. Thompson, president of the Missouri Bar Association, presented journalists with a host of requests from the legal elite in a 1924 speech printed in the

Journal. Thompson asked for "fair and respectful criticism of the courts," that is, for as few negative comments as possible, especially in constitutional cases. The press, he said, should neither report trials in a sensational manner nor portray lawyers as charlatans but rather remind its readers that many of the vagaries in the judicial system were the fault of laymen, especially jurymen and political hacks. Editors, continued Thompson, should provide "stalwart and persistent defense against assaults from certain quarters now being made upon our system of government" and should support the worthy goals of bar associations, helping them raise their memberships and sustaining their calls for higher educational standards for admission to the profession.[108]

Henry W. Taft, brother of the Chief Justice and president of the Association of the Bar of the City of New York, laid partial blame for the failure of technical law reform on the press. As a member of the ABA's Committee on Jurisprudence and Law Reform, he had presented draft bills to the House and Senate Judiciary Committees, but, he said, "they attracted little attention from the press, favorable or adverse, and they have since appeared to be sleeping the sleep of death." To Taft the press was a

> powerful agency...to instruct and lead public sentiment. If it should unite its efforts to those of lawyers, useful results might be

> anticipated. But if it contents itself with being a mere reporter of news and an occasional commentator, frequently critical, it must bear a share of the responsibility for the continuance of present conditions.[109]

At an ABA-sponsored conference with journalists in 1924, prominent New York attorney Wilson M. Powell declared such headlines as "Dog Outwits Judge to Decide Rightful Owner" and "Court Rules Lady Can Bob Her Hair" to be objectionable to the bar. He suggested that newspapermen take their cue from the legal elite and "become a select class operating under license of the state [with] grievance committees as a means for enforcing ethical standards."[110] More realistically, the Journal advised its readers to answer "temperately, concisely and effectively erroneous statements in the public press which reflect[ed] seriously upon the courts or the profession."[111] It also warned lawyers to be cautious when journalists were about so as to avoid "misquotation." "Look alive," the Journal admonished, "and prepare and deliver...addresses with a full consciousness that they are likely to be reported."[112]

Clearly the press criticism which most disturbed the legal elite was that directed against the judiciary. In fact, much of the darkening mood of the Association in the Twenties may be attributed to the realization that attacks upon the courts would continue indefinitely. The Association now understood that the anti-recall fight had

only been a holding action in what a Journal editorial called "the Endless Battle for Constitutional Principle."[113] Association leaders believed one source of this criticism to be foreign-born radicals who, in the words of Walter George Smith, found "in the calm atmosphere of a court of justice influences deadly to the germs of revolution and disorder and therefore have directed their most desperate efforts to discredit the entire judicial system."[114]

But practically speaking, the legal elite recognized that "substitution of the rule of force for the rule of law....commonly designated as Bolshevism....[could] not succeed in the United States."[115] A more potent threat to the traditional strength of the judiciary, they believed, was the growth of labor union power and violence. Post-war strikes--especially the Seattle general strike, the Boston policemen's strike, and the Herrin Massacre in Williamson County, Illinois--filled the legal elite with fear and loathing.[116] Nor were their apprehensions diminished when Samuel Gompers exclaimed before the Lusk Committee investigation, "God save us from the courts," or when a railroad labor leader presented with an injunction swore, "To hell with the order of the court."[117] Moorfield Storey was loudly applauded at the 1919 meeting of the National Conference of Commissioners on Uniform State Law when he

urged that body to make strikes a criminal offense.[118] What appeared especially menacing to the legal elite was the possibility that labor unions might succeed in weakening the judicial system. Luther Z. Rosser noted that unlike a lynch mob, a labor mob did not "slink away in darkness or fear, but [dispersed] boldly, defiantly, boasting of its deeds." Often, he said, it survived in strength long enough "to vote and to exert its corrupting influence upon legislation and administration."[119] Furthermore, said Ben W. Hooper, Chairman of the Railroad Labor Board, the political goals of labor leaders included

> a demand that the courts be shorn of certain of their powers....In furtherance of this program, the most virulent attacks have been launched against the judiciary. These are men, organizations, and periodicals in great number that lose no opportunity to preach the pernicious doctrine that the courts are dominated by the rich and powerful and that they deny justice to the poor and weak. It will not do to underestimate the effectiveness of this widespread effort to poison the minds of millions of people against the courts of our land.[120]

As a remedy against this erosion of faith in the judiciary, the ABA leadership recommended a position at variance with that of its nineteenth century predecessors, namely that labor disputes be submitted to a court for adjudication. One Journal editorial asked rhetorically if error were "not more likely to be avoided in the calm atmosphere of the temple of justice than in the passion and

bitterness of industrial strife."[121] The Journal argued further that lay arbitration would not be effective both because it was "negotiation by advocates and partisans" and because it did "not command that prime essential--the confidence of the contending parties."[122]

Fear of societal disturbance and the perceived need to boost judicial prestige overcame the natural reluctance of Association conservatives to recommend a course of action that would involve increasing governmental power over economic affairs. By 1923 there was considerable sentiment within the ABA for the establishment of state industrial courts. Kansas had already established such a body in 1920 and had given it the power to fix wages and labor conditions in businesses "affected with a public interest." Although the Association itself never officially endorsed the idea, industrial courts were supported by the ABA Journal, the Committee on Commerce, Trade and Commercial Law, and the National Conference of Commissioners on Uniform State Laws.[123] Former Executive Committee member Charles Thaddeus Terry made it the subject of a glowing speech to the Kansas Bar Association, which the Journal reprinted. Terry went so far as to say that he would have rather been the author of the Kansas Industrial Relations Act "than to have written the plays of Shakespeare or the works of Dante, or have discovered electricity." Kansas,

said Terry, had "applied the only remedy given under heaven and among men whereby the industrial world may be saved."[124] The Supreme Court, however, proved to be less enamored of the idea and unanimously struck down the Kansas statute on the grounds that it interfered with freedom of contract under the Fourteenth Amendment.[125] The ABA's Commerce Committee thereupon slunk back to supporting more traditional methods of settling labor disputes.[126]

Another contemporaneous threat to the proper operation of the judicial system was the revived Ku Klux Klan. ABA leaders of unimpeachable nativist sentiments flayed the Klan because it usurped judicial functions. For instance, former ABA president J. M. Dickinson paused long enough in a verbal attack upon radicals and immigrants to condemn the Klan as "a vicious disease which will run its course and be a stench in the nostrils of all patriotic people."[127] A Journal editorial of the same year referred to the Klan as "this species of midnight mummery" and declared that if Klan members believed "that a night-riding mob can administer justice in an organized community, then the long struggle of the race to give every man the benefit of counsel, a fair hearing, and the protection of orderly methods of testing evidence, has been for them without significance."[128] At the annual meeting of 1923, Justice Pierce Butler warned that the Klan's dominance of "public

affairs, public officers and courts by threats and intimidation amounts to a taking of the law and its proper enforcement out of the hands of lawfully constituted authority. These things are anarchistic and threaten society."[129]

Crime in the Twenties also seemed to be anarchistic and threatening to society. Not surprisingly, a number of influential ABA members served on urban crime commissions that were so fashionable during the decade. The Association itself, however, demonstrated comparatively little interest in what was rapidly becoming a national political issue.[130] The ABA did establish a Section of Criminal Law in 1920, but its recommendations dealt narrowly with procedural issues, such as the elimination of delays and technicalities in criminal trials.[131] The same emphasis was evident in the few convention speeches that touched upon the problem.[132] Meanwhile, the Journal maintained an air of aggrieved disappointment that newspaper editors would blame the courts and the legal profession generally for the crime problem. It devised a three-point, "workable program for more efficient criminal procedure" which included forcing the most egregious criminal lawyers out of the profession (driving "the false priests from the temple of justice"), restoring more courtroom power to the judiciary, and simplifying

"indictments and the whole course of the pleading and procedure."[133] Of course, the legal elite coveted the accomplishment of these reforms for other reasons as well.

Despite new forces in the Twenties which threatened the authority of the courts, the legal elite understood clearly enough what it did not often verbalize: that the greatest challenge to the judiciary came from its traditional rival, the legislature. As had been true from the founding of the organization, the American Bar Association consistently denounced and disputed legislative attempts to reduce judicial power and prestige during the 1920's. At times the official rhetoric could be quite strident, as in 1921, when the Journal charged an unnamed group with endeavoring "to gain control of [the court system] by stealth for selfish and sinister purposes." Such assaults, it declared, were "more insidious and dangerous than the direct attacks of blatant anarchists" because the former were more "likely to succeed and...destroy the judicial institution."[134] Five years later the ABA periodical accused "shallow demagogues and self-interested seekers after preferment" of planning to diminish the authority of the Supreme Court. Whether they knew it or not, the Journal asserted, they were "breaking down...our democratic representative government under a written constitution. A good many," the editor hinted

darkly, "do know it and their purposes are thinly veiled."[135]

In the main, the targets of these innuendoes were senatorial progressives, such as Robert M. La Follette and William E. Borah, who had urged that the "judicial oligarchy" be checked by constitutional amendment. La Follette, as always the most venturesome of the progressives, proposed that no lower federal court be permitted to rule on the constitutionality of an act of Congress. The Supreme Court would be allowed that power but only "subject to the right of Congress to nullify the Court's decision by reenacting the law."[136] Borah advocated the more moderate remedy of requiring a majority of seven justices before congressional legislation could be invalidated.[137] Both proposals, however, were repeatedly anathematized at the annual meetings and in the Journal. In his presidential address of 1923, John W. Davis declared that when these propositions were "reduced to their simplest terms," they stood forth "naked and undisguised as an attack upon our theory of government under a written constitution."[138] Moorfield Storey, in a speech of the same year, assured the Court that the bar would "stand with all its force behind the great tribunal which is the crown of our government" and would resist "by tongue, pen and vote all attempts from any source to impair its influence

or curtail its jurisdiction."[139] Even William Draper Lewis described the progressive proposals as "the recent stupid attempts to modify the power of the Supreme Court."[140]

The American Bar Association also fought to maintain the status and powers of state and lower federal courts during the Twenties. Lobbying for increased salaries, a service traditionally performed by the Association for the federal judiciary, was discharged with more urgency during the years 1918-1928 because of the sharp inflation which followed American entry into World War I. In 1918 the Executive Committee authorized its first constitutional referendum on the question of whether the compensation of federal judges ought to be increased. The vote was 5750 to 975 in favor of a pay raise. The Special Committee on Compensation then drafted a suitable bill but, after consultation with members of Congress, declined to introduce it.[141] Later committees achieved modest success with legislation that they sponsored, although much of their effort was expended in compiling statistics about judicial salaries to be included in the annual Reports.[142]

Only once did an attempt to support judicial power encounter serious opposition at an annual meeting. In 1918 ABA leaders sought Association approval for a protest against a congressional measure that would have limited the power of federal judges to charge the jury after closing

arguments had been completed. Moorfield Storey explained why the leadership opposed passage of the bill:

> A lawyer will stand up in court and say to the jury: "Look at this great wealthy corporation. Go to the office of this company and see the money pouring into its coffers, and then tell me that you are not willing to take money to pay this poor plaintiff from the company's overflowing treasury." That sort of argument is used many times. Now there ought to be some calm, judicial statement of the case and the facts.[143]

The rank-and-file were less enthusiastic about such "calm, judicial" statements, in part because ordinary ABA members would have most likely represented the plaintiff in Storey's hypothetical example. The Executive Committee openly discussed the possibility that if the entire membership were to consider the leadership's proposal, it would be overwhelmingly defeated. Not surprisingly, opponents of the protest requested a referendum and came within five votes of achieving their objective.[144] In 1924 the even more stringent Caraway bill, which would have prohibited judicial comment on the credibility of witnesses or the weight of evidence, was introduced into Congress. Everett Wheeler's Committee on Jurisprudence and Law Reform called it "iniquitous," "alarming," and "a vicious plan to destroy the powers and independence of the Federal judiciary." In this case there was no recorded internal opposition to the Association's censure.[145]

Another more subtle assault upon the power of the courts was the rising tide of statute law generated annually by state and national legislatures. "When we think of the menaces to a well-ordered freedom," Charles Evans Hughes told the 1925 annual meeting, "we are apt first to lament the multiplicity and uncertainty of laws. And well we may."[146] Nearly everything about the statue-making process ran counter to the convictions of the legal elite regarding the fundamental nature of justice. Statutes were enacted in haste by laymen and members of the lower bar "to satisfy some momentary clamor"; they were promoted by "particular interests" and engendered class strife; they encouraged the belief that "the state should protect everyone against all the trials and burdens of life." Statutes directly regulated the procedures and operations of the courts, indirectly pre-empted areas of the law that were once fertile fields for judicial interpretation, and left in their wake confusion and uncertainty for which the entire legal profession was held accountable.[147] No wonder ABA president Chester Long suggested that lawyers adopt the slogan "Slow down the Legislatures and Speed up the Courts."[148]

Of course the growing volume of laws was, as Hughes himself said, an old complaint. But in the nineteenth century the legal elite could at least turn from the

confusion of legislative enactments to contemplate the comparative orderliness of the judge-made common law. By the 1920's, this was no longer possible; conservatives were forced to agree with Benjamin Cardozo that there was no "solid land of fixed and settled rules."[149] Even Elihu Root admitted in his presidential address of 1916 that the

> vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish cadi who is expected to do in each case what seems to him to be right.

The solution proposed by Root and other members of the legal elite was a "restatement" of the common law, an authoritative description of "generally recognized and accepted legal principles." However, Root was uncertain about who or what would undertake this task, and the matter was left in abeyance during World War I.[150]

In March 1922, shortly after Root and William Draper Lewis had contrived the professional endorsement of higher legal education standards at the ABA's Washington Conference, Lewis paid a visit to his new friend and confided to him a plan for organizing a permanent body to undertake the job of drafting restatements of the law. Root was "thoroughly interested" and not only outlined "the underlying objects and the way to obtain them but carefully

went over the detailed steps which had to be taken in order to launch the organization successfully."[151]

One difficulty was that there already existed an organization with a similar purpose, the "American Academy of Jurisprudence," founded in 1914 by James D. Andrews. Andrews, it is true, was something of a crank, but he was also the Chairman of the ABA Committee on Classification and Restatement of the Law. Furthermore, he had provided excellent window dressing for his Academy. William Howard Taft was the nominal president and Roscoe Pound, Samuel Williston, and Elihu Root himself were members of the governing board. Perhaps suspecting that a rival organization was being planned, Andrews brought to the 1922 annual meeting a resolution which would have effectively involved the ABA in a promotional scheme to sell subscriptions for his unwritten restatements. The Executive Committee was adamant in its opposition and, after a rancorous debate, easily carried the day. The sixty-six year old Andrews bitterly watched his illusion of becoming an American Blackstone come to an end.[152]

Under the guidance of Root and Lewis, the American Law Institute was established a few months later on February 23, 1923. Of the 341 persons in attendance at the organizational meeting, only three were not members of the American Bar Association. Lewis became the first director

of the Institute, and Root, with the title of honorary president, provided the necessary influence to obtain a $1.1 million endowment grant from the Carnegie Corporation.[153] Because the ultimate form of the proposed restatements remained ambiguous, the ALI was endorsed by virtually all the legal elite, practitioners and law professors, conservatives and progressives. Progressives imagined that the restatements would provide an opportunity to adapt "law to changing economic conditions."[154] Conservatives believed that the restatements would restore nineteenth century certainty to the common law and thus provide a bulwark for appellate judges engaged in combat with the legislatures. However, progressives soon discovered that the restatements, even those drawn by liberal hands, were to be conservative systemizations "almost virgin of any notion that rules had social or economic consequences."[155] And conservatives might have noted the dismay of the Commissioners on Uniform State Laws at the manner in which their creations were being ignored or variously interpreted by state courts.[156] Nevertheless, the drafting of restatements proved so satisfying to elite professionals that it has continued to the present.

In the year of the Association's fiftieth anniversary, the ABA Journal reprinted selections from a few early addresses to the Association. One was an excerpt from E.

J. Phelps' 1879 declamation on the glories of John Marshall and the Constitution that concluded: "Let us join hands in a fraternal and unbroken clasp to maintain the great and noble traditions of our inheritance and to stand fast by the ark of our covenant." The Journal commented that those words were

> the key to one branch of the Association's principal activities during the last fifty years--support of sound constitutional principles against all manner of attacks....Its campaign during the last few years to bring the Constitution back to the minds and hearts of the people, is but the latest of a long series which stretches back to the very beginning of the Association.[157]

But the editorialist was wrong. Phelps' speech had been a well-polished anomaly, and the Association's burden for defending a static Constitution could be traced back only as far as Rome Brown's recall campaign. During the Thirties and beyond, the extreme conservatism of the American Bar Association became notorious, and it was not difficult for scholars and other laymen to conclude that the Association had always been a reactionary organization. The American Bar Association had no reason to dispute that opinion, and so it may be said that the Association was instrumental in helping to create its own stereotypical image.

CHAPTER 10

THE LEADERSHIP OF THE AMERICAN BAR ASSOCIATION, 1878-1928: A PROSOPOGRAPHY AND A CONCLUSION

Simeon Baldwin, the founder of the American Bar Association, died on January 30, 1927, just seven months before the organization's fiftieth annual meeting. Baldwin had been broken in health for some years and so could not have participated in the Association's semi-centennial celebration in any case.[1] Still, it is interesting to speculate about how he might have treated the changes that the ABA had undergone since its establishment. For his part, Francis Rawle, the last survivor of the founding members, emphasized the necessity for maintaining strong ties with the past. Just before leading the 1927 convention in a moment of silence to the memory of Baldwin, Rawle successfully opposed passage of a constitutional amendment that would have restricted the secretary and treasurer to terms of three successive years. Rawle argued that this measure would break the continuity of the Association, and continuity, he said, had been the basis of its success.[2]

Of course, Rawle spoke of the continuity of leadership. As an organization which had been mainly social in its earliest years and then had stumbled into an era of unmanaged expansion, the Association was almost totally dependent upon the character of its leadership. Rank-and-file members had neither vote nor voice in ABA affairs unless they attended the business sessions at the annual meeting, and fewer members seemed inclined to do so. At some of the later conventions of the period, the number of participants dropped below one percent of the total membership. Whether out of deference or indifference, the rank-and-file usually allowed the inner circle to have its way. Although R. E. L. Saner suggested that the Association publish "a much needed complete and accurate history" of the organization on its fiftieth anniversary, what the ABA actually commissioned was James Grafton Rogers' biographical sketches of the first fifty presidents. There was some feeling that these two were almost the same thing.[3]

Because the leadership of the Association was of such consequence, it is necessary to examine its social, economic, political, and educational composition before drawing conclusions about the course of American Bar Association history from 1878 to 1928. Rogers' biographical sketches are a fascinating introduction to the

legal elite of the period, but they are too few to be entirely representative of the ABA leadership. Therefore, for purposes of this study, 233 committeemen have been selected and divided into six chronological classes or cohorts in order to examine more closely the degree of continuity and change within the Association.[4]

Like the membership as a whole, the leadership of the early American Bar Association was weighted heavily towards the Northeast. In 1878 forty-four percent of the committeemen were residents of states east of Ohio and north of Maryland.[5] This percentage had dropped to thirty-two by 1928 with the growing economic importance of the West and Midwest; yet the average for all decades was still more than thirty-five percent. New York alone accounted for fifteen percent of the committee members, while West Virginia, Mississippi, Oklahoma, Arizona, Nevada, Washington, and Oregon remained unrepresented in any decade. Ten additional states were represented by a single committeeman.[6] Ninety-five of these bar leaders (41%) were legal residents of the five industrial states of Massachusetts, New York, Pennsylvania, Maryland, and Illinois, and this total does not include a number of gentlemen who practiced law in New York or politics in Washington but maintained legal residence elsewhere.[7]

As might be expected of the legal elite, a high proportion of the ABA committeemen resided in the largest cities. One hundred (43%) lived in the ten largest, according to the census of 1900, and almost sixty percent lived in the twenty largest. New York City alone accounted for thirteen percent. Fewer than fifteen gentlemen resided in cities of less than ten thousand people.[8]

Table 1

Number of ABA Committeemen from the Twenty Largest Cities (1900)

1.	New York	32	11.	Cincinnati	6
2.	Chicago	16	12.	Detroit	2
3.	Philadelphia	11	13.	New Orleans	7
4.	St. Louis	9	14.	Milwaukee	2
5.	Boston	14	15.	Washington, DC	9
6.	Baltimore	12	16.	Newark	4
7.	Pittsburgh	0	17.	Jersey City	0
8.	Cleveland	2	18.	Louisville	4
9.	Buffalo	1	19.	Minneapolis	1
10.	San Francisco	3	20.	Providence	2

Total = 137 (of 233)

Though the committeemen tended to gravitate towards the cities, where opportunities for the most lucrative and stimulating legal practices were available, not all cities

received an equal share of newcomers. Only two of the eleven committeemen from Philadelphia had not been born in Philadelphia--and those two were associated in practice with other committeemen who were. On the other hand, twelve of the sixteen gentlemen from Chicago had been born outside that city, eight outside the state of Illinois.[9] Granted the social attitudes of Philadelphians, it was to the advantage of George Biddle, scion of the distinguished Philadelphia family, to practice law in his native city; whereas George R. Peck, a farm boy from upstate New York, found his opportunity in the towns and cities of the Midwest.[10]

The average age of the committeemen while holding office was fifty-four, with the range over the decades varying from fifty-one in 1878 to fifty-six at the Association's fiftieth anniversary.[11] As might be expected, the leadership tended to become slightly older as the organization itself stabilized and matured. However, it is possible that if the untabulated committeemen of the later years were included in the sample, the result might slightly reduce the average age for those decades since the tabulated committees seem to have been somewhat more prestigious.

Excluding a very few gentlemen whose birthplaces are unknown,[12] it is certain that all committeemen but seven

were born in the United States. Of these seven, three were born in Canada, one to American parents in Scotland, and one to American missionaries in India. Thus there were only two "true" immigrants: Andrew A. Bruce (1866-1934), a British orphan who landed in Brooklyn at the age of fifteen, and Frederick W. Lehmann (1853-1931), who left his native Prussia before he was ten. Lehmann, president of the ABA 1908-09, became an exceptionally wealthy and well-educated resident of St. Louis, but his birth in a non-English speaking country was unique among the analyzed group of committeemen.

The fathers of committeemen, especially committeemen who served in the earlier decades, were often men of local or regional reputation. Occasionally the committeeman was an epigone. For instance, Rodney Mercur (1851-c. 1931) enjoyed an excellent education--Hopkins Grammar School, Phillips Exeter Academy, Harvard--and a modestly successful legal career in Towanda, Pennsylvania; but his father, Ulysses Mercur, had been both a congressman and chief justice of the Supreme Court of Pennsylvania. On the other hand, most committeemen outshone even notable forebears, as did Roscoe Pound, whose father had sat on Nebraska's Second Judicial Circuit.

Of the fifty-six percent (131) of the committeemen whose fathers' occupations could be determined, a

significant number were born to lawyers, small businessmen, politicians and capitalists, even though nineteenth century America was overwhelmingly an agricultural society. Furthermore, Table 2 below excludes the many instances of multiple careers, an accounting of which would bring the total number of lawyers to forty-four and the number of politicians to twenty-seven.

Table 2

Primary Occupations of the Fathers of 131 ABA Committeemen

Lawyers	29	Clergymen	9
Small businessmen	16	Judges	9
Politicians	15	Teachers-Professors	5
Farmers	13	Editors	4
Physicians	12	Military officers	3
Capitalists	10	Others	6

Simply listing alphabetically the first five committeemen of the 1878 cohort along with their fathers' occupations is an adequate index of the social position which the founding members inherited. The father of Julian J. Alexander was a civil engineer who became the owner of Georges Creek Coal and Iron Company; the father of Simeon Baldwin was a former governor of Connecticut; Miles Bennett, father of Edmund H. Bennett, sat in the Supreme Court of Vermont; Clement Biddle, father of George W.

Biddle, founded the Philadelphia Saving Fund Society; and Benjamin F. Butler, father of William Allen Butler, was both a lawyer of reputation and Attorney-General in the cabinet of Andrew Jackson.

Although it is dangerous to argue from ignorance, there is some indication that the fathers of the 1878 committeemen surpassed those of 1928 committeemen in achievement and influence since the occupations of eighty-two percent of the former and only thirty-eight percent of the latter were uncovered. Presumably more of the cohort of 1928 sprang from middle class roots which biographers and obituary writers have passed over in silence.

In any case, few of the ABA leaders struggled up from absolute poverty to a position among the elite of the bar. The leadership of the American Bar Association was an aristocracy of talent, but that talent was immensely enhanced by the advantage of good birth. J. Randolph Tucker, born into a long line of blacksmiths rather than the distinguished Virginia family of lawyers, might well have become a reputable lawyer, but he would not have become J. Randolph Tucker.

Only a half dozen committeemen managed to surmount the aristocratic barrier which impeded a low-born lawyer from joining the ranks of the legal elite; and of these, perhaps only three were truly Horatio Alger figures: Thomas

McIntire Cooley (1824-1898), George G. Wright (1820-1896), and the previously mentioned Frederick Lehmann. Cooley had unusual intellectual gifts; Wright harnessed a talent for organization under a quiet, friendly exterior; and Lehmann employed his legal acumen and speaking ability to amass a fortune. However, each man, like the Horatio Alger heroes, had a stroke of good fortune as well. Lehmann, an itinerant shepherd with a thirst for books, made a suitable impression upon a country doctor who helped him through Tabor College. Wright, the son of a brick yard laborer, completed a degree at the University of Indiana as a "charity" (scholarship) student and was provided with a legal education by his brother, who himself became governor of Indiana. Cooley, who had little formal education, moved five times around little towns in the Old Northwest before his thirty-fourth birthday and generally gave every indication that he would continue to practice in respectable obscurity. However, in 1857 the opportunity to exercise his scholarly bent by compiling the state statutes of Michigan, initiated a notable career. Eventually Lehmann was appointed Solicitor-General by Taft, Wright became a United States Senator from Iowa, and Cooley molded the first Interstate Commerce Commission in his own image. All three served as president of the American Bar

Association; but their rise from obscure birth to membership in the legal elite was clearly exceptional.[13]

Given their family backgrounds, it is not surprising that the educational preparation of the 233 committeemen was, on the average, very high. At least 73% (171) had attended and 61% (141) had graduated from college. Of the seventy-eight different institutions which they represented, Harvard and Yale attracted by far the greatest number of future committeemen: twenty-one and fifteen respectively.

Table 3

Colleges Attended by at least Four ABA Committeemen

Harvard	21
Yale	15
Princeton	8
University of Pennsylvania	8
Dartmouth	5
University of Virginia	5
University of Michigan	5
Amherst	4
University of Wisconsin	4

A comparison of the six cohorts reveals a significant change in legal education among the bar elite in the latter half of the nineteenth century. While sixty-five percent of the 1878 committeemen had graduated from college, only fifty-five percent of the 1928 group had done so. Thus at the end of a period noted for its increasing number of college-trained professionals, the percentage of college graduates among the leaders of the American Bar Association actually declined slightly. This decline is especially ironic in view of the Association's increasing emphasis upon the establishment of higher and more uniform educational standards as a requirement for admission to the bar.[14]

On the other hand, formal law school preparation increased dramatically during the same years. While only ten of the original thirty-eight committeemen (26%) had graduated from law school--a significant number for the middle third of the nineteenth century--at least thirty-five of the surveyed sixty-two committeemen (56%) of 1928 had received a law degree. Likewise, the number who had been admitted to the bar after a period of apprenticeship dropped correspondingly from fifty-five percent in 1878 to eleven percent in 1928. Even in 1878 only four ABA committeemen had prepared themselves for the profession by "reading law" in the manner of Abraham Lincoln; and not one

of the sixty-two gentlemen of the 1928 cohort, so far as can be determined, entered the bar in this fashion.

Table 4

Educational Profile of ABA Committeemen, 1878-1928

	1878 (38)	1888 (40)	1898 (40)	1908 (42)	1918 (55)	1928 (62)	Total (233)+
Attended College	29	29	29	32	45	44	171
	76%	72%	72%	76%	82%	70%	73%
Graduated from College	25	21	27	29	36	34	141
	66%	53%	68%	69%	65%	55%	61%
Attended Law School	17	18	24	27	38	43	137
	45%	45%	60%	64%	69%	69%	59%
Graduated from Law School	10	8	16	22	32	35	100
	26%	20%	40%	52%	58%	56%	43%
Law Office Apprenticeship	21	14	12	12	11	7	65
	55%	35%	30%	28%	20%	11%	28%
Self-Study	4	2	3	2	1	0	9
	11%	5%	8%	5%	2%	0%	4%
Unknown	2	2	1	2	5	8	18
	5%	5%	3%	5%	9%	13%	8%

+Because some individuals held committee assignments in two or more years, horizontal totals are meaningless; likewise, vertical totals often exceed 200% because of the various possible combinations of legal training.

Another measure of change in legal education is evident in the decline of part-time law school faculty members among the ranks of elite lawyers. Forty-five percent (17) of the 1878 cohort and only eight percent (5) of that of 1928 could be so described. On the other hand, there were only two full-time law school faculty members among the first committeemen and none in 1898, whereas in the committees of 1918 and 1928 they numbered eight and six respectively.

Related to the growth of law schools and the rise of legal specialization, but more difficult to quantify, was the gradual replacement of the humanistically oriented members of the nineteenth century bar elite with the more narrowly prepared corporation lawyers of the twentieth. For example, the broad interests of the 1878 cohort could appropriately be represented by A. Q. Keasbey, who wrote poetry and died in Rome; George W. Biddle, who published a translation of Demosthenes and Aeschines' On the Crown; Edward L. Pierce, who wrote a biography of Charles Sumner and made the acquaintance of John Bright on one of his numerous trips to Europe; U. M. Rose of Little Rock who was fluent in French and German; E. C. Sprague, who found time while serving as counsel for a half dozen railroads and banks to savor poetry and the fine arts; and James T. Mitchell, who was active in the affairs of the Pennsylvania

Historical Society for over fifty years. Of course the almost pathologically diverse interests of Simeon Baldwin are too numerous to repeat here.[15]

Conversely, a canvass of the 1918 cohort reveals a different type of elite lawyer. Edgar Bancroft, general counsel for International Harvester, had time to write one book, The Chicago Strike of 1894 (1895); Ashley Cockrill served for three years as a member of the Little Rock School Board; Charles C. Hyde represented Guatemala in a boundary dispute with Honduras in 1931-32 and wrote a textbook on international law; T. Scott Offutt compiled the Baltimore County Code; and William R. Vance was general editor of the American Case Book series.

It would be easy to overstate this transformation in interests. A phrase that George V applied to John W. Davis, "The most perfect gentleman," might adequately describe dozens of committeemen from 1878 to 1928; and there were certainly others of the later cohorts who, like Davis, demonstrated a wide interest in cultural and intellectual matters outside their narrow range of practice. Yet the difference in tone is perceptible enough to qualify a description of Simeon Baldwin as "a corporation lawyer [who] preferred to think of himself as a gentleman scholar and lawyer-politician of the old school." It seems evident that many of the earlier ABA leaders managed to combine

their roles as "corporation lawyer" and "gentleman scholar," whereas the extra-legal interests of the following generations were indeed more narrow. To contrast Baldwin and Davis it might be said that while Davis enjoyed reading history, Baldwin enjoyed writing it.[16]

Of the 147 committeemen whose political affiliation can be determined, 58% (85) were Republicans, 36% (53) Democrats, and 6% (9) independents or others. However, during the fifty-year period of this study there was a roughly constant trend of Republican party growth at the expense of the independents, who statistically disappear by 1928. The rise in the number of Democratic lawyers during the middle third of the nineteenth century has been discussed elsewhere.[17] A similar rise in the number of Republicans at the turn of the century might be attributed to that party's identification with the new middle class.[18] Obviously there was also a natural tendency for politically ambitious young men to attach themselves to the ascendant political party. Independents found themselves increasingly isolated in the twentieth century, with the Bull Moose Progressives being the only third party before 1928 which any of these elite lawyers actively supported. Even so, only four of the eighty-five Republican committeemen were denominated "Progressive Republicans" by their biographers.

As for the Democrats, a bare majority resided in the former Confederacy, though their number also included a few big city Democrats--mostly WASPs like George Biddle of Philadelphia, William Fisher of Baltimore, and Frederick Judson of St. Louis. Other Democrats were politically isolated. Simeon Baldwin won a Connecticut gubernatorial election in 1912 only because of the disastrous Republican split of that year; and Edward Phelps, who had the unenviable duty of directing the tiny Democratic party of Vermont, managed only an appointive office under Cleveland. The same fate in reverse befell Southern Republicans like William Wirt Howe.

Whatever their party affiliation, most ABA committeemen were conservatives in the twentieth century sense of that term. Lyman Trumbull, in his old age, helped draft the Populist Party platform of 1894; James Hagerman, an important Democratic functionary from Missouri, supported free silver and Bryan; Charles Amidon of Fargo, North Dakota, aided numerous progressive causes from TR to FDR; and William Draper Lewis, who supported the recall of judicial decisions and New Deal court-packing, lived long enough to question the official explanations for the origins of the Cold War. That these were the most "radical" of the committeemen clearly indicates the tenor of the American Bar Association leadership.[19]

On the other hand, the committeemen were not generally reactionaries who spent their days attempting to sweep back the tide of American culture. A Whig interpretation of history was popular among them, and they were not adverse to those of proper standing using the legal system for social engineering. Their conservatism sprang not so much from ideological conviction as from personal and professional experience. American capitalism and the American legal system had provided them with wealth, position, and a satisfying occupation. It was not to be expected that such men would assume leadership in a conscious attempt to reconstruct American society.

Although partisan politics affected individual careers, it seems to have had little influence on Association policy before the New Deal.[20] Perhaps it would be more correct to say that partisan politics effectively blocked many possible ABA actions, for it was in the interest of the Association to avoid interparty bickering in order to solidify its position as the national representative of the legal profession.[21]

In matters of religion the committeemen of the American Bar Association achieved a similar harmony. Though statistics are fragmentary, it is not surprising to discover that of the eighty-nine gentlemen whose religious affiliation may be determined with certainty, eighty-two

were Protestants. Of these, thirty-three were members of the Episcopal Church, "the Church of wealth, culture and aristocratic lineage,"[22] and twenty-two others belonged to the Presbyterian church. Of the latter, most were members of the Presbyterian Church (North) which "provided the liberal [theological] movement with scholarly and popular leadership" at the turn of the century.[23] There were also a few Congregationalists, Methodists, Unitarians, and Baptists.[24]

At least four Catholics served as committeemen during this period. One of these, William Fisher, was a member of an old and distinguished Baltimore family, and another, Walter George Smith of Philadelphia, inherited fortune along with his Catholicism. Only William Breen and Joseph O'Connell were of non-"Anglo-Saxon" ancestry, but even Breen's father, an Irish immigrant, was apparently a man of some substance since he had served as a member of the Terre Haute city council; and O'Connell was a Harvard graduate and a former congressman. Of the two committeemen who were Jewish in both heritage and religion, one, Ernest Touro Florance, was evidently descended from early Sephardic immigrants, while the other, Monte Lehmann, like O'Connell, had graduated from Harvard Law School and was prominent enough to have become president of the Louisiana State Bar Association.

Only one committeeman, George Hoadly, was described as essentially nonreligious by his biographer; but dozens of others had, at most, a perfunctory relationship with organized religion, a fact indicated by their failure to list a denomination on the standard forms for biographical dictionaries. Even those who actively participated in the affairs of their church usually held "non-devotional," business-oriented offices. For example, Ashley Cockrill was chancellor of the Episcopal Diocese of Arkansas, John Hinkley became a trustee of the Swedenborgian church, Thomas Dent was a member of the board of trustees of McCormick Theological Seminary, and Rufus King held the office of vestryman for thirty-six years. Unusual was John C. Townes who taught a Baptist Sunday School class for college students in Houston. More typical was the selection of John W. Davis to serve as a vestryman of his wife's church, which he explained, tongue in cheek, as a desire on the part of the church to choose a person "of preeminent piety, high moral reputation and sound financial judgment."[25] After surveying the religious attitudes of these members of the bar elite, one is reminded of Gamaliel Bradford's characterization of Theodore Roosevelt as a man of no religion.

> He had a profound sense of conduct in this world, of morals....Now to me religion is the love of God, the need of God, the longing for God, and the constant sense of another world than

> this....[Roosevelt] had no need of [God] and no longing, because he really had no need of anything but his own immensely sufficient self. And the abundant, crowding, magnificent presence of this world left no room for another.[26]

For most of the bar elite the world was indeed "abundant, crowding, [and] magnificent." Although accurate estimates of wealth are not only difficult to obtain but also difficult to compare across fifty years and the breadth of the nation, it may be stated without fear of contradiction that the vast majority of these ABA committeemen were individuals of moderate to considerable financial worth. Riches fairly ooze from their biographies--though rarely is the biographer crass enough to mention a specific figure.[27] Often their fortune is revealed by the nature of their professional employments, as in the case of C. LaRue Munson, a director of a railroad, two banks, and more than a half dozen commercial and industrial corporations. Others were philanthropists like Rufus King of Cincinnati, a prominent participant in the establishment of the public library, the art museum, the college of music, and the Cincinnati Law School. Still others traveled extensively in Europe, not only as tourists but as United States ambassadors and representatives of private eleemosynary institutions. Four--William Evarts, Edward J. Phelps, Joseph Choate, and John W. Davis--served as the American representative to the Court of St. James.

On the other hand, Cortlandt Parker declined ambassadorships to Russia and Austria, as well as a seat in the Senate. Then there were collectors like George Rose of Little Rock, whose personal library contained eleven thousand books and four thousand phonograph records; Theodore Green whose tastes ran to Chinese art; and Hampton Carson of Philadelphia, whose collection of works on English common law was reputedly surpassed only by Harvard and the British Museum. Often biographical sketches list exclusive clubs like "the Century" or the "Seabright Law Tennis and Cricket Club," or they give the subject's favorite sport as "yachting." Even James O. Crosby, an eccentric who refused to leave his tiny town of Garnoville, Iowa, is said to have introduced the automobile to his adopted state. Perhaps the "poorest" of the committeemen were the full-time law professors like James Barr Ames of Harvard, William Keener of Columbia, and John Wigmore of Northwestern, all of whom would have been considered comfortably middle class by their contemporaries.[28]

The epitome of this wealthy elite was Cordenio Arnold Severance, a specialist in the defense of large corporations like the Chicago meat packers and U. S. Steel against government anti-trust suits. Severance, who was ABA president in 1921-22, owned "Cedarhurst" an estate of five hundred acres outside St. Paul, Minnesota, on which he

raised prize-winning collies, collected a large library on diverse subjects, and sponsored concerts in his "music room" in which he himself often played the cello. Like a medieval seignior he

> shared in the sunny and cloudy days of the Cottage Grove community, attended the weddings and funerals of the neighborhood, kept a watchful eye on the schools and the churches, discussed crops and stockraising through long hours, and chatted by the roadside with the oldest inhabitants. The gardens about his residence were a delight to him and he seemed to know every tree and consider its personality. He entered his dogs in shows and gave their puppies to his friends. He was an authority on large investments and the problems of world markets. This business and his own tastes led to much rambling, particularly in Europe, and he was much at home in the Capitals and official circles of Washington and abroad. All his business associations led to friendships, from friendships to visits to "Cedarhurst" and then often to long records of attachment.[29]

Extensive social contacts were, in fact, typical of all the leaders of the American Bar Association. As Richard Beringer has said in regard to another elite: "One is struck by the impression that everybody knew almost everybody else, and those who did not would soon be introduced to the few they had missed."[30] There were two sets of fathers and sons and at least one set of cousins among the studied committeemen. At least another dozen had either studied in the law office of one of their colleagues or were their law partners. They frequently had attended law school together, and especially in the earlier cohorts,

had served as co-counsel or opposing counsel in notable politico-legal cases. For instance, at least six committeemen represented either Hays or Tilden in the serpentine maneuverings of 1876-77.[31]

In summary, the typical American Bar Association committeeman of the period 1878-1928 was a gentleman in his mid-fifties, native born to an upper middle class family, who had acquired a college degree and had attended, though not graduated from, law school. He most likely resided in a large city in the Northeast and was somewhat more likely to be a Republican than a Democrat. He was a political conservative regardless of party. The typical committeeman was an independent practitioner or a partner in a small law firm, not a full-time law teacher; and the major emphasis of his practice was corporate law. A nominal Protestant who held no significant office in his denomination, he was a man of considerable wealth, of social grace, and of wide acquaintance.

There are few surprises in this collective portrait. Clearly the American Bar Association was directed by exactly the type of wealthy and well-educated urban lawyer who would have been expected to have conducted its affairs during this period. Similarities among the 233 committeemen far outnumber the differences. It is not difficult, therefore, to understand why the ABA retained

its inefficient club-like organization long after the Association had become, in the words of James Grafton Rogers, a "clumsy, unguided leviathan."[32]

Unfortunately, the close communion among the leadership which had been necessary to the survival of the organization in the nineteenth century became an obstacle to its effectiveness in the twentieth. Even after the Association began to solicit members during the second decade of the century, its affairs continued to be directed by a small group with similar background and preconceptions about the nature of the legal profession. As the consensus of American socio-political opinion shifted away from those conservative ideologies embraced by the Association leadership, much of the organization's resources and energy was expended in a hopeless attempt to restore an America that could not return.

Still, it is difficult to imagine how the American Bar Association might have achieved the success of the American Medical Association. The ABA had the misfortune of attempting to "uphold the honor of the profession of the law" during a period in which the relative status of the legal profession continued to lose ground to medicine and other scientifically-oriented disciplines. Even if the American Bar Association had reorganized itself along representative lines, had gained control of legal education

and admission to the bar, and had codified, restated, and made uniform all laws common and statute, it would not have been able to reverse the perception of the American people that law, like theology, was an outworn, uncertain, and man-made system, not the key to the future as was science.

APPENDIX A

PRESIDENTS OF THE AMERICAN BAR ASSOCIATION, 1878-1928

1.	1878-1879	James O. Broadhead	St. Louis, MO
2.	1879-1880	Benjamin H. Bristow	New York, NY
3.	1880-1881	Edward J. Phelps	Burlington, VT
4.	1881-1882	Clarkson N. Potter	New York, NY
5.	1882-1883	Alexander R. Lawton	Savannah, GA
6.	1883-1884	Cortlandt Parker	Newark, NJ
7.	1884-1885	John W. Stevenson	Covington, KY
8.	1885-1886	William Allen Butler	New York, NY
9.	1886-1887	Thomas J. Semmes	New Orleans, LA
10.	1887-1888	George G. Wright	Des Moines, IA
11.	1888-1889	David Dudley Field	New York, NY
12.	1889-1890	Henry Hitchcock	St. Louis, MO
13.	1890-1891	Simeon E. Baldwin	New Haven, CT
14.	1891-1892	John F. Dillon	New York, NY
15.	1892-1893	John Randolph Tucker	Lexington, VA
16.	1893-1894	Thomas M. Cooley	Ann Arbor, MI
17.	1894-1895	James C. Carter	New York, NY
18.	1895-1896	Moorfield Storey	Boston, MA
19.	1896-1897	James M. Woolworth	Omaha, NE
20.	1897-1898	William Wirt Howe	New Orleans, LA
21.	1898-1899	Joseph H. Choate	New York, NY
22.	1899-1900	Charles F. Manderson	Omaha, NE
23.	1900-1901	Edmund Wetmore	New York, NY
24.	1901-1902	U. M. Rose	Little Rock, AR
25.	1902-1903	Francis Rawle	Philadelphia, PA
26.	1903-1904	James Hagerman	St. Louis, MO
27.	1904-1905	Henry St. George Tucker	Lexington, VA
28.	1905-1906	George R. Peck	Chicago, IL
29.	1906-1907	Alton B. Parker	New York, NY
30.	1907-1908	J. M. Dickinson	Chicago, IL
31.	1908-1909	Frederick W. Lehmann	St. Louis, MO
32.	1909-1910	Charles F. Libby	Portland, ME
33.	1910-1911	Edgar H. Farrar	New Orleans, LA
34.	1911-1912	Stephen S. Gregory	Chicago, IL
35.	1912-1913	Frank B. Kellogg	St. Paul, MN
36.	1913-1914	William H. Taft	Washington, DC
37.	1914-1915	Peter W. Meldrim	Savannah, GA
38.	1915-1916	Elihu Root	New York, NY
39.	1916-1917	George Sutherland	Salt Lake City, UT
40.	1917-1918	Walter George Smith	Philadelphia, PA
41.	1918-1919	George T. Page	Peoria, IL
42.	1919-1920	Hampton L. Carson	Philadelphia, PA
43.	1920-1921	William A. Blount	Pensacola, FL
44.	1921-1922	Cordenio A. Severance	St. Paul, MN
45.	1922-1923	John W. Davis	New York, NY
46.	1923-1924	R. E. L. Saner	Dallas, TX

47.	1924-1925	Charles E. Hughes	New York, NY
48.	1925-1926	Chester I. Long	Wichita, KS
49.	1926-1927	Charles S. Whitman	New York, NY
50.	1927-1928	Silas H. Strawn	Chicago, IL
51.	1928-1929	Gurney E. Newlin	Los Angeles, CA

APPENDIX B

DATES AND PLACES OF THE ANNUAL MEETINGS, 1878-1928

1.	1878	Aug. 21, 22	Saratoga Springs
2.	1879	Aug. 20, 21	Saratoga Springs
3.	1880	Aug. 18, 19, 20	Saratoga Springs
4.	1881	Aug. 17, 18, 19	Saratoga Springs
5.	1882	Aug. 8, 9, 10, 11	Saratoga Springs
6.	1883	Aug. 22, 23, 24	Saratoga Springs
7.	1884	Aug. 20, 21, 22	Saratoga Springs
8.	1885	Aug. 19, 20, 21	Saratoga Springs
9.	1886	Aug. 18, 19, 20	Saratoga Springs
10.	1887	Aug. 17, 18, 19	Saratoga Springs
11.	1888	Aug. 15, 16, 17	Saratoga Springs
12.	1889	Aug. 28, 29, 30	Chicago
13.	1890	Aug. 20, 21, 22	Saratoga Springs
14.	1891	Aug. 26, 27, 28	Boston
15.	1892	Aug. 24, 25, 26	Saratoga Springs
16.	1893	Aug. 30, 31, Sept. 1	Milwaukee
17.	1894	Aug. 22, 23, 24	Saratoga Springs
18.	1895	Aug. 27, 28, 29, 30	Detroit
19.	1896	Aug. 19, 20, 21	Saratoga Springs
20.	1897	Aug. 25, 26, 27	Cleveland
21.	1898	Aug. 17, 18, 19	Saratoga Springs
22.	1899	Aug. 28, 29, 30	Buffalo
23.	1900	Aug. 29, 30, 31	Saratoga Springs
24.	1901	Aug. 21, 22, 23	Denver
25.	1902	Aug. 27, 28, 29	Saratoga Springs
26.	1903	Aug. 26, 27, 28	Hot Springs, VA
27.	1904	Sept. 26, 27, 28	St. Louis
28.	1905	Aug. 23, 24, 25	Narragansett Pier, RI
29.	1906	Aug. 29, 30, 31	St. Paul
30.	1907	Aug. 26, 27, 28	Portland, ME
31.	1908	Aug. 25, 26, 27, 28	Seattle
32.	1909	Aug. 24, 25, 26, 27	Detroit
33.	1910	Aug. 30, 31, Sept. 1	Chattanooga
34.	1911	Aug. 29, 30, 31	Boston
35.	1912	Aug. 27, 28, 29	Milwaukee
36.	1913	Sept. 1, 2, 3	Montreal
37.	1914	Oct. 20, 21, 22	Washington, DC
38.	1915	Aug. 17, 18, 19	Salt Lake City

39.	1916	Aug. 30, 31, Sept. 1	Chicago
40.	1917	Sept. 4, 5, 6	Saratoga Springs
41.	1918	Aug. 28, 29, 30	Cleveland
42.	1919	Sept. 3, 4, 5	Boston
43.	1920	Aug. 25, 26, 27	St. Louis
44.	1921	Aug. 31, Sept. 1, 2	Cincinnati
45.	1922	Aug. 9, 10, 11	San Francisco
46.	1923	Aug. 29, 30, 31	Minneapolis
47.	1924	July 8, 9, 10	Philadelphia
48.	1925	Sept. 2, 3, 4	Detroit
49.	1926	July 14, 15, 16	Denver
50.	1927	Aug. 31, Sept. 1, 2	Buffalo
51.	1928	July 25, 26, 27	Seattle

APPENDIX C

MEMBERSHIP AND ATTENDANCE AT THE ANNUAL MEETING, 1878-1928

		Membership	Attendance
1.	1878	289	75
2.	1879	524	no record
3.	1880	552	97
4.	1881	546	124
5.	1882	571	107
6.	1883	626	120
7.	1884	671	108
8.	1885	702	124
9.	1886	740	137
10.	1887	751	149
11.	1888	752	121
12.	1889	962	158
13.	1890	943	132
14.	1891	1,110	202
15.	1892	1,062	143
16.	1893	1,102	130
17.	1894	1,144	140
18.	1895	1,307	199
19.	1896	1,393	276
20.	1897	1,489	184
21.	1898	1,496	227
22.	1899	1,541	227
23.	1900	1,540	230
24.	1901	1,720	306
25.	1902	1,718	230
26.	1903	1,814	250
27.	1904	2,000	451

28.	1905	2,049	277
29.	1906	2,606	369
30.	1907	3,074	402
31.	1908	3,585	312
32.	1909	3,715	389
33.	1910	3,690	324
34.	1911	4,701	625
35.	1912	5,584	558
36.	1913	8,033	1,023
37.	1914	9,855	1,184
38.	1915	9,609	531
39.	1916	10,636	943
40.	1917	10,884	598
41.	1918	10,995	604
42.	1919	10,677	871
43.	1920	11,941	727
44.	1921	15,153	1,206
45.	1922	17,426	1,447
46.	1923	19,871	1,815
47.	1924	22,024	956
48.	1925	23,318	1,839
49.	1926	24,883	2,116
50.	1927	26,246	1,604
51.	1928	26,595	2,033

APPENDIX D

PROCEDURES AND SOURCES FOR THE PROSOPOGRAPHY

The 233 individuals selected for prosopographical study were members of the eight original standing committees and their successors for the founding year of the American Bar Association and its first five decennials: 1888, 1898, 1908, 1918, and 1928. While it is evident that some of these gentlemen were given committee assignments for reasons of geographic balance or internal politics, it is also obvious that many others were not only leaders of the American Bar Association but of the American bar as

well. As a group they were influential in professional legal circles far beyond their symbolic membership on an ABA committee. Thirty-six were elected president of the Association, and at least 72 became presidents of their state and/or local bar associations. A list of the most influential lawyers during the fifty-year period divided by the turn of the century might well include James Barr Ames, Simeon Baldwin, James C. Carter, Joseph H. Choate, Thomas M. Cooley, John W. Davis, Willis Van Devanter, John F. Dillon, William Maxwell Evarts, David Dudley Field, Charles Evans Hughes, William Draper Lewis, John B. Moore, Alton B. Parker, George Wharton Pepper, Roscoe Pound, Henry Wade Rogers, Henry W. Taft, George Wickersham, and John H. Wigmore. All were American Bar Association committeemen in at least one of the years included in this study.

In order to maintain cohorts of roughly comparable size, standing committees established after 1878 have been ignored. Thus, while all 38 committeemen for 1878 were included in the study, only 52 of the 101 committeemen for 198 have been so analyzed. Random sampling of unanalyzed committees suggests no serious distortions in this procedure, though it seems the older committees continued to be somewhat more prestigious. The General Council has likewise been excluded, although James Grafton Rogers, a perceptive observer of Association affairs, stated that it

was "knee-deep in questions of polity and policy." Since the General Council was composed of one member from each state, inclusion of biographical data on its membership would have magnified to the point of distortion the influence of members who resided outside the Northeast, the geographical focus of the Association.

A few of those studied (8) served on two committees in a single year, and a number of others (36) held positions on two or more committees separated by a decade. To cite the most extreme example, Francis Rawle, long-time treasurer of the Association and its last surviving founder, served on both the Executive and Publication committees in 1878 and continued to hold membership on one or the other in 1888, 1898, and 1918. Members of more than one committee in a single year have been counted only once in the statistics; those serving on more than one committee in different years have been counted once when the committeemen are treated as a group but repeatedly when the cohorts for each decade are compared against one another.

The sources used in this study included the Dictionary of American Biography, the National Cyclopaedia of American Biography, Who Was Who, minor national biographical dictionaries, state and local histories, and the so-called "bench and bar" books--regional biographical dictionaries of lawyers and judges published in the late nineteenth and

TABLE 5

American Bar Association Committees Analyzed and Numbers of Members on Each, 1878-1928

	1878	1888	1898	1908	1918	1928
Executive	5	8	7	9	13	15
Jurisprudence & Law Reform	5	5	5	5	5	5
Judicial Administration & Remedial Procedure*	5	5	5	5	15	--
Legal Education & Admission to Bar#	5	5	5	5	5	11
Commercial Law%	5	5	5	5	5	15
International Law	5	5	5	5	5	5
Publication	5	5	4	5	5	5
Grievances@	5	5	5	5	5	7
Total	40	43	41	44	58	63
Total of Individuals&	38	40	40	42	55	62

*In 1918: The Standing Committee to Suggest Remedies and Propose Laws Relating to Procedure.

#In 1918: Council of Legal Education; in 1928: Section on Legal Education and Admission to the Bar.

%In 1918: Commerce, Trade and Commercial Law; in 1928: Commercial Law and Bankruptcy.

@In 1928: Professional Ethics and Grievances.

&Excludes members of more than one committee in a single year.

early twentieth centuries. Since the annual ABA Report provided the city and state of residence for each committeeman, this much, at least, is known about all 233 gentlemen. Only seventeen committeemen (7%) could not be identified further for purposes of this study. Ironically, the number of "missing" individuals rises for the later decades.

NOTES

Chapter 1

[1]Albert P. Melone, Lawyers, Public Policy and Interest Group Politics (Washington: University Press of America, 1977); see especially pp. 207-213; Gerald Carson, A Good Day at Saratoga (Chicago: ABA, 1978), p. 3.

[2]Edwin R. Sunderland, The History of the American Bar Association (New York: The Survey of the Legal Profession, 1953), p. 3. The ABA commissioned two popular articles on the founding of the Association for its centennial in 1978, one by Baltimore attorney Walker Lewis, "The Birth of the American Bar Association," 64 American Bar Association Journal (ABAJ) 996-1002 (July, 1978); and another, published as a 59-page book, by noted free-lance writer, Gerald Carson, A Good Day at Saratoga (Chicago: ABA, 1978). Both are good examples of their genre, nicely written and illustrated. The implication for academic historians should be obvious and perhaps ominous.

[3]Robert Meserve, "The American Bar Association: A Brief History and Appreciation," [speech delivered to the 1973 Massachusetts Dinner of the Newcomen Society, March 28, 1973] (New York: The Newcomen Society in North America, 1973), p. 12.

[4]Benjamin R. Twiss, "Lawyers Against Government: Their Assertion and Defense of Laissez-Faire as a Constitutional Doctrine," Ph.D. dissertation, Princeton University, 1938, published posthumously as Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court (Princeton: Princeton University Press, 1942). The topic has been thoroughly analyzed by Norbert Brockman, both in "The Politics of the American Bar Association," Ph.D. dissertation, the Catholic University of America, 1963, pp. 15-20, and in "Laissez-Faire Theory in the Early American Bar Association," 39 Notre Dame Lawyer 270 (1964). The following discussion of Corwin relies heavily upon Brockman's research.

[5]Twiss, Lawyers and the Constitution, p. x.

[6]Edward S. Corwin, Constitutional Revolution, Ltd. (Claremont, California: Claremont Colleges, 1941), p. 85.

[7]Edward S. Corwin, Liberty Against Government (Baton Rouge: Louisiana State University Press, 1948), pp. 137-138.

[8]C. Herman Pritchett, The American Constitution (New York: McGraw-Hill, 1959), p. 558. Actually, the first public mention of the Granger cases at an ABA meeting occurred in 1884; cf. Andrew Allison, "The Rise and Probable Decline of Private Corporations in America," 7 American Bar Association Report (ABA Rep) 241 @ 253-254 (1884).

[9]Cf. Brockman, "Laissez-Faire Theory," p. 275.

[10]Alpheus T. Mason and William M. Beaney, American Constitutional Law (Englewood Cliffs, New York: Prentice Hall, 1954), p. 383.

[11]Anton-Hermann Chroust, "The Dilemma of the American Lawyer in the Post Revolutionary Era," 35 Notre Dame Lawyer 48 (1959).

[12]Roscoe Pound, The Lawyer from Antiquity to Modern Times (St. Paul, Minn.: West Publishing Company, 1953), pp. 180-183. "Bar Associations," Southern Literary Messenger 4 (1838), 583; W. Raymond Blackard, "The Demoralization of the Legal Profession in Nineteenth Century America," 16 Tennessee Law Review 314 (1940).

[13]Pound, The Lawyer, p. 225.

[14]L. E. Chittenden, "Legal Reminiscences," 5 Green Bag 307 @ 309 (1893). The candidate was often expected to bring cigars and some liquid refreshment to his examination, although Lincoln is supposed to have examined an applicant while taking a bath. Questions ranged from the quantity and nature of law books read to the date of the Magna Carta to the difference between whiskey and brandy. One A. H. Nelson was admitted while his examiners continued to argue over the correct answer to a question they had posed. William Tecumseh Sherman was admitted to the bar without any examination on "the ground of general intelligence," but Walter Hill said that it was common knowledge in Georgia that one man had secured admission to the profession though he had signed his name with his mark! Oliver A. Harker, "Fifty Years with Bar and Bench of Southern Illinois," Transactions of the Illinois State Historical Society 27 (1920), 41-53; Albert Woldman, Lawyer Lincoln (Boston: Houghton Mifflin, 1936), pp. 153-154; John Prentiss Poe, 20 ABA Rep 438 (1897); A. H. Nelson, 20 ABA

Rep 424 (1897); Max Radin, "The Achievements of the American Bar Association,"26 ABAJ 19 (1940); [Review of Sherman's Memoirs] 11 American Law Journal 360 (1875); Walter B. Hill, "Bar Associations," 5 Georgia Bar Association Reports 80 (1888).

[15]Pound, The Lawyer, p. 225.

[16]Maxwell Bloomfield, American Lawyers in a Changing Society, 1776-1876 (Cambridge, Mass.: Harvard University Press, 1976), p. 137; cf. Wayne Karl Hobson, "The American Legal Profession and the Organizational Society, 1890-1930," unpublished Ph.D. dissertation, Stanford University, 1977, pp. 216-217; William R. Johnson, Schooled Lawyers: A Study in the Clash of Professional Cultures (New York: New York University Press, 1978), pp. 25-31.

[17]Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), p. 278; J. Willard Hurst, The Growth of American Law: The Law Makers (Boston: Little, Brown and Co., 1950), p. 286.

[18]Pound, The Lawyer, p. 246; Philip J. Wickser, "Bar Associations," 15 Cornell Law Quarterly 390 @ 401 (1930); Albert P. Blaustein, "New York Bar Associations Prior to 1870," 12 American Journal of Legal History 50 (1968). The latter typifies the paucity of our knowledge regarding these early societies. On the other hand, Gerard Gawalt, in his exhaustive study of Massachusetts lawyers, suggests that in some cases bar associations in that state were able to maintain high educational standards and that the percentage of lawyers holding liberal arts degrees actually increased in the early nineteenth century. Gerard W. Gawalt, The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840 (Westport, Conn.: Greenwood Press, 1979), see especially pp. 140-148.

[19]Friedman, History of American Law, p. 561; Wickser, "Bar Associations," p. 396; James Bryce, "The Legal Profession in America," McMillan's Magazine, 25 (January, 1872), 214.

[20]Samuel Hand, "Annual Address of the President," 3 New York State Bar Association Proceedings 67 @ 71 (1880); Walter B. Hill wrote that a "zealous, conscientious and fearless scrutiny of the qualifications of persons proposed for membership is of supreme importance." Hill, "Bar Associations," p. 63.

[21]James Bryce, The American Commonwealth (London: Macmillan and Co., 1888), II, 490; Audra L. Prewitt, "American Lawyers and Social Ferment," Ph.D. dissertation, Northwestern University, 1973, pp. 16-17.

[22]"The Hon. John Holmes," [obituary] 1 Monthly Law Reporter 275 (1839), quoted in Bloomfield, American Lawyers, p. 148.

[23]"Summary of Events," 5 American Law Review 556 (1871).

[24]"Professional Organization," 6 Albany Law Journal 233 (1873); Walter B. Hill, "Bar Associations," p. 75.

[25]Alexis de Tocqueville, Democracy in America (1835) [Reeve-Bowen translation, ed. Phillips Bradley], p. 278. "During the early part of the 19th century the bar came nearer to constituting an exclusive privileged class in the new republic than any other group in the community." Harlan Fiske Stone, "The Lawyer and His Neighbors," 4 Cornell Law Quarterly 179 (1919).

[26]W. G. Hammond, "The Legal Profession--Its Past, Its Present, and Its Duty," [speech delivered before the Iowa State University Law Department] 11 Alb. Law J. 113 @ 114 (1875). Hammond added, however, that "it is untrue, unjust, unAmerican, to infer thence that the bar is degraded." Cf. Joseph Katz, "The Legal Profession, 1890-1915," unpublished M.A. thesis, Columbia University, 1954, pp. 18-21.

[27]Arthur Schlesinger, "Biography of a Nation of Joiners," American Historical Review 50 (1944), 16-18; Howard Mumford Jones, The Age of Energy: Varieties of American Experience, 1865-1915 (New York: Viking Press, 1970), pp. 166-170; James Bryce, The American Commonwealth, pp. 239-240. "[In] the crowded urban centers, humanitarians intensified their earlier efforts and discovered many new outlets for reform zeal. Representative of these multifarious interests were the American Prison Association, the National Conference of Social Work, the Women's Christian Temperance Union, and the Society for the Prevention of Cruelty to Children--all formed in the 1870's--and the American Red Cross Society, the National Divorce Reform League, the National Arbitration League, and the Indian Rights Association, which came along in the 1880's." Schlesinger, pp. 17-18.

[28]13 Alb. Law J. 423 (June 17, 1876).

[29]Hurst, The Growth of American Law, p. 286; James Grafton Rogers, "The American Bar Association in Retrospect," in Law: A Century of Progress (New York: New York University, 1937), I, 173.

[30]George Martin, Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York (Boston: Houghton, Mifflin Company, 1970), pp. 3-86; cf. 5 American Law Review 556 (1871).

[31]Speeches of William M. Evarts and Henry Nicoll, 1 Association of the Bar of the City of New York Report [ABCNY Rep] 8, 28 (1870), quoted in Martin, Causes and Conflicts, pp. 33-34.

[32]"Lawyers in Council," 1 Alb. Law J. 219 (March 19, 1870).

[33]Hill, "Bar Associations," p. 65; Friedman, A History of American Law, pp. 561-563. For a list of bar associations and their dates of organization see Wickser, "Bar Associations," pp. 417-418.

[34]Cf. Robert Wiebe, The Search for Order (New York: Hill and Wang, 1967), p. 117.

[35]Wickser, "Bar Associations," pp. 396, 417.

[36]13 Alb. Law J. 171 (March 11, 1875).

[37]16 Alb. Law J. 268 (October 13, 1877).

[38]Koerner to Simeon Baldwin, August 3, 1878, printed in Simeon Baldwin, "The Founding of the American Bar Association," 3 ABAJ 658 @ 680 (1917). Gustave Koerner (1809-1896), a German emigré and former justice of the Illinois Supreme Court, was appointed minister to Spain in 1862 by his friend Abraham Lincoln. Koerner became a Liberal Republican after the war and supported Tilden against Hayes in 1876. He remained influential in the German-American community till his death. It is not improbable that Koerner's advocacy of "scientific conferences of Jurists" sprang from his study of jurisprudence at the University of Jena.

[39]The United State Law Association was an unrelated successor of the American Legal Association (1849-1854), the first such national referral service; cf. Bloomfield, American Lawyers, pp. 154-155. The information regarding

the "Congress of Lawyers" has been gleaned from the Albany Law Journal and the Philadelphia Inquirer, Public Ledger, and Press of June 21-22, 1876.

[40]13 Alb. Law J. 375 (May 27, 1876).

[41]Philadelphia Inquirer, June 22, 1876, p. 2. The improbably named Orlando F. Bump (1841-1884) was a graduate of Yale and a prolific writer of legal works on commercial topics. His Law and Practice of Bankruptcy went through ten editions. Bump, who had little time for politics or organized religion, worked himself to death at the age of forty-three. "Orlando F. Bump," 18 American Law Review 307 (1884).

[42]13 Alb. Law J. 440 (June 24, 1876).

[43]The only scholarly biography of Baldwin is Frederick H. Jackson, Simeon Eben Baldwin (New York: King's Crown Press, 1955). See also Frederick H. Jackson, "Simeon E. Baldwin: Father of the American Bar Association," 39 ABAJ 686 (1953); James Grafton Rogers, American Bar Leaders: Biographies of the Presidents of the American Bar Association, 1878-1928 (Chicago: American Bar Association, 1932), pp. 61-65. Charles C. Goetsch, Essays on Simeon E. Baldwin (West Hartford, Conn.: Connecticut School of Law Press, 1981) makes excellent use of the Baldwin diaries and other newly discovered correspondence. However, the diaries contain little of importance directly relating to the American Bar Association.

[44]Frederick C. Hicks, Yale Law School: 1895-1915: Twenty Years of Hendrie Hall (New Haven: Yale University Press, 1938), p. 84. Baldwin said this "at the memorial exercises to William K. Townsend, June 18, 1907." Baldwin's friend Lyman Brewster told him that his "astounding and continuous power of work and that of most tedious description and of detail and minutiae" made him seem like "a calculating machine." (Jackson, Baldwin, p. 79). For the morbid details of Susan Baldwin's insanity, see Goetsch, Essays on Simeon E. Baldwin, Chapter III. Baldwin's attempt to use work as "a banisher of sorrow" was only partly successful. Frederick Hicks called Baldwin "lonesome and heartsick" (p. 85), an assessment easily confirmed by a reading of his journals.

[45]John G. Sproat, "The Best Men": Liberal Reformers in the Gilded Age (New York: Oxford University Press, 1968), pp. 4-10; see also Gerald W. McFarland, "Partisan of Non-Partisanship: Dorman B. Eaton and the Genteel Reform

Tradition," Journal of American History, 54 (March, 1968), pp. 806-822; Morton Keller, In Defense of Yesterday: James M. Beck and the Politics of Conservatism (New York: Coward-McCann, Inc., 1958), pp. 41-42.

[46]Sproat, "The Best Men," p. 6.

[47]Jackson, Baldwin, pp. 82ff., 139-140, 134.

[48]Ibid., pp. 94-95, 125-132, 106, 136, 214; Simeon E. Baldwin, "Education for the Bar in the United States," American Political Science Review, 9 (August, 1915), 437-448.

[49]Carroll Wright, "The Growth and Purpose of Bureaus of Statistics," Journal of Social Science, 25 (1888), 2-3; Daniel Coit Gilman, "Opening Address," ibid., 12 (1880), xxiii, quoted in Mary O. Furner, Advocacy and Objectivity: A Crisis in the Professionalization of Social Science (Lexington: University Press of Kentucky, 1975), p. 21.

[50]"Principle Objects of the American Social Science Association," Journal of Social Science, 1 (1869), 3-4; "The American Social Science Association," ibid., 6 (1874), 1.

[51]Simeon E. Baldwin, "The Founding of the American Bar Association," p. 658.

[52]Ibid.; Rogers, "The American Bar Association," p. 173. "[The ABA] is a great achievement of mine. A casual remark of Judge Poché as we sat chatting at a social Science Assn. meeting in Saratoga, in 1877, that we ought to have a national association of lawyers, led me to bring the matter before our state bar assn in 1878...." (Simeon E. Baldwin diary, July 12, 1916, Baldwin Family Papers, Yale University). Felix Pierre Poché (1836-1895) made $15,000 in his first year of law practice, mostly through war-related liquidations and settlements. He was appointed to the Louisiana Supreme Court in 1880 after a long personal fight against carpetbag government in his state. Apparently his idea for a national bar association was stimulated by knowledge of "L'Ordre des Batonniers de France." (Biographical and Historical Memoirs of Louisiana, II, 314-316 (1892); 18 ABA Rep 505-506 (1895).

[53]Anthony Higgins to Simeon E. Baldwin, October 15, 1877, Baldwin Papers.

[54]Jackson, Simeon E. Baldwin, p. 80; Baldwin, "The Founding of the American Bar Association," p. 659; "William Hamersley", National Cyclopaedia of American Biography, XIX, 371; "Richard Dudley Hubbard," ibid., X, 342. Hamersley, who was instrumental in improving the jury system and procedural rules in Connecticut, later sat with Baldwin on the state supreme court. Baldwin's method of organizing the American Bar Association seems suspiciously similar to Hamersley's previous organization of the Connecticut bar in 1875; see Victor M. Gordon, ed., "A History of the First One Hundred Years of the Connecticut Bar Association, 1875-1975," 49 Connecticut Bar Journal 201 (1975), especially pp. 201-226.

[55]Baldwin, "The Founding of the American Bar Association," p. 659. Although Baldwin did the lion's share of the work, Hubbard and Hamersley were not complete ciphers; each wrote to the "leading lawyers" with whom they had some acquaintance. Cf. Hamersley to Baldwin, June 1, 1878, Baldwin Papers.

[56]"Charles Devens," Dictionary of American Biography, V, 260, "Charles O'Conor," DAB, XIII, 620; "William Maxwell Evarts, DAB, VI, 215; "Severn Teackle Wallis," DAB, XIX, 385; "Charle Rollin Buckalew," DAB, III, 225; 225; "Alexander Robert Lawton," DAB, XI, 61; "Carleton Hunt," DAB, IX, 382; "John Brooks Henderson," DAB, VIII, 527; "Lyman Trumbull," DAB, XIX, 19; "George Hoadly," DAB, IX, 84; "Thomas M. Cooley," DAB, IV, 392; "Stanley Matthews," DAB, XII, 418. There are discrepancies in Baldwin's reminiscences regarding the names and numbers of lawyers to whom requests for signatures were sent.

[57]"Benjamin Helm Bristow," DAB, III, 55; "Henry Hitchcock," DAB, IX, 75; "J. Randolph Tucker," DAB, XIX, 34; "Edward John Phelps," DAB, XIV, 528; "John K. Porter," National Cyclopaedia of American Biography, III, 252; "Charles R. Train," Who Was Who, I, 608; for Richard C. McMurtrie, see The Law Association of Philadelphia: 1802-1902 (Philadelphia: privately printed, 1906), pp. 55-70; 33 American Law Register 845-848 (1894).

[58]Charles O'Conor to Richard Hubbard, May 14, 1878, in Baldwin, "The Founding of the American Bar Association," pp. 663-664; cf. Wayne K. Hobson, "The American Legal Profession and the Organizational Society," p. 221.

[59]For an excellent discussion of Field's running controversy with the Association of the Bar of the City of New York, see George Martin, Causes and Conflicts, pp. 55-60, 88-103.

[60]"Luke P. Poland," DAB, XV, 33; "James Overton Broadhead," DAB, III, 58; "George Grover Wright," DAB, XX, 551; "John Hazlehurst Boneval Latrobe," DAB, XI, 27; "Francis Rawle," DAB, XV, 400; "Thomas Jenkins Semmes," DAB, XVI, 582; "William Allen Butler," DAB, III, 369. Lawton, Hunt, Hitchcock, and Tucker were either members of the ASSA or had attended the 1877 meeting of the Judicial Department at which Baldwin had spoken. Members of the "Saratoga clique" are identified by James Grafton Rogers in "The American Bar Association in Retrospect," pp. 176-178. However, Roger's informal sources probably overestimated the importance of the clique in the early direction of the Association.

It is noteworthy that at the Centennial Celebration of the Supreme Court of the United States on February 4, 1890, the four major addresses were delivered by Butler, Hitchcock, Semmes, and Phelps. By 1890 all were past presidents of the ABA. (13 ABA Rep 345 [1890]).

[61]Cf. Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. (New York: Knopf, 1955), p. 158: "In the movement for broader conceptions of professional service, for new legal concepts and procedural reforms, for deeper professional responsibility, for criticism of the courts, the teaching side of the profession now became important." Of course, Hofstadter had reference to the Progressive Era, but his comments are accurate, to a lesser extent for this period as well.

[62]"Call for a Meeting to Form an American Bar Association," 1 American Bar Association Reports 4 (1878).

> Dear Sir:
>
> It is proposed to have an informal meeting at Saratoga, N.Y. on Wednesday morning, August 21, 1878, to consider the feasibility and expediency of establishing an AMERICAN BAR ASSOCIATION. The suggestion came from one of the State Bar Associations, in January last, and the undersigned have been favorably impressed by it. A body of delegates, representing the profession in all parts of the country, which should meet annually, for a comparison of views and friendly intercourse, might be not only a pleasant thing

for those taking part in it, but of great service in helping to assimilate the laws of the different States, in extending the benefit of true reforms and in publishing the failure of unsuccessful experiments in legislation.

This circular will be sent to a few members of the Bar in each State--whom it is thought, such a project might interest.

If possible, we hope you will be present on the day named at Saratoga; but in any event, please communicate your views on the subject of the proposed organization to Simeon E. Baldwin, New Haven, Conn., who will report to the meeting the substance of the responses received.

BENJAMIN H. BRISTOW, Kentucky
WILLIAM M. EVARTS, New York
GEORGE HOADLY, Ohio
HENRY HITCHCOCK, Missouri
CARLETON HUNT, Louisiana
RICHARD D. HUBBARD, Connecticut
ALEXANDER R. LAWTON, Georgia
RICHARD C. McMURTRIE, Pennsylvania
STANLEY MATTHEWS, Ohio
E. J. PHELPS, Vermont
JOHN K. PORTER, New York
LYMAN TRUMBULL, Illinois
CHARLES R. TRAIN, Massachusetts
J. RANDOLPH TUCKER, Virginia

July 1, 1878

[63]Francis Rawle, "How the Association Was Organized," 14 ABAJ 375 (1928); Baldwin, "The Founding of the American Bar Association," pp. 671-672.

[64]For amusing anecdotes about Saratoga see contemporary guidebooks such as R. F. Dearborn, Saratoga and How to See It (Albany: Weed, Parson's & Co., 1873), Hugh Bradley, Such Was Saratoga (New York: Doubleday, Doran and Company, Inc., 1940), and Carson, A Good Day at Saratoga. Rawle, "How the Association Was Organized," p. 375; Rogers, "The American Bar Association in Retrospect," p. 175; New York Tribune, August 11, 1978, p. 1.

[65]Rawle, "How the Association Was Organized," p. 375; John C. Ropes to Baldwin, July 9, 1878, in Baldwin, "The Founding of the American Bar Association," p. 672. John C. Ropes (1836-1899), a distinguished and reform-minded Boston lawyer, had "no doubt that the meetings of such a body of

gentlemen would be very pleasant"; however, he doubted that their association would be of "any practical benefit," Significantly, Ropes was afflicted with a spinal deformity which prevented a much desired military career. He remained a bachelor, retired from the courtroom to the office, and is remember, when remembered at all, as the author of a military history of the Civil War.

[66]1 ABA Rep 16 (1878).

[67]Furner, Advocacy and Objectivity, p. 1.

[68]Gustave Koerner to Simeon Baldwin, August 3, 1878, in Baldwin, "The Founding of the American Bar Association," p. 680; emphasis in the original.

[69]Occasionally mentioned in the replies to Baldwin was the belief that the bar association might provide "a new field of professional activity...in which the temptations that beset the mental labors and habits" of an attorney would be sublimated in the search for justice in the abstract. The quote is from Hill, "Bar Associations," p. 86.

[70]Gustave Koerner to Baldwin, August 3, 1878, and Senator Charles Jones to Baldwin, August 10, 1878, in Baldwin, "The Founding of the American Bar Association," pp. 680,682.

[71]1 ABA Rep 27 (1878).

[72]Judge E. W. Stanley to Baldwin, July 24, 1878, and Chief Judge William C. Ruger to Baldwin, August 1, 1878, in Baldwin, "The Founding of the American Bar Association," pp. 677, 679. Another of Baldwin's correspondents wrote requesting action upon the "licensing of incompetent practitioners. This is an evil, the magnitude of which, one cannot appreciate, unless brought in actual contact with it. These raters of good moral characters have brought a discredit upon the profession, that it will take years to eradicate, even with the help of merited reforms [sic]. Green Durbin to Baldwin, July 23, 1878, in Baldwin, ibid., p. 688. "Upholding the honor of the profession" was of great importance to Baldwin himself. He queried his diary, "Why am I with my scholarly tastes and capabilities groveling among ants,...when my mind might find more congenial occupation in other fields? But is there any aim higher than that of raising the standard of your profession...?" (Simeon Baldwin diary, February 8, 1874, Baldwin Papers.)

[73]Gustave Koerner to Baldwin, August 3, 1878, in Baldwin, "The Founding of the American Bar Association," p. 680; Rogers, "The American Bar Association," p. 180; New York Tribune, August 22, 1878, p. 1.

[74]Paul H. Buck, The Road to Reunion, 1865-1900 (Boston: Little, Brown and Company, 1937), pp. 140-141.

[75]"Current Topics," 18 Alb. Law J 141 (August 24, 1878); Jacob Weart, "The American Bar Association: Its History for the First Sixteen Years of its Existence and its Impress Upon the Thought of the Nation," 27 New Jersey Law Journal 338 (1904). "We come together from all parts of our country--our common country--from the scenes of desolation and sorrow on all hands, that God alone can estimate....Let it all pass. We come to bury the armed Caesar, not to praise him." Edward J. Phelps, "Chief Justice Marshall," 2 ABA Rep 173 @ 191 (1879); cf. Walter Hill, "Bar Associations," p. 71; "The Association's 'Semi-Centennial Year'", 13 ABAJ 512 (1927).

[76]Charles Jones to Baldwin, August 10, 1878, in Baldwin, "The Founding of the American Bar Association," p. 682.

[77]Ibid., pp. 691-693; 1 ABA Rep 10-11 (1878); 33 ABA Rep 54 (1908).

[78]Rogers, American Bar Leaders, p. 123; "James O. Broadhead: A Subject for Reappraisal," Missouri Historical Society Bulletin 27 (January, 1971), 125-128.

[79]Carson, A Good Day at Saratoga, p. 4.

[80]"Current Topics," 18 Alb. Law J 141 (August 24, 1878).

[81]Simeon Baldwin diary, August 31, 1878, Baldwin Papers; cf. diary for September 4, 1881, and April 7, 1917. Baldwin was never excessively modest, especially in private.

Chapter 2

[1]Jacob Weart, "The American Bar Association: Its History for the First Sixteen Years of Its Existence...," 27 New Jersey Law Journal 292 @ 295 (1904); cf. Francis Rawle to Simeon Baldwin, August 6, 1879, and May 26, 1884, Baldwin Family Papers, Yale University.

[2]Victor M. Gordon, ed., "A History of the First One Hundred Years of the Connecticut Bar Association, 1878-1975," 49 Connecticut Bar Journal 201 @ 205-07 (1975); Leslie G. Whitmer, "The First Convention of the Kentucky Bar, December 15, 1871," 35 Kentucky Bar Journal 69-71 (1971); Margaret F. Sommer, "The Ohio State Bar Association: The First Generation, 1880-1912," Ph.D. dissertation, Ohio State University, 1972, pp. 25ff.

[3]Wayne Karl Hobson, "The American Legal Profession and the Organizational Society, 1890-1930," Ph.D. dissertation, Stanford University, 1977, p. 237; cf. Alfred Z. Reed, Training for the Public Profession of the Law (New York: The Carnegie Foundation for the Advancement of Teaching, 1921), p. 210; "Is it not absolutely true that the bar of each state in the American Union is better acquainted with the laws and the lawyers of Great Britain, than they are with those of the most populous states of the Union" Cortlandt Parker, "Alexander Hamilton and William Paterson," 3 ABA Rep 149 @ 164 (1880).

[4]12 ABA Rep 27 (1889).

[5]John L. T. Sneed, 5 ABA Rep 89 (1882).

[6]James Grafton Rogers agrees with this assessment both in American Bar Leaders: Biographies of the Presidents of the American Bar Association, 1878-1928 (Chicago: American Bar Association, 1932), p. viii, and in "The American Bar Association in Retrospect," in Law: A Century of Progress (New York: New York University Press, 1937), pp. 180-81. C. S. Lewis wrote that he had "never read an autobiography in which the parts devoted to the earlier years were not far the most interesting." Surprised by Joy (New York: Harcourt, Brace & World, 1955), p. viii.

[7]1 ABA Rep 16 (1878); Edson R. Sunderland, A History of the American Bar Association and its Work (Chicago: American Bar Association, 1953), p. 18; Rogers, American Bar Leaders, p. 223.

[8]1 ABA Rep 30-31 (1878); Sunderland, p. 18; Francis Rawle to Simeon Baldwin, January 10, 1880 & October 17, 1890, Baldwin Papers; Nathan William MacChesney, 41 ABA Rep 631-32 (1916); F. Dumont Smith, 52 ABA Rep 76 (1927).

[9]John Norton Pomeroy to Simeon Baldwin, November 30, 1879, Baldwin Papers. "Sometime or other," Pomeroy wrote, "I sh[ould] hope to attend a meeting."

[10]7 ABA Rep 69 (1884); 8 ABA Rep 38 (1885).

[11]Sunderland, pp. 19-21.

[12]4 ABA Rep 10 (1881); Edward O. Hinkley to Simeon Baldwin, January 8 and 10, 1880, Francis Rawle to Simeon Baldwin, April 12, 1893, Baldwin Papers; 10 ABA Rep 12-13 (1887).

[13]Luke P. Poland, 7 ABA Rep 7-8 (1884).

[14]Rogers, "The American Bar Association in Retrospect," p. 177.

[15]Cf. Rogers, American Bar Leaders, p. ix, and Rogers, "The American Bar Association in Retrospect," p. 177. Rogers never put all these men in a single list; Norbert Brockman did so for the first time in "The Politics of the American Bar Association," Ph.D. dissertation, Catholic University of America, 1963, p. 25. Rogers cites no source for his information; it is quite possible he garnered the names from Francis Rawle; cf. American Bar Leaders, pp. 121, 124; Rogers, "Fifty Years of the American Bar Association" 53 ABA Rep 522 (1928).

[16]Rogers, American Bar Leaders, p. ix.

[17]Rogers, "American Bar Association in Retrospect," p. 177.

[18]The American Historical Association was directed by such a clique at the turn of the century. "In effect the 2,800 members of the association were governed by two or three dozen professors from a half dozen universities, drawn largely from those in their senior years....Within this governing clique an elite inner core known as the Nucleus Club met annually at a gay champagne dinner where fundamental policy decisions were made--or so the mass of the members believed." Ray Allen Billington, "Tempest in

Clio's Teapot: The American Historical Association Rebellion of 1915," American Historical Review 78 (1973), 348.

[19]20 Albany Law Journal 176 (1879); cf. 22 Alb. Law J. 162 (1880). Irving Browne (1835-1899) was the H. L. Mencken of the contemporary legal press. He was "the son of two persons of strongly contrasting personality...a Universalist clergyman of austere character, and...a lady of attractive personality and social charm." In 1879 he became editor of the Albany Law Journal and quickly brought it "to a foremost place among the legal periodicals of his day." Browne brought his skeptical eye to bear on the new American Bar Association, and his irreverent, not to say flippant, treatments of the second through the tenth annual ABA meetings are delightfully readable. In 1893 Browne resigned his editorial position and joined the faculty of the Buffalo Law School. Dictionary of American Biography, III, 165-166.

[20]Alexander Lawton to Simeon Baldwin, September 9, 1879; Carleton Hunt to Simeon Baldwin, August 25, 1881, Baldwin Papers.

[21]Francis Rawle to Simeon Baldwin, May 26, 1884; cf. Rawle to Baldwin, August 29, 1879, Baldwin Papers.

[22]"The order you have appointed for the Bar Association meeting of next season seems to me very promising. I have always thought, and taken pains to say, how much the arrangements have been indebted to your disinterested zeal, and your organizing abilities." Carleton Hunt to Simeon Baldwin, October 30, 1881, Baldwin Papers.

[23]Simeon Baldwin to Francis Rawle (draft), January 20, 1888; one Daniel H. Chamberlain made the same suggestion to Baldwin in the same year, Chamberlain to Baldwin, September 13, 1888, Baldwin Papers.

[24]James Fairbanks Colby, "Luke Potter Poland," DAB, VIII, 33-34; "Luke P. Poland," 10 ABA Rep 431 (1887); Weart, "The American Bar Association," pp. 294-95.

[25]30 Alb. Law J. 161 (1884); 19 American Law Review 777 (1888).

[26]"Edward Otis Hinkley," 19 ABA Rep 653 (1896); for discussion of the social implications of organized relief work see George M. Fredrickson, The Inner Civil War (New York: Harper & Row, 1965), pp. 211-215.

[27]"Hinkley," 19 ABA Rep 653 (1896); 30 Alb. Law J. 161 (August 30, 1884) and 36 Alb. Law J. 161 (August 27, 1887); Edward Hinkley to Francis Rawle, August 27, 1881; Francis Rawle to Simeon Baldwin, May 26, 1884, April 13, 1893, and May 4, 1894, Baldwin Papers.

[28]Rogers, American Bar Leaders, pp. 121-125; Rogers, "The American Bar Association in Retrospect," pp. 176-177; "Francis Rawle," DAB XV, 400-401. When Baldwin needed a gavel at the first Saratoga meeting, he sent Rawle across the street to buy a carpenter's mallet for seventeen cents. The mallet was used by every president of the Association for seventy-nine years. During the year of his presidency, Rawle suggested that it be decorated with the names of all the ABA presidents. This was done by the Colorado Bar Association, first with silver, then with gold bands until there was room for no more. The mallet was stolen in 1946 and recovered, bands intact, at the Baltimore city dump by long-time executive secretary, Olive G. Ricker. Walker Lewis, "The Birth of the American Bar Association," 64 ABAJ 996 @ 1002 (1978); Chester I. Long, 51 ABA Rep 34-35 (1926).

[29]Francis Rawle to Simeon Baldwin, August 6, 1879, May 26, 1884, July 11, 1888, October 17, 1890, April 12, 1893, May 4, 1894, Baldwin Papers.

[30]"The American Bar Association," 20 Alb. Law J. 176 (August 30, 1879). Rawle was infuriated at Browne's continual carping combined with praise for the innocuous Hinkley. "Next year," Rawle wrote to Baldwin, "we must arrange with the principle magazines to report us fully and fairly." Rawle to Baldwin, August 29, 1881, Baldwin Papers.

[31]Weart, "The American Bar Association," p. 294; Rogers, American Bar Leaders, p. 123.

[32]Rawle to Baldwin, December 22, 1879, September 6, 1883, January 17, 1888, Baldwin Papers. As an example of Rawle's ruthless editing, compare Irving Browne's lively account of the ABA debate over possible solutions to the backlog of cases on the Supreme Court docket with the limp version given in the Report. 26 Alb. Law J. 141 @ 142 (August 19, 1882), 5 ABA Rep (1882).

[33]"The American Bar Association," 20 Alb. Law J. 176 @ 178 (August 30, 1879).

[34]2 ABA Rep 9 (1879); Sunderland, p. 9; 11 ABA Rep 95 (1888); Philip J. Wickser, "Bar Associations," 15 Cornell Law Quarterly 390 @ 418 (1930). By 1978 membership had grown to over 235,000 and the registration for the Centennial annual meeting was over 10,000. (American Bar Association, Centennial [Chicago: American Bar Association, 1979], p. 5.)

[35]"I think we have elected twice as many members of this body as remain now upon the roll." 5 ABA Rep 14 (1882); By-Law XIII, 5 ABA Rep 119 (1882).

[36]Rawle to Baldwin, June 18, 1880, November 12, 1880, February 2, 1881, Baldwin Papers.

[37]Rawle to Baldwin, December 28, 1886, Baldwin Papers.

[38]Reed, Training for the Public Profession of the Law, pp. 215-218; Brockman, "Politics of the ABA," p. 249.

[39]This is an especially odd argument because the hall they were meeting in at that moment was spacious enough to seat several times the number of members present; cf. the remarks of Bedford M. Estes, 5 ABA Rep 16 (1882). By 1883, Hinkley had completely reversed himself. 6 ABA Rep 53 (1883).

[40]C. C. Bonney to Baldwin, July 27, 1888, Baldwin Papers.

[41]Only four of the ninety-four ABA members from Massachusetts could not be located in William T. Davis, Bench and Bar of the Commonwealth of Massachusetts (Boston: Boston History Company, 1895), 2 vols. There were never more than 61 Massachusetts members in any one year (1881), and the average number of members was 46.

[42]"The American Bar Association," 19 American Law Review 777 @ 778 (1885).

[43]5 ABA Rep 63-64; Sunderland, p. 35.

[44]George L. Payton to Edward Hinkley, August 17, 1882; Hinkley to Baldwin, May 8, 1883, Baldwin Papers.

[45]Rawle to Baldwin, February 23, 1883; cf. Rawle to Baldwin, August 29, 1881, Baldwin Papers.

[46]The meeting was held in Hot Springs, Virginia, and Rawle went out of his way to praise the influence of

southerners in the early days of the Association, Rawle, "Address of the President," 26 ABA Rep 261 (1903).

[47]C. C. Bonney, 6 ABA Rep 47 (1883). "At its last meeting a Saratoga daily paper, contained in the space of two or three inches, a notice of its proceedings for the preceding day, and in the same issue devoted two or three columns to a ball given by one of the leading hotels." 21 Central Law Journal 518 (1885); cf. "The American Bar Association," 20 American Law Review 553 (1886) and the remarks of Thomas J. Semmes, 11 ABA Rep 91 (1888).

[48]6 ABA Rep 49 (1883); Sunderland, p. 36.

[49]6 ABA Rep 47-60, 349-350 (1883); 43 ABA Rep 150-151 (1918).

[50]7 ABA Rep 6 (1884). "Three years later, in 1886, Charles C. Lancaster, of the District of Columbia, moved that the meeting to occur two years from that time be held in Chicago. The Association voted to let the motion lie over until the next year. But when that time came the motion was not brought up." (9 ABA Rep 80 [1886]; Sunderland, p. 37.)

[51]Art. VIII, 2 ABA Rep 22 (1879).

[52]Ibid.; cf. Ezra S. Sterns to Baldwin, June 20, 1891; James M. Woolworth to Baldwin, June 29, 1891, Baldwin Papers; John W. Stevenson, "Address of the President," 8 ABA Rep 149 @ 151 (1885).

[53]Baldwin, "Address of the President," 14 ABA Rep 163 (1891); cf. Henry Hitchcock to Baldwin, July 18, 1891, Baldwin Papers: "Accept my sincere sympathy for the task in which you are or presumably have been engaged, of collating state statutes. I want no more of that--do you?"

[54]"The American Bar Association," 18 American Law Review 871 (1884); cf. "Lawyers Taking Counsel," New York Times, August 29, 1889, p. 5.

[55]By-Law I, 5 ABA Rep 116 (1882); Rawle to Baldwin, January 17, 1888: "The best lawyers in the Country ought to be glad and willing to read a paper at our meeting, and yet we have frequently chosen some unknown man with an amiable desire to please a member or for geographical reasons." Luke Poland to Baldwin, May 24, 1882; Rawle to Baldwin, May 26, 1884; October 17, 1890, April 12, 1893; Henry Hitchcock

to Baldwin, February 18, 1884; Lyman Trumbull to Baldwin, December 31, 1890, Baldwin Papers.

[56]Rawle to Baldwin, May 26, 1884; Edward Hinkley to Baldwin, June 14, 1884; Rawle to Baldwin, April 12, 1893. Rawle was typically unhappy with both the speakers and their choice of topics; cf. Rawle to Baldwin, July 11, 1888, Baldwin Papers. Speakers did receive two hundred free copies of their speech. (3 ABA Rep 9 [1880]).

[57]Weart, p. 295; even Irving Browne said that "the tone of the address was most admirable, enlivened as it was by occasional flashes of eloquent humor...." 20 Alb. Law J. 176 (August 30, 1879). Francis Rawle considered Phelps' speech to be one of the three best during the first twenty five years of Association history. Rogers, American Bar Leaders, pp. 124-125.

[58]30 Alb. Law J. 161 (August 30 1884); John F. Dillon, "American Institutions and Laws," 7 ABA Rep 203-239 (1884).

[59]George Hoadly, "Annual Address," 11 ABA Rep 219 @ 245 (1888); earlier that year Rawle had complained to Baldwin that the Annual Address had "degenerated from Mr. Phelps' style of an oration to a paper and no more." Rawle to Baldwin, January 17, 1888; Baldwin to Rawle, January 22, 1888, Baldwin Papers.

[60]Henry E. Young, "Sunday Laws," 3 ABA Rep 109-147 (1880); cf. comments of Irving Browne, 22 Alb. Law J. 162 (August 28, 1880) and 30 Alb. Law J. 161 (August 30, 1884).

[61]Rawle to Baldwin, August 29, 1879, Baldwin Papers. Of a later speech the American Law Review commented that the reading of it took "two weary hours, at the end of which all the lawyers who had not departed in weariness, were ready to vote against any and every proposition advocated in the paper." 26 American Law Review 747 (1892).

[62]Francis Rawle, "Car Trust Securities," 8 ABA Rep 277-322 (1885); 32 Alb. Law J. 161 (August 29, 1885).

[63]5 ABA Rep 10-11 (1882); 7 ABA Rep 11 (1884). Papers by Thomas M. Cooley and Gustave Koerner were read by the Secretary in 1881 and 1882 respectively. Irving Browne mentioned that "considerable disappointment was felt at the nonappearance of Judge Cooley...[A]fter all many of us would have been glad to meet [him]". 24 Alb. Law J. 161 (August 27, 1881).

Cooley had a peculiar relationship with the American Bar Association. He refused to allow his name to be used on Baldwin's call for organization but was a charter member of the Association. He did not appear to read his paper in 1881 but did respond to a toast at the first Chicago meeting banquet in 1889. In 1893 he was elected president but was too ill to read his address in 1894. It was read for him despite the rule. Cooley is probably the only ABA president never to have addressed an annual meeting in person--a good indication of his high reputation in legal circles.

[64]Sunderland, pp.. 21-22; Simeon Baldwin, 33 ABA Rep 54 (1908).

[65]Sunderland, p. 24.

[66]Baldwin to Rawle, January 20, 1888; 22 Alb. Law J. 162 @ 163 (August 28, 1880); Henry Hitchcock to Baldwin, April 12, 1886, July 15, 1886, & September 23, 1889; William Allen Butler to Baldwin, August 4, 1879, January 18, 1882, January 31, 1882, and September 7, 1885; Rawle to Baldwin, June 13, 1882; Baldwin to members of the ABA Committee on Jurisprudence and Law Reform, December 20, 1886, Baldwin Papers.

[67]Sunderland, p. 28.

[68]20 Alb. Law J. 176 @ 177 (August 30, 1879). As an example, a fairly noncontroversial resolution recommending a national bankruptcy law was referred to committee in 1886, reported on favorably in 1887, but not finally approved by the Association until 1889 and then without the recommendation of any of the specific bills which had been drafted by the committee. 9 ABA Rep 79 (1886); 10 ABA Rep 344-358 (1887); 12 ABA Rep 29, 35 (1889).

[69]20 Alb. Law J. 176 @ 177 (August 30, 1879); 2 ABA Rep 209-236 (1879); Sunderland, p. 72.

[70]20 Alb. Law J. 176 @ 177 (August 30, 1879).

[71]3 ABA Rep 15 (1880).

[72]3 ABA Rep 13-37 (1880).

[73]4 ABA Rep 30, 237-301 (1881); Sunderland, p. 73. Hunt remained a member of the ABA until his death in 1921.

[74]8 ABA Rep 22 (1885); Robert Holzman, Adapt or Perish: The Life of General Roger A. Pryor, C.S.A. (Hamden, Conn.: Shoestring Press, 1976). Pryor was a criminal lawyer. 22 Central Law Journal 143 (1886); cf. "The Surveillance of Professional Criminals," 19 American Law Review 782 (1885).

[75]10 ABA Rep 55-78 (1887). Baldwin was no sadist. He understood the deficiencies of the penitentiary system, especially in the case of wife beating and "other assaults on the weak and helpless." It seemed unjust to him that a brute might be sentenced to the comparative security of prison while his family was thrown upon charity. However, lacking some expertise in the marriage relationship, Baldwin probably overestimated both the willingness of a battered woman to press charges against her husband when punishment would be a public flogging and her economic and physical welfare in the aftermath.

[76]"American Bar Association," 21 American Law Review 1001 (1887); cf. 34 Alb. Law J. 161 (August 28, 1886). Rawle edited the dark-humored amendment from the record.

[77]4 ABA Rep 10-24 (1881).

[78]24 Alb. Law J. 161 (August 27, 1881); cf. 20 Alb. Law J. 176 @ 177 (August 30, 1879) and 30 Alb. Law J. 161 (August 30, 1884); New York Times, August 19, 1887, p. 4.

"We are seriously afraid that the Association is in the situation attributed by the late Senator Morton to a certain political party, 'who, like a man looking out of the rear window of a railway train, cannot see anything until they have gone by it.' The art of foretelling past events is very easy; but brethren, let us go to the other end of the train, hold on to our hats, a look ahead now and then." 28 Alb. Law J. 161 (September 1, 1883).

[79]John W. Stevenson, "Address of the President," 8 ABA Rep 149 @ 199 (1885); 2 ABA Rep 19 (1879); 4 ABA Rep 51-52 (1881); 5 ABA Rep 32 (1882); Cortlandt Parker, "Address of the President," 7 ABA Rep 147 @ 201 (1884); 10 ABA Rep 21 (1887).

[80]The best introduction to the codification controversy is Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), pp. 340-355 and George Martin, Causes and Conflicts (Boston: Houghton Mifflin Company, 1970), pp. 142-157.

[81]Edward J. Phelps, "Address of the President," 4 ABA Rep 141 @ 173 (1881); Phelps was strongly opposed to codification. Cortlandt Parker, "Address of the President," 7 ABA Rep 147 @ 151 (1884); John F. Dillon, "American Institutions and Laws," 7 ABA Rep 203 @ 230 (1884).Dillon advocated "codification within...conservative limits." Both Phelps and Dillon served on Field's special committee.

[82]7 ABA Rep 75-76 (1884).

[83]8 ABA Rep 323-449 (1885); 9 ABA Rep 325-358 (1886); 19 American Law Review 777 @ 780 (1885). Elihu Root remembered many years later how vehemently New York lawyers in his youth had despised Field's code of procedure. "Time and again I have heard them in consultation with the author, describe the book as 'your damned code, Mr. Field.'" Elihu Root, "The Layman's Criticism of the Lawyer," 30 ABA Rep 386 @ 399 (1914).

[84]32 Alb. Law J. 161 (August 29, 1885).

[85]John Hinkley, "Reminiscences of the American Bar Association," 21 ABAJ 452 @ 455 (1935); 9 ABA Rep 11-74 (1886); New York Times, August 21, 1886, p. 2.

[86]Hinkley, p. 455; cf. 34 Alb. Law J. 161 @ 162 (August 28, 1886); New York Times, August 21, 1886, p. 4; Austen G. Fox, 9 ABA Rep 59 (1886).

[87]Max Radin, "The Achievements of the American Bar Association," 25 ABAJ 1007 (1939). Radin recalls only the rejection of the Field Code by the New York state legislation and governor in a paragraph entitled "Codification Never Popular with Lawyers." Likewise, when James D. Andrews referred to this controversy in 1906, he asserted that the "battle fell against Mr. Field." 29 ABA Rep 58 (1906).

[88]34 Alb. Law J. 161 @ 162 (August 28, 1886); Herbert B. Turner, an opponent of codification from New York, charged that Field had brought "eight or ten" men with him "who have always voted together in our city Bar Association." 9 ABA Rep 32 (1886). Unfortunately for the historian, an attempt by Field's enemies to take a roll call vote failed.

[89]Friedman, A History of American Law, p. 352; cf. Charles Rembar, The Law of the Land (New York: Simon and Schuster, 1980), p. 229; Thomas J. Semmes, "Annual

Address," 9 ABA Rep 213-214 (1886): "The history of codification teaches that the task of preparing a code of laws is difficult, that its proper execution is a work of years, to be entrusted not to a deciduous committee of fugitive legislators, but to a permanent commission of the most enlightened and a cultivated jurists whose projet, prior to adoption, should be subjected to rigid and universal criticism."

While the voting was going his way, Field introduced a resolution supporting a commission to prepare a federal code of procedure. The motion was ruled out of order, however. 9 ABA Rep 75 (1886).

[90]Felix Frankfurter and James Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (New York: The Macmillan Company, 1927), pp. 60, 86; Willard L. King, Melville Weston Fuller: Chief Justice of the United States (Chicago: University of Chicago Press, 1950), p. 148.

[91]Frankfurter and Landis, pp. 60-69; Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America (Cambridge: Harvard University Press, 1977), p. 356. On the other hand, some state courts were faced with virtually the same problems of overcrowding; cf. Sommer, "Ohio State Bar Association," pp. 74-161.

[92]Frankfurter and Landis, pp. 72-73, 80-81.

[93]Ibid., p. 81.

[94]4 ABA Rep 41-84 (1881). The committee members were John W. Stevenson (Kentucky), Henry Hitchcock (Missouri), Richard T. Merrick (District of Columbia), Charles S. Bradley (Rhode Island), Cortlandt Parker (New Jersey), Rufus King (Ohio), Alexander Lawton (Georgia), Clarkson Potter (New York), Edward J. Phelps (Vermont). Irving Browne called this "the sort of business that the Association ought to devote itself to." 24 Alb. Law J. 161 @ 162 (August 27, 1881).

[95]Radin, p. 908; Frankfurter and Landis, p. 83, fn. 124; 5 ABA Rep 363 (1882).

Majority
John Stevenson (Kentucky)
Charles S. Bradley (Rhode Island)
Rufus King (Ohio)
Alexander Lawton (Georgia)
Henry Hitchcock (Missouri)

Minority
Edward J. Phelps (Vermont
Cortlandt Parker (New Jersey)
William M. Evarts (New York)
Richard T. Merrick (District of Columbia)

Evarts had replaced Clarkson Potter who died before the annual meeting of 1882.

It seems that only one member of the ABA publicly suggested curtailing the jurisdiction of the federal courts as a solution to the problem of delay. Thomas Wilson (Minnesota), 12 ABA Rep 16 (1889).

[96]5 ABA Rep 18-102 (1882).

[97]26 Alb. Law J. 141 @ 142 (August 19, 1882). Browne said that Russell delivered his speech so loudly that he "might prudently have saved the expense of his journey to Saratoga and delivered his speech on the levee at St. Louis."

Senator Davis, annoyed at the request of an opposing Senator for a postponement in order to learn the view of the American Bar Association on Davis's bill, categorized the Association as only "a few gentlemen whom he had met at Saratoga last summer." Russell returned the compliment by calling Davis a "quasi-politician." New York Times, May 6, 1882, p. 1.

Rawle struck the whole "discussion" from the Report.

[98]5 ABA Rep 101 (1882).

[99]New York Times, May 6, 1882, p. 1; Walter B. Hill, "The Federal Judicial System" 12 ABA Rep 289 @ 319 (1889); Walter George Smith, 12 ABA Rep 9 (1889); Cortlandt Parker, "Address of the President," 7 ABA Rep 147 @ 199 (1884): "And as for arranging for a division, that would be contrary to that established maxim already mentioned, superior in force to Holy Writ, 'To the victors belong the spoils.'"

[100]Frankfurter and Landis, pp. 96-97.

[101]Ibid., p. 97; Walter B. Hill, "The Federal Judicial System," 12 ABA Rep 289 @ 322 (1889); John F. Dillon, 13 ABA Rep 36 (1890); Henry Hitchcock, "Address of the President," 13 ABA Rep 147 @ 155 (1890).

[102]Frankfurter and Landis, p. 98.

[103]Ibid., p. 99.

[104]Ibid., pp. 101-102. Appropriately, the victory occurred during Baldwin's term as ABA president; cf. Baldwin, "Address of the President," 14 ABA Rep 163 @ 164 (1891). The Illinois State Bar Association achieved a similar victory in 1896 (Lawrence E. Sommers, "Lawyers and Progressive Reform: A Study of Attitudes and Activities in Illinois 1890 to 1920," Ph.D. dissertation, Northwestern University, 1967, pp. 84-85).

[105]Cf. King, Fuller, pp. 148-151; Walter B. Hill, "Bar Association," 5 Georgia Bar Association Reports 51 @ 83 (1888): "Both parties have, by their conduct, placed themselves in an attitude which would estop them from objection [to the Court bill], if it should come to pass that the Senate, House and President were in political accord."

[106]Radin, "Achievements of the ABA," p. 908.

[107]Alfred Russell, "Avoidable Causes of Delay and Uncertainty in Our Courts," 14 ABA Rep 197 @ 206 (1891); Charles C. Lancaster 14 ABA Rep 41 (1891), 4 ABA Rep 77 (1881). Cf. similar sentiments of Martin W. Cooke, President of the New York State Bar Association, "Presidential Address," 11 NYSBA Proceedings 38 @ 47 (1888).

[108]The annual dinners usually consisted of seven courses and cost the Association treasury somewhat over five dollars a head including wine and cigars. One year the executive committee committed (in the words of the Central Law Journal) "The grave mistake" of substituting a "collation"--cold salad and champagne--for the annual dinner. The experiment created almost as much excitement as the debate over codification and was never repeated. 22 Central Law Journal 143 (1886); Weart, "The American Bar Association," p. 339; Edward Hinkley to Francis Rawle, August 27, 1881, Baldwin Papers.

The Association still holds an annual dinner but now schedules cocktail parties and prayer breakfasts as well.

[109]20 Alb. Law J. 176 @ 177 (August 30, 1879).

[110]Joseph Choate, later president of the ABA, caused a furor when his after dinner remarks to the Friendly Sons of St. Patrick, sarcastic to the point of bad taste, were reprinted in the New York Sun in March, 1893.

[111]30 Alb. Law J. 181 (September 6, 1884).

[112]Weart, "The American Bar Association," p. 341.

[113]Rawle to Baldwin, May 5, 1887, Baldwin Papers, in regard to the recommendation of Walter George Smith to be a U. S. District Attorney.

[114]Baldwin to President Benjamin Harrison, October 27, 1890, March 5, 1891; The White House to Baldwin, March 23, 1891; Baldwin to R. S. Taylor, March 28, 1891; Horace Lurton to Baldwin, March 23, 1891; George G. Mercer to Baldwin, January 18, 1894, January 20, 1894; Hampton Carson to President Grover Cleveland, January 22, 1894, Baldwin Papers.

[115]Hobson, "The American Legal Profession," pp. 225ff; J. H. Kennard to Baldwin, October 10, 1884, Baldwin Papers; Brockman, p. 249.

[116]Reprinted in 14 American Law Review 446 (1880); cf. the words of welcome to the 1915 annual meeting by Governor William Spry of Utah: "It is a good thing for men to meet occasionally and look into each others faces. They know each other better, and perhaps there comes a time when through cooperation greater things may be accomplished because of that knowledge and through that association." 40 ABA Rep 6 (1915).

[117]7 ABA Rep 75 (1884).

[118]25 Central Law Journal 121 (1887).

Chapter 3

[1]The National Bar Association (1888-1891) is not to be confused with the predominantly black National Bar Association, Inc., founded in 1925.

[2]Cf. Alfred Z. Reed, Training for the Public Profession of the Law (New York: Carnegie Foundation for the Advancement of Teaching, 1921), p. 442.

[3]National Bar Association, Preliminary Statement (Washington, D. C.: McQueen & Wallace, 1888), pp. 5-6.

[4]Ibid., pp. 16, 18; Washington Star, May 22, 1888, p. 5; cf. letter to Editor of the Central Law Journal from G. A. F.[inkelnberg], May 1, 1888, 26 Cent. L. J. 487.

[5]Preliminary Statement, p. 23; Washington Post, May 22, 1888, p. 3.

[6]Cf. above pp. 14-15.

[7]Preliminary Statement, pp. 27-30.

[8]Cf., for instance, "Current Topics," 20 Albany Law Journal 161 (August 30, 1879); Simeon E. Baldwin, "The Founding of the American Bar Association," 3 ABAJ 658 @ 668, 678-79 (1917); E. F. Bullard, 5 ABA Rep 17 (1882). At the annual meeting of 1888, Rufus King, the founder of the Cincinnati Law School, argued that had the ABA adopted a representative scheme of organization, the "other, styled the National, would not have been formed." 11 ABA Rep 14 (1888); cf. 32 American Law Review 596-97 (1898); 31 Am. L. Rev. 749 (1897); 34 Am. L. R. 573 (1900).

[9]By-Law IV. In 1886, the Boston Bar Association was represented, "and of its two delegates one was already a member of the American Bar Association and the other was promptly elected." Reed, Training for the Public Profession of the Law, p. 210.

[10]Preliminary Statement, pp. 19-20; 23-24.

[11]Ibid., p. 34; the resolution was introduced by the Treasurer, former Congressman Lewis B. Gunckel, and was unanimously adopted; cf. 2 NBA Proceedings 33-35 (1889).

[12]R. Ross Perry, Secretary of the NBA for most of its history, felt it necessary to issue a formal statement as to the differences between the two organizations because of the number of inquiries he received questioning the raison d'être of the NBA. The NBA, he said, had "no quarrel with the American Bar Association." 2 NBA Proc. 33-35 (1889).

[13]Cf. remarks of John D. Sullivan, 9 Ohio State Bar Association Proceedings 86 (1888); E. W. Stuart, 9 OSBA Proc 82 (1888); "Major Bacon," 5 Georgia State Bar Association Proceedings 26 (1888).

[14]9 OSBA Proc 125 (1890).

[15]In May, the members sailed down the Potomac to Mount Vernon; in August they journeyed to the "islands of Lake Erie." Washington Post, May 24, 1888, p. 3; 20 Weekly Law Bulletin 135 (August 13, 1888).

[16]Washington Star, May 22, 1888, p. 5.

[17]20 Weekly Law Bulletin 126 (August 13, 1888).

[18]Washington Post, May 23, 1888, p. 3.

[19]Who Was Who, I, 962; Indianapolis News, August 6, 1890, p. 2. For all his efficiency and businesslike appearance, Perry was something of a romantic. While his own national organization was faltering, Perry was dreaming of an international bar association. Perry to Frederick G. Bromberg, June 26, 1890, in 13 Alabama State Bar Association Proceedings 134-36 (1890).

[20]2 NBA Proc. 36 (1889); Washington Post, December 10, 1891, p. 7; Dinner Given by the Committee of Arrangements Appointed by the Bar Association of the District of Columbia to the Fourth Annual Meeting of the National Bar Association of the United States (Washington, D. C.: The Arlington Hotel, 1891), p. 41-42.

[21]19 American Law Review 717 (1885); 21 Cent. L. J. 241 (1885); W. L. Gross, "Presidential Address," 7 Illinois State Bar Association Proceedings 50-51 (1884): "During our own existence the tendency to localization has been one of the most persistent dangers, and it has required no little effort to overcome it. Before the National Association [the ABA] can be expected to accomplish very much, it must embrace the leading spirits of the profession the country over."

[22]20 Weekly Law Bulletin 65 (July 23, 1888); cf. "The American Bar Association," 22 Amer. L. Rev. 929 (1888).

[23]10 ABA Rep 12 (1887); Baldwin, Rawle, Field and E. J. Phelps were in Europe attending the conference of the International Law Association.

[24]C. C. Bonney to Baldwin, July 27, 1888; Rawle to Baldwin, January 17, 1888; Daniel H. Chamberlain to Baldwin, September 13, 1888, Baldwin Papers.

[25]"The American Bar Association," 22 Am. L. Rev. 929 (1888).

[26]Rawle to Baldwin, January 17, 1888, Baldwin Papers.

[27]Rawle to Baldwin, July 11, 1888, Baldwin Papers.

[28]Hinkley to Baldwin, June 11, 1888; Baldwin to Hinkley, June 12, 1888, Baldwin Papers. Upon accepting the presidency of the National Bar Association, Broadhead damned the ABA with faint praise: "The American Bar Association, I think, has established itself. It may not be as efficient as it ought to be, but it has done some good." Preliminary Statement, pp. 20-21.

[29]Hinkley to Baldwin, June 11, 1888; cf. Preliminary Statement, pp. 7-15 with 11 ABA Rep 127-144 (1888).

[30]Hinkley to Baldwin, June 11, 1888, Baldwin Papers.

[31]Ibid.; Baldwin to Hinkley, June 12, 1888, Baldwin Papers. When the Secretary of the New Mexico Bar Association inquired as to the procedure for sending delegates to the ABA meetings, Hinkley not only replied with a cordial letter but sent all the back volumes of the Reports still in print. 2 NMBA Minutes 18-19 (1888).

[32]Washington Star, May 23, 1888, p. 1.

[33]20 Weekly Law Bulletin 128 (August 13, 1888).

[34]11 ABA Rep 25 (1888); Broadhead concluded on a somewhat defensive note: "I happened to be in Washington when the organization was first proposed...I had some hesitancy at first, until I was satisfied that the intention was to cooperate with the American Bar Association. If I have committed an error I have not been able to see it."

[35]Ibid., pp. 25-26.

[36]"The American Bar Association," 22 Am. L. Rev. 929 (1888); 20 Weekly Law Bulletin 179 (September 3, 1888). The close vote was not mentioned in the ABA Report. At the next annual meeting when a similar resolution was presented, it was tabled on the motion of Henry Wise Garnett of the District of Columbia. 12 ABA Rep 54-55 (1889).

[37]11 ABA Rep 13 (1888).

[38]Ibid., pp. 13-14.

[39]The gentleman was appropriately named I. C. Grubb; ibid., p. 42.

[40]Ibid., p. 33.

[41]Ibid., p. 29.

[42]Ibid., p. 41.

[43]Ibid., p. 43; those who voted for the change usually suggested that membership in the ABA would increase since the delegates sent by local bar associations would join the Association upon arrival. Cf. comments of P. W. Meldrim and George Wright, pp. 30, 36.

[44]12 ABA Rep 5-6 (1889).

[45]11 ABA Rep 22 (1888). Rufus King wanted the whole matter dropped because he said it was a "a very agitating question." (p. 85).

[46]Ibid., pp. 86-87.

[47]Ibid., p. 89.

[48]Ibid., p. 91.

[49]Ibid., p. 89. Hinkley tried to remain neutral: "When birds are hatched in a nest they stay a little while until they are fledged, but when such a big bird as this is hatched, it may require that it should stay in its nest a little longer time before it begins its flights. And what is the length of time that we ought to stay at Saratoga before we fly around is a question for the growth of the body itself to determine." (p. 90).

[50]Ibid., p. 93; the ABA did return to Saratoga for its golden anniversary in the war year of 1917.

The 1889 meeting in Chicago was not as pleasant as might have been expected. The weather was hot, and the speakers were drowned out by a "nerve-torturing...buzz saw in an adjoining building." New York Times, August 29, 1889.

[51]12 ABA Rep 74 (1889); see Appendix C for annual membership figures.

[52]"The American Bar Association," 22 Am. L. Rev. 929 (1888). The article stated that it had been the establishment of the National Bar Association which had "stirred [the ABA] up to the necessity of moving away from Saratoga."

[53]"Adolph Moses," [obituary notice] 29 ABA Rep 654 (1906); cf. the remarks of George Record Peck, 29 ABA Rep 300 (1906). Though it is possible that the ABA had previously admitted other Jews to membership before 1889, Moses was certainly the first influential member of obvious Jewish descent. In other words, it is difficult to believe his Jewishness went unnoticed.

[54]John Higham, Send These to Me: Jews and Other Immigrants in Urban America (New York: Atheneum, 1975), pp. 148-149; Hugh Bradley, Such Was Saratoga (New York: Doubleday, Doran and Company, Inc., 1940), pp. 135-159.

[55]This is not to say that the leaders of the ABA were less intolerant of Jews than their contemporaries of similar status; cf. a series of letters from E. J. Phelps to Baldwin on August 4, 15, and 19, 1882, Baldwin Papers. The final letter closes: "Doubtless our valued correspondent is one of the children of Israel....Let him go to the devil. And let us 'call the gentlemen of the watch together, and thank God we are rid of a knave.'" C. C. Bonney may have been thinking of the possible admittance of Jews to membership in the ABA when he wrote to Baldwin just before the meeting of 1888 asking him to "prevent the appointment of a meeting at Chicago or any other large city....Practically, admission to membership is now almost unrestrained, and therein might lie a very great peril." C. C. Bonney to Baldwin, July 27, 1888, Baldwin Papers.

[56]Baldwin to George C. Wright (draft), July 9, 1888, Baldwin Papers.

[57]Cf., for example, the statement of Broadhead at the organizational meeting, Preliminary Statement, p. 21, and the Report of the Secretary, 2 NBA Proc. 33-37 (1889).

[58]Preliminary Statement, p. 19. As late as 1890, the President of the Indianapolis Bar Association in his address of welcome to the NBA said, "When the Bar of this nation shall move together for a public purpose who can stand against them? The people trust us with their affairs and look to us for advice, guidance and protection." 3 NBA Proc. 22 (1890).

[59]Cf. Philip J. Wickser, "Bar Associations," 15 Cornell Law Quarterly 390 @ 417 (1930). John Doyle guessed that there were "something over thirty" in 1890, but this figure is certainly too high. John H. Doyle, "Address of the President," 3 NBA Proc. 23 (1890).

[60]Ibid., p. 26.

[61]Cf. the report of the first annual meeting of the NBA in 20 Weekly Law Bulletin 126 especially @ 129-134 (August 13, 1888); 2 NBA Proc. 74-75 (1889); 3 NBA Proc. 70 (1890). Addison C. Harris complained that he had heard "with astonishment...[an NBA] delegate declare in substance, 'My state will never give up her right to rule property in her jurisdiction as she pleases to please any other state or person.' This is the egotism of provincialism. It is in the teeth of commercial and material progress." 3 NBA Proc. 22 (1890).

[62]3 NBA Proc. 85-89 (1890). The suggested uniform acts concerned the negotiability of promissory notes, acknowledgements affecting real estate and married women, limitations of actions, wills, and interstate extradition.

[63]The only exception to the indifference with which these uniform laws were received seems to have been in New Mexico Territory where the Bar Association secured passage of several of these recommended laws in the Territorial Legislature. Ibid., p. 43.

[64]John H. Doyle, "Address of the President," 3 NBA Proc. 23 @ 25 (1890). Doyle had expressed the same sentiments the year before: "It was not expected by those who were instrumental in forming the National Bar Association that its success in bringing about the reforms which were so much desired by the profession would be phenomenal or rapid, or that it would be possible to bring the people, into whose hands the power of making laws was placed, into harmony with our views of unification without the usual tedious, and sometimes imperceptible, process of education." 2 NBA Proc. 21 (1889).

[65]Cf. the report of T. A. Lambert, Chairman of the Bar Association Committee, 2 NBA Proc. 51-53 (1889); remarks of A. S. Worthington, Washington Post, December 10, 1891, p. 7.

[66]2 NBA Proc. 84 (1889); 3 NBA Proc. 43 (1890).

[67]Ross Perry wrote to the secretaries of state and local bar associations that "to be consistent, the American Association must remain as it was organized--an Association representing only its own members. It will thus accomplish such results as the efforts of the distinguished lawyers, who largely compose it, will be able to effect." 2 NBA Proc. 34 (1889). Likewise, Henderson Elliott, who argued

for Ohio membership in the NBA, called the members of the ABA "gentlemen of the highest character and attainments in the legal world....[T]he National Bar Association will not hesitate to follow the lead of those eminent and respectable gentlemen in the accomplishment of [legal uniformity]...if they being the older Association, shall go forward in the work." 9 OSBA Proc. 89-90 (1888).

[68]20 Weekly Law Bulletin 132 (August 13, 1888).

[69]XIX, National Cyclopaedia of American Biography 80; George I. Reed, ed., The Bench and Bar of Ohio (Chicago: Century Publishing and Engraving Company, 1897), II, 260-262. Doyle appears to have been very conscious of "class legislation" being directed against courts and capitalists. 3 NBA Proc. 30-31 (1889).

[70]Indianapolis News, August 7, 1890, p. 1.

[71]3 NBA Proc. 43, 53 (1890). Perry had obviously spent a great deal of time trying to drum up support from state and local bar associations; cf. 13 Alabama State Bar Association Proceedings 135 (1890).

[72] National Cyclopaedia of American Biography,II 176; Indianapolis News, August 6, 1890, p. 2.

[73]Indianapolis News, August 7, 1890, p. 1; 11 OSBA Proc. 31 (1890).

[74]In the short but only scholarly article ever written on the National Bar Association, "The National Bar Association, 1888-1893: The Failure of Early Bar Federation," 10 American Journal of Legal History 122 (1966), Norbert Brockman asserts that "the National Bar Association had drawn to its [first] meeting as prominent a group of lawyers as the American Bar Association could boast." (p. 125) Brockman mentions future Vice-President Adlai Stevenson, Senator Lyman Trumbull, and Richard Venable of Maryland as examples. Of these, Venable, a professor of law at the University of Maryland, was an ABA member and not an especially notable one. Stevenson was only first assistant Postmaster in 1888 and known more as a politician than a lawyer. Trumbull, another ABA member, never attended an NBA session.

[75]Indianapolis News, August 7, 1890, p. 1; according to the News most of the evening at the Columbia Club "was spent in conversation and the spinning of legal yarns." Even in 1888, the American Law Review said that the meeting

at Cleveland "did not show any great signs of promise." 22 Am. L. Rev. 929 @ 930 (1888).

[76]Indianapolis News, August 8, 1890, p. 1.

[77]20 Weekly Law Bulletin 134 (August 13, 1888); "Report of the Treasurer," 2 NBA Proc. 82 (1889); 3 NBA Proc. 77 (1890). In 1891, the Treasurer did not appear, and there was no treasurer's report. Washington Post, December 10, 1891, p. 7.

[78]3 NBA Proc. 77 (1890); 11 OSBA Proc. 31 (1890).

[79]12 OSBA Proc. 23, 63, 101 (1891). Curiously, Samuel F. Hunt was elected to the honorary post of ABA Vice-President for Ohio in 1893.

[80]Dinner Given by the Committee, p. 42; cf. A. S. Worthington as quoted in the Washington Post, December 9, 1891, p. 6.

[81]Dinner Given by the Committee, p. 42; 15 Alabama State Bar Association Proceedings 197-99 (1892).

[82]Dinner Given by the Committee, p. 42.

[83]Ibid., pp. 5-10, the remarks of Calderon Carlisle, Chairman of the Committee of Arrangements.

[84]Washington Star, December 10, 1891, pp. 7, 10.

[85]Dinner Given by the Committee, p. 9. Alfred Z. Reed says that guests at the banquet "were regaled with the dream that Congress might appropriate funds for a building," but this seems to be an error. Reed, Training for the Public Profession of the Law, p. 210fn. Even Washington lawyers weren't that visionary.

[86]Washington Star, December 9, 1891, p. 6.

[87]New York Times, December 11, 1891, p. 4.

[88]Washington Star, December 9, 1891, p. 6; Washington Post, December 9, 1891, p. 6; December 10, 1891, p. 7; December 11, 1891, p. 1.

[89]11 ABA Rep 94 (1888).

[90]New York Times, December 11, 1891, p. 4; Dinner Given by the Committee, passim; the toast is on page 44. The

response was made by Senator George Bates of Delaware, an ABA member, who suggested that the two Associations might profitably merge sometime in the future. (p. 47).

[91]Wayne Karl Hobson, "The American Legal Profession and the Organizational Society," 1890-1930," Ph.D. dissertation, Stanford University, 1977, p. 253; Norbert Brockman, "The National Bar Association," p. 126; for an example of the activities of one of the better state associations see Margaret F. Sommer, "The Ohio State Bar Association: The First Generation, 1880-1912," Ph. D. dissertation, Ohio State University, 1972.

[92]Hobson, p. 253; Brockman, pp. 125-126.

[93]Brockman, pp.. 125-126. However, contrary to the implication in Brockman's article, the National Bar Association did have a Committee on Legal Education and Admission to the Bar which presented reports to the Association in 1889 and 1890. Interestingly, at the grand banquet there was little mention of the conflict of laws, but two speakers obliquely mentioned the concern of the profession with admission standards. Dinner Given by the Committee, pp. 40-41, 47.

[94]Walter B. Hill, "Bar Associations," 5 Georgia Bar Association Reports 51 @ 53 (1888).

[95]The NBA also endorsed the Davis (or Evarts) Bill, but of course, the new association had no hand in its successful passage. 3 NBA Proc. 75 (1890).

[96]Cf. Dennis R. Nolan, ed., Readings in the History of the American Legal Profession (Indianapolis: Michie/Bobbs-Merrill, 1980), p. 195.

Chapter 4

[1]George R. Peck, "Address of the President," 29 ABA Rep 297 @ 298 (1906).

[2]Simeon E. Baldwin to George G. Wright, July 9, 1888, Baldwin Papers, Yale University; John Hinkley, "Reminiscences of the American Bar Association," 21 ABAJ 452 @ 455 (1935).

[3]13 ABA Rep 41-42, 85, 339-343 (1890); Henry Hitchcock to Baldwin, September 28, 1889, Baldwin Papers.

[4]Cf. drawing on the reverse of an announcement from the New Haven, Connecticut Chamber of Commerce, February 18, 1891; Francis Rawle to Baldwin, February 25, 26, 1891, March 6, 1891; Baldwin to Rawle, February 26, 1891, March 5, 1891, April 8, 1892, Baldwin Papers.

There is some indication that Baldwin's interest in an ABA award stemmed in part from his desire to create it. He and Rawle took considerable care with the design and inscriptions, even after the ABA leadership group had decided to abolish the award. Of a proposed design for Justice, Baldwin noted that the goddess "leers too knowingly at the scales, and, not to criticize her liberal display of bosom, seems to be scratching herself in defense against some small interior enemy." (March 5, 1891) He was even less enamored of a design of Moses, though he admitted that the Lawgiver would look "more like the recipients of the medal...and may pass for a likeness of one of them...." (April 8, 1892).

The final design was made by Charles Barber, chief engraver at the Philadelphia Mint. The obverse showed a seated figure of Justice in high relief with a sword in her right hand and scales in her left. On the reverse, encircled by a wreath of oak leaves, was the inscription: 1891/Awarded to/ /for Distinguished Services/in Advancing the/Science of/Jurisprudence. Each medal contained $100 worth of gold. (New York Times, August 23, 1892, p. 8.)

At the annual meeting of 1892, Baldwin offered to have bronze copies of the medals struck if any member of the ABA wanted them as mementoes, but there is no indication that anyone did (15 ABA Rep 42 [1892]). A fragile plaster cast from the die, more or less intact, is filed with the Baldwin Papers, Box 190.

[5]Baldwin to Henry Hitchcock, May 5, 1981, Baldwin Papers.

[6]Henry Hitchcock to Baldwin, May 15, 1891; Alexander R. Lawton to Baldwin, June 9, 1891; James O. Broadhead to Baldwin, June 10, 1891; Thomas J. Semmes to Baldwin, June 10, 1891; William Allen Butler to Baldwin, June 16, 1891; Baldwin to Award Committee members, July 3, 1891.

[7]It is probable that Field did not receive an inquiry from Baldwin about Selborne in June but did receive a copy of Baldwin's letter of July 3 in which Baldwin implied that a majority of the committee had approved of the Englishman. Baldwin to Award Committee members, July 3, 1891; David J. Brewer to Thomas J. Semmes, July 6, 1891; John Dillon to Baldwin, July 8, 1891; Henry M. Field to Baldwin, July 9,

1891; H. P. Wilds to George G. Wright, July 10, 1891; H. P. Wilds to Henry Hitchcock, July 10, 1891, Baldwin Papers.

[8]David J. Brewer to Thomas J. Semmes, July 6, 1891, Baldwin Papers.

[9]Henry M. Field to Baldwin, July 9, 1891, Baldwin Papers.

[10]David J. Brewer to Baldwin, July 12, 1891; cf. John F. Dillon to Baldwin, July 8, 1891; William Allen Butler to Baldwin, July 6, 1891; Walter B. Hill to Baldwin, September 11, 1891, Baldwin Papers. Field lived on until 1894.

[11]William Allen Butler to Baldwin, July 6, 1891; Baldwin to Butler, July 9, 1891; Hitchcock to Baldwin, July 9, 1891; Thomas J. Semmes to Baldwin, July 9, 1891; Cortlandt Parker to Baldwin, July 13, 1891; George G. Wright to Baldwin, July 13, 1891; Butler to Baldwin, July 22, 1891, Baldwin Papers.

[12]E. J. Phelps to Baldwin, July 10, 1891; Baldwin to Thomas J. Semmes, July 13, 1891; cf. Phelps to Baldwin, July 20, 1891. Even Hitchcock, who was sympathetic to the claims of Field, felt that the letter from Wilds, Field's secretary, was in bad taste. Hitchcock to Baldwin, July 13, 1891, Baldwin Papers.

[13]Baldwin to David Dudley Field, July 11, 1891, Baldwin Papers. The draft of this letter, with its many deletions and additions, bears witness to Baldwin's care in composing it.

[14]Hinkley, p. 455.

[15]Charles S. Campbell, The Transformation of American Foreign Relations, 1865-1900 (New York: Harper & Row, 1976), pp. 134-135; memorandum of a letter from Ignatius C. Grubb to John B. Moore, September 1, 1891, in John Bassett Moore Papers, Library of Congress (filed under "Everett D. Wheeler," Box 8).

[16]A copy of this article is located in the Baldwin Papers for August, 1891; Walter B. Hill to Baldwin, September 11, 1891, Baldwin Papers.

[17]Ibid.; Hinkley, p. 455; Boston Globe, August 29, 1891, p. 9.

[18]Memorandum of Grubb to Moore (see above note 15); Hinkley, p. 455.

[19]Ibid., pp. 455-56; 15 ABA Rep 42-43 (1892); 16 ABA Rep 60 (1893); 55 ABA Rep 149-155 (1929); cf. E. J. Phelps to Baldwin, July 10, 20, 1891; August 27, 1891; William Allen Butler to Baldwin, September 10, 1891, Baldwin Papers; "The American Bar Association Medal," 25 Amer. L. Rev. 975 (1891).

[20]I.e., James Broadhead, E. J. Phelps, J. Randolph Tucker, Henry Hitchcock, George Wright, Thomas J. Semmes, Alexander Lawton, and William Allen Butler. James Grafton Rogers, American Bar Leaders (Chicago: American Bar Association, 1932), p. ix; Rogers, "The American Bar Association in Retrospect," in Law, A Century of Progress, 1835-1935 (New York: New York University Press, 1937), I, 177; cf. Norbert Brockman, "The Politics of the American Bar Association," Ph.D. dissertation, Catholic University of American, 1963, pp. 25-26.

[21]James Grafton Rogers, "Fifty Years of the American Bar Association," 53 ABA Rep 518 @ 528 (1928).

[22]Baldwin Diary, August 28, 1892, Baldwin Papers; cf. Baldwin to Edward Hinkley, October 20, 1893, Baldwin Papers; Brockman, p. 37. Baldwin had also resigned from the Executive Committee in 1888, before his election to the presidency, in order to allow other members to hold the office.

[23]Cf. Brockman, p. 37. Brockman and I have calculated these statistics a little differently.

[24]Baldwin Diary, August 28, 1892, Baldwin Papers.

[25]Cf. Rawle to Baldwin, January 14, 1893, May 4, 1894, August 22, 1898, Baldwin Papers.

[26]Rawle to W. Thomas Kemp, September 21, 1922, John W. Davis Papers, Yale University, is an example of unasked for advice.

[27]For membership figures year by year, see Appendix C; cf. Samuel Williston, "Salutations from Renowned Members of the Bar," 39 ABAJ 701 (1953).

[28]Baldwin to Charles E. Searls (draft) on letter from Searls to Baldwin, March 20, 1891, Baldwin Papers.

[29]18 ABA Rep 47 (1895).

[30]18 ABA Rep 49 (1895).

[31]Rome Brown, President of the Minnesota Bar Association, in welcoming remarks to the ABA, 20 ABA Rep 4 (1906); H. H. Ingersoll, 25 ABA Rep 29 (1902).

[32]24 ABA Rep 10-13 (1901); 25 ABA Rep 27, 498-99 (1902); 26 ABA Rep 98 (1903). The "Universal Congress" was a cooperative venture of the Louisiana Purchase Exposition, the ABA, and the bar associations of St. Louis and Missouri.

[33]In 1919 the Association was forced to substitute Boston for New London, Connecticut, only three months before the annual meeting in order to assure adequate hotel accommodations. (W. Thomas Kemp to William Howard Taft, June 25, 1919, Taft Papers, Library of Congress) Attendance at modern ABA conventions is so large that only a handful of cities can provide the necessary facilities.

[34]W. H. Taft to George Whitelock, November 30, 1914, Taft Papers.

[35]George Whitelock to W. H. Taft, December 1, 1914, Taft Papers: "I appreciate and share your disinclination to the holding of our next meeting in the far West, but the agitation in the interest of these people has been so constant for a number of years, and the intimation has been so frequent that we would go there in 1915, that I see no escape. Indeed if the organization is to maintain its national character I think we must at times go to the Far West."

Major legal journals had been critical of the Association's reluctance to hold meetings outside the area where the majority of its members lived. Cf. 31 American Law Review 749 (1897); 55 Albany Law Journal 279 (1897); 32 American Law Review 596-97 (1898). In 1900, the American Law Review suggested that the name of the organization ought to be changed to the "Northeastern Bar Association." 34 American Law Review 573 (1900).

[36]Cordenio A. Severance to John W. Davis, October 16, 1922, Davis Papers.

[37]W. H. Taft to S. S. Gregory, October 29, 1914; W. H. Taft to George Whitelock, November 30, 1914; Whitelock to W. H. Taft, December 1, 1914; James Taylor Burcham to W. H. Taft, December 15, 1914; A. F. Mason to Frederick Wadhams,

January 16, 1915; J. M. Dickinson to Frederick Wadhams, January 23, 1915; Henry St. George Tucker to Wadhams, January 25, 1915; S. S. Gregory to Wadhams, January 25, 1915; William H. Burges to Wadhams, January 27, 1915; Whitelock to W. H. Taft, February 6, 1915; Wadhams to W. H. Taft, February 9, 1915, Taft Papers. George Whitelock to George Sutherland, November 24, 1915, Sutherland Papers, Library of Congress. There are other letters in the Sutherland collection which also discuss the process of selecting Salt Lake City as the site for the 1915 annual meeting.

"A good time was had by all" at the "Universal Congress," but H. H. Ingersoll complained that the ABA convention of 1904 was "the most insignificant and unprofitable meeting of the past decade." "The most memorable scene of the occasion," said Ingersoll, "was the banquet in the Tyrolean Alps, where wine was drunk and speeches made in all languages, living and dead. The wine needed no bush." 30 American Law Review 912 (1905).

On the importance of summer climate, see "Welcome Awaits Association at Cincinnati," 7 ABAJ 71 (1921).

[38]Boston Globe, August 27, 1891, p. 3 (morning edition), p. 4 (evening edition). Even the dullness of the meeting favorably impressed the reporter; "No other class of men would listen so attentively, and with such evident interest, to the long papers and speeches of rather dry and technical character that have been upon this week's programme."

[39]20 ABA Rep 99 (1897); 56 Albany Law Journal 173 (1897); U. M. Rose, "Address of the President," 25 ABA Rep 199 @ 200 (1902).

McKinley's membership was honorary rather than voluntary. In the earliest days the Association "carefully eschewed any political connection." For instance, Hinkley advised Rawle not to invite Benjamin Harrison to make a banquet speech "because he was then in politics." Rawle to John W. Davis, June 18, 1923, Davis Papers, Series III, Box 15.

Four Supreme Court Justices--White, Peckham, McKenna, and Brown--attended the 1907 meeting at Narragansett Pier. New York Times, August 24, 1905, p. 6.

[40]New York Times, August 20, 1896, p. 3; Rogers, American Bar Leaders, p. 123.

[41]Ibid., p. ix.

[42]Rogers, "Fifty Years of the American Bar Association," p. 528; cf. Brockman, p. 248.

[43]Baldwin Diary, August 28, 1888, September 13, 1890, Baldwin Papers.

[44]New York Times, August 23, 1892, p. 8.

[45]Brockman, p. 251; Rogers, American Bar Leaders, p. 201; "The American Bar Association," 19 American Law Review 777 (1885); C. C. Bonney to Baldwin, August 25, 1888, Baldwin Papers. In 1889, ex-Senator Lyman Trumbull was virtually nominated at the instigation of the "western men," but he "positively declined the honor and Henry Hitchcock of St. Louis was selected." (New York Times, August 30, 1889, p. 5). Trumbull was probably the last man to decline the presidency of the Association.

[46]New York Times, August 26, 1897, p. 1; 22 ABA Rep 18 (1899); 29 ABA Rep 24 (1906).

[47]16 ABA Rep 12-14 (1893); but cf. New York Times, August 25, 1894, p. 8.

[48]John C. Richberg, 33 ABA Rep 8 (1908); 12 ABA Rep 49-50 (1889); New York Times, August 31, 1889, p. 1; cf. Brockman, pp. 252-253.

[49]16 ABA Rep 48-50 (1893).

[50]29 ABA Rep 42 (1906).

[51]31 ABA Rep 58-60 (1907).

[52]31 ABA Rep 84-85, 98-99, 105 (1907); New York Times, August 29, 1907, p. 6.

[53]33 ABA Rep 8 (1908).

[54]Roscoe Pound to Norbert Brockman, May 24, 1960, copy in possession of author; cf. Brockman, p. 251. Pound refers to these gentlemen only as "those particularly active in the Association." However, there were many more active members, such as William A. Ketcham, Walter S. Logan, and R. S. Taylor (to name three) who did not participate in the general direction of the Association to the degree in which Pound's gentlemen did.

[55]16 ABA Rep (1893); George Sharp to Baldwin, April 27, 1893, Baldwin Papers; "George Matthews Sharp," [obituary

notice] 26 ABA Rep 509 (1911). At the organizational meeting Sharp was named Secretary of the Section.

[56]Baldwin to Thayer, May 23, 1893, Baldwin Papers.

[57]16 ABA Rep 7 (1893).

[58]New York Times, August 25, 1894, p. 8.

[59]New York Times, August 24, 1894, p. 5; 17 ABA Rep 351-493 (1894); 17 ABA Rep 51-52 (1894). The name of the section was changed in 1899 to the Section of Patent, Trademark and Copyright Law.

[60]Glenn R. Winters, "Bar Association Activities: Suggestions for Bar Association Executives." 36 ABAJ 546 @ 548 (1950); Edson R. Sunderland, History of the American Bar Association and its Work (Chicago: American Bar Association, 1953), pp. 31-33; Brockman, p. 153; Edward O. Hinkley, 17 ABA Rep 67 (1894).

[61]By-Law XII, 16 ABA Rep 89 (1893); 17 ABA Rep 51-52 (1894); John F. Dillon, 17 ABA Rep 58 (1894).

[62]19 ABA Rep 29-40 (1896); 17 ABA Rep 54-67 (1894); George M. Foster, 19 ABA Rep 39-40 (1896); the Judicial Section was organized in 1913, but since judges are an obviously distinct group of lawyers, perhaps the next "true" section organized was the Section of Public Utility Law in 1917.

[63]31 ABA Rep 1001-1009 (1907). The Bureau changed its name to the Section of Comparative Law in 1919. From all indications the Bureau was not an early success. When it published the Visigothic and Swiss Civil Codes at $1.00 per volume to Association members, only sixteen purchased copies. 44 ABA Rep 263 (1919).

[64]Grant Gilmore, The Ages of American Law (New Haven: Yale University Press, 1977), p. 70; cf. Robert H. Wiebe, The Search for Order, 1877-1920 (New York: Hill and Wang, 1967), pp. 80-83.

[65]Sunderland, pp. 50-52.

[66]12 ABA Rep 50-51 (1889); Rufus King, 13 ABA Rep 29-30, 336-37 (1890); Max Radin, "The Achievements of the American Bar Association: A Sixty Year Record," 25 ABAJ 1008 (1939).

[67]Walter George Smith, 35 ABA Rep 19-20 (1910); Radin, p. 1008; Sunderland, p. 54; Rogers, American Bar Leaders, p., 197; Rogers, "History of the American Bar Association," 30 ABAJ 659 @ 661 (1953); Samuel Williston, who was an important member of the NCCUSL and the draftsman of the Uniform Sales Act, described his colleague on the NCCUSL Committee on Commercial Laws, John Hinkley, as "a careful lawyer, a baseball enthusiast, a good story teller, and a delightful companion. Many a game of cards in which he was a party have I had on railroad trains or in hotels when our work was not occupying our attention." Samuel Williston, Life and Law: An Autobiography (Boston: Little, Brown and Company, 1940), p. 229; cf. Thomas Kilby Smith to Hampton L. Carson, August 13, 1919, Carson Papers, Pennsylvania Historical Society.

[68]Walter George Smith, 35 ABA Rep 19-20 (1910); Charles Thaddeus Terry, 42 ABA Rep 77 (1917); Sunderland, pp. 167-68; 36 ABA Rep 7, 83 (1911); Walter George Smith, 37 ABA Rep 24-25 (1912). In 1925 legislation regarding arbitration reported by an ABA committee was endorsed by the annual meeting althought it conflicted with a uniform act of the NCCUSL on the same subject. The convention later reversed itself, but to prevent a recurrence of the problem an amendment to the constitution and bylaws of 1926 required sections and committees proposing state legislation to confer with the Conference before bringing it to the floor. 51 ABA Rep 38-43 (1926).

[69]Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), pp. 471, 355; Radin, p. 1008.

[70]Ibid., the commercial statutes were repealed in all enacting states when the Uniform Commercial Code was adopted in the 1960's. Gilmore, p. 133, fn. 7.

[71]Quote from Doe in Lyman D. Brewster, "Uniform State Laws," 21 ABA Rep 315 @ 330, cf. 323-324 (1898); even a breezy article critical of the uniform laws movement agreed that the uniformity of state laws in commercial matters was "advantageous, perhaps even necessary." John Hemphill, "The Uniform Laws Craze," American Mercury 5 (May, 1925) 59; Richard M. Venable, "Growth or Evolution of Law," 23 ABA Rep 278 @ 291-92 (1900); Lawrence Friedman, "Law Reform in Historical Perspective," 13 St. Louis University Law Journal 351 @ 358-59 (1969).

[72]Ibid., p. 357.

[73]Charles Rembar, The Law of the Land (New York: Simon and Schuster, 1980), p. 237fn; Rembar, in his typically flamboyant style, also calls the ABA "a disgusting organization at the time," but he too generally approves of uniform state laws; Friedman, "Law Reform," p. 358; cf. John W. Griggs, "Lawmaking," 20 ABA Rep 257 @ 274-75 (1897).

[74]Henry T. Terry, 12 ABA Rep 327 @ 332 (1889); John W. Stevenson, "Address of the President," 8 ABA Rep 149 @ 184-85 (1885); John Ruhm, "A Plea for Uniform Laws," 2 Proceedings of the Bar Association of Tennessee 79 @ 84 (1883); Report of the Committee on Jurisprudence and Law Reform, 5 ABA Rep 295 (1882); 11 ABA Rep 308-09 (1888). However, prominent Philadelphia lawyer and ABA leader Walter George Smith, who was a devout Catholic, became a strong proponent of uniform divorce laws for religious reasons. Thomas A. Bryson, Walter George Smith (Washington, D. C.: Catholic University Press, 1977), pp. 40-41.

[75]George M. Bates, "Negotiable Instruments Act in Michigan Legislature," 37 American Law Review 876-879 (1903); cf. Wayne Karl Hobson, "The American Legal Profession and the Organizational Society, 1890-1930," Ph.D. dissertation, Stanford University, 1977, pp. 246-247.

[76]Alton B. Parker, "Uniform State Laws," 43 Chicago Legal News 314-315 (May 7, 1910); "Report of the Committee on Uniform State Laws", 14 ABA Rep 365 (1891); Charles F. Libby, "Address of the President," 33 ABA Rep 331 @ 350 (1910); John Lowell, 14 ABA Rep 4 (1891) Charles Thaddeus Terry, 42 ABA Rep 77 (1917); Lawrence E. Sommers, "Lawyers and Progressive Reform: A Study of Attitudes and Activities in Illinois, 1890 to 1920," Ph.D. dissertation, Northwestern University, 1967, p. 151.

[77]Friedman, "Law Reform," p. 359: "Modern law reform (in the technical sense) is presented as the program of 'the bar,' and it is presented as scientific and objective; to be credible, it must be socially innocuous." Cf. Edgar H. Farrar, "Address of the President," 36 ABA Rep 229-258 (1911) and a fitting reply by Frank B. Kellogg, "New Nationalism" 37 ABA Rep 341 @ 362 (1912).

[78]National bankruptcy laws had been in effect in the United States in 1800-1801, 1841-43, and 1867-1878. Samuel Wagner, "The Advantages of a National Bankruptcy Law." 4 ABA Rep 223-235 (1881); New York Herald, August 19, 1880, p. 4; 10 ABA Rep 344-358 (1887); 12 ABA Rep 29, 35 (1889);

Charles Warren, Bankruptcy in United States History (Cambridge, Mass.: Harvard University Press, 1935) pp. 133-141.

[79]21 ABA Rep 14, 411 (1898); 22 ABA Rep 25-27, 414-416 (1899); M. Louise Rutherford, The Influence of the American Bar Association on Public Opinion and Legislation (Philadelphia: privately printed, 1937), p. 332.

[80]Sunderland, p. 64; Charles F. Manderson, "Address of the President," 23 ABA Rep 179 @ 183 (1900); 26 ABA Rep 11-12 (1903).

[81]Sunderland, pp. 117-118.

[82]Jacob M. Dickinson, "Address of the President," 33 ABA Rep 341 @ 355 (1908).

[83]Ruhm, "A Plea for Uniform Laws," p. 84.

[84]Emlin McClain, "The Evolution of Judicial Opinion," 25 ABA Rep 373 @ 386, 396-97 (1902).

[85]19 ABA Rep 398-404 (1896); 21 ABA Rep 437-450 (1898); 23 ABA Rep 377-378 (1900); 26 ABA Rep 456-459 (1903); 27 ABA Rep 450 (1904); 28 ABA Rep 460-464 (1905); 35 ABA Rep 532 (1910); Sunderland, pp. 70-71, 138-39.

[86]John F. Dillon, "Law Reports and Law Reporting," 9 ABA Rep 257 @ 271 (1886); 25 ABA Rep 14-18 (1902); 35 ABA Rep 532 (1910); 39 ABA Rep 24 (1914).

[87]41 ABA Rep 51 (1916); 42 ABA Rep 58-60 (1917).

[88]Friedman, A History of American Law, p. 356.

[89]39 ABA Rep 24 (1914).

[90]44 ABA Rep 123 (1919); Sunderland, p. 135.

[91]A similar sentiment was expressed in the earliest years of the Association and has been repeated recently:

Henry Budd: "It strikes me that if this Association is to take up everything that transpires in Congress, that may in some way oppose the views of any of our members, that we shall lose force and influence." 7 ABA Rep 78 (1884).

Associate Justice and former ABA President Lewis Powell: "The Association's responsibilities relate primarily to the legal profession, and these could not be discharged if our membership were lost, fractionated or

embittered by involvement in political controversy." Mark Green, "The ABA as Trade Association," quoted in Dennis R. Nolan, Readings in the History of the American Legal Profession (Indianapolis: Michie/Bobbs-Merrill Company, Inc., 1980), p. 194.

[92]15 ABA Rep 314-315 (1892).

[93]16 ABA Rep 53, 60 (1893).

[94]28 ABA Rep 492-519 (1905); Walter George Smith, 28 ABA Rep 121 (1905).

[95]22 ABA Rep 70-81 (1899); cf. C. C. Lancaster, 12 ABA Rep 29 (1889); William A. Ketcham, 28 ABA Rep 56 (1905). Although Labori's briefcase was stolen, the bullet lodged in his back muscles without doing serious damage.

[96]W. O. Hart, 33 ABA Rep 59 (1908): "Why, gentlemen, the report of the Committee on Commercial Law presented by our lamented brother, Mr. Logan of New York, in 1903, was postponed so long that he died before it even got before the Association." In this case, however the delay was probably deliberate.

[97]George G. Wright, 12 ABA Rep 17 (1889); A. A. Ferris, 12 ABA Rep 31 (1889); New York Times, August 31, 1889, p. 5.

[98]27 ABA Rep 41, 446-47 (1904). Even in this case the Committee asked to be excused from any action on what they considered to be a private matter.

[99]36 ABA Rep 42 (1911).

[100]Alexander C. Botkin to Charles F. Libby, June 16, 1902, printed at 25 ABA Rep 482-83 (1902).

[101]Minneapolis Tribune, September 1, 1906, clipping in Alton B. Parker Papers, Box 26, Library of Congress; cf. New York Times, August 22, 1896, p. 3; Francis Rawle to Simeon Baldwin, August 22, 1898, Baldwin Papers.

[102]22 Amer. L. Rev. 775 (1899); 34 Amer. L. Rev. 744 (1900); cf. 27 Amer. L. Rev. 775 (1893); New York Times, August 22, 1896, p. 3.

[103]Cf. 12 ABA Rep 53 (1889); New York Times, August 22, 1889, p. 8; 23 Amer. L. Rev. 663 (1889); 14 ABA Rep 6 (1891); 16 ABA Rep 5 (1893); New York Times, August 29,

1895, p. 14; August 26, 1897, p. 1; 29 ABA Rep 7 (1906); 31 ABA Rep 82 (1907); Boston Globe, August 30, 1911, p. 5; Hinkley, pp. 454, 457; 27 ABA Rep 56 (1904) "The Great Expedition," 8 ABAJ 533-534 (1922); A. H. Tillman, 20 ABA Rep 73-74 (1897).

[104]John C. Richberg, 29 ABA Rep 73 (1906); 29 ABA Rep 78 (1906).

[105]Charles Whitman, "Annual Address," 52 ABA Rep 154 (1927). Whitman does not identify the president whom he is quoting.

Chapter 5

[1]John H. Clarke, "A Call to Service: The Duty of the Bench and Bar to Aid in Securing a League of Nations to Enforce the Peace of the World," 43 ABA Rep 225 (1918).

[2]The brochure was directed at law students in 1976; it concluded with the phrase, "An organization as backward as the Bill of Rights."

[3]Lawyers and the Constitution (Princeton: Princeton University Press, 1942), pp. 3, 147-148, 173; cf. Edward S. Corwin, Liberty Against Government (Baton Rouge: Louisiana State University, 1948), pp. 137-38. (Note that Corwin used a title similar to Twiss's original dissertation, "Lawyers Against Government.") C. Hermann Pritchett, The American Constitution (New York: McGraw-Hill, 1959), p. 558; Joseph Katz, "The Legal Profession, 1890-1015," M.A. thesis (directed by Richard Hofstadter) Columbia University, 1954, p. 8; Alpheus T. Mason and Richard H. Leach, In Quest of Freedom (Englewood Cliffs, N. J.: Prentice Hall, Inc., 1959), pp. 413-17; Sidney Fine, Laissez-Faire and the General Welfare State (Ann Arbor: University of Michigan Press, 1956), pp. 127n., 162; Henry Steele Commager, The American Mind (New Haven: Yale University Press, 1950), pp. 71, 463.

[4]Arnold Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (Ithaca: Cornell University Press, 1960); see especially pp. 1-5. With somewhat less success, Audra L. Prewitt, a student of Robert Wiebe, also attempted to tie the ideology of bar association speeches to current events in "American Lawyers and Social Ferment: Prelude to Progressivism, 1870-1900," Ph.D. dissertation, Northwestern University, 1973.

[5]Norbert Brockman, "Laissez-Faire Theory in the Early American Bar Association," 39 Notre Dame Lawyer 270 (1964); cf. pp. 279-81 with pp. 283-84. Simeon Baldwin seems to be in both groups.

[6]Paul, pp. 4-5.

[7]Two examples of the older view are Eric F. Goldman, Rendezvous with Destiny (New York: Alfred A. Knopf, Inc., 1952) and Sidney Fine, Laissez-Faire and the General Welfare State (Ann Arbor: University of Michigan Press, 1956).

[8]Examples of the more recent "search for order" school would include Robert H. Wiebe, The Search for Order, 1877-1920 (New York: Hill and Wang, 1967); Samuel P. Hays, "The Social Analysis of American Political History, 1880-1920," Political Science Quarterly 80 (September, 1965), 373-394; Samuel Hays, "Introduction--The New Organizational Society," in Jerry Israel, ed., Building the Organizational Society (New York: Free Press, 1972), pp. 1-16; Robert C. Bannister, Social Darwinism: Science and Myth in Anglo-American Social Thought (Philadelphia: Temple University Press, 1979).

[9]Alexis de Tocqueville, Democracy in America [1835] (New York: Alfred A. Knopf, 1945) [Reeve-Bowen translation, ed. by Phillip Bradley], p. 278.

[10]James Bryce, The American Commonwealth (London: Macmillan and Co., 1888), II, 489-90. George Martin has suggested another reason for the decline in the prestige of the legal profession: the increasing dullness of legal work. "There is drama in the courtroom....But there is no passion in a corporate reorganization....The public, as if acting in the belief that dull work makes a dull man, began to look elsewhere than the legal profession for its heroes. There was nothing any lawyer or any bar association might do to reverse the trend: for reasons quite beyond the control of the profession, its position in the community was declining." George Martin, Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York (Boston: Houghton Mifflin Company, 1970), p. 197.

[11]45 Association of the Bar of the City of New York Reports 337 @ 441, quoted in Martin, Causes and Conflicts, p. 203.

[12]J. Willard Hurst is probably correct in his assertion that the "organized bar was by no means as blindly conservative as the general body of lawyers." J. Willard Hurst, The Growth of American Law: The Lawmakers (Boston: Little, Brown and Company, 1950), p. 360. The true reactionaries among the bar elite included men like John G. Johnson, "the complete Machiavellian," (p. 368) and John W. Sterling, whose death doubled Yale's resources. Of Sterling, George Martin has written that he "never under any circumstance appeared in court; he never joined any bar association or took interest in the profession's problems; and he never participated in the activities of any church, political party, or civic or other movement." (Martin, Causes and Conflicts, p. 194).

[13]William Lindsay, "Annual Address," 22 ABA Rep 327 @ 329 (1899). Historical skepticism ought to be tempered by the consideration that what is good for General Motors is often good for the United States.

[14]Hurst suggests a similar thought: "The record of the American Bar Association might fairly be taken to measure the most sustained work of the organized bar in law reform. One could not accurately or fairly label this record reactionary or radical, conservative or liberal, in the ordinary meaning of any of these terms." (Hurst, p. 361)

[15]Andrew Allison, "The Rise and Probable Decline of Public Corporations in America," 7 ABA Rep 241 @ 256 (1884); Twiss, p. 151; Brockman, pp. 280-81. Twiss mistakenly refers to Allison as "Ellis."

[16]Edward J. Phelps, "Address of the President," 4 ABA Rep 141 @ 142-47, 160-61 (1881); cf. Edward J. Phelps, 5 ABA Rep 46 (1882); Edward J. Phelps, "Chief Justice Marshall and the Constitutional Law of his Time," 2 ABA Rep 173 @ 184 (1879); Twiss, pp. 149-51; Brockman, p. 280. Francis Rawle considered the speech on John Marshall to be one of the three finest given during Rawle's long administration as Treasurer. James Grafton Rogers, American Bar Leaders (Chicago: American Bar Association, 1932), pp. 17, 124-25.

[17]Brockman, p. 278.

[18]John M. Shirley, "The Future of Our Profession," 6 ABA Rep 195 @ 218 (1883). The author of Shirley's obituary called him "an ardent friend and a rugged hater." 10 ABA

Rep 421 (1887); cf. William P. Wells, "The Dartmouth College Case and Private Corporations," 9 ABA Rep 229 @ 238 (1886).

[19]Simon Sterne, "The Prevention of Defective and Slipshod Legislation," 7 ABA Rep 275 @ 284 (1884); cf. "Simon Sterne," [obituary notice] 24 ABA Rep 639 (1901); Bannister, Social Darwinism, pp. 66-68.

[20]Cortlandt Parker, "Address of the President," 7 ABA Rep 147 @ 160, 175 (1884); Rogers, American Bar Leaders, pp. 29-32.

[21]U. M. Rose, "The Law of Trusts and Strikes," 16 ABA Rep 287 @ 319 (1893); cf. Alan Jones, "Thomas M. Cooley and 'Laissez Faire Constitutionalism': A Reconsideration," Journal of American History 53 (March, 1967), 751-771.

[22]Charles F. Manderson, "Address of the President," 22 ABA Rep 219 @ 252-53 (1899).

[23]Edward Quinton Keasby, "New Jersey and the Great Corporations," 22 ABA Rep 379 @ 393, 413 (1899).

[24]William A. Glasgow, Jr. "A Dangerous Tendency of Legislation," 26 ABA Rep 376 @ 386 (1903). Glasgow concluded his speech with a canonization of Robert E. Lee.

[25]U. M. Rose, "Address of the President," 25 ABA Rep 199 @ 234 (1902).

[26]Frederick W. Lehmann, "Address of the President," 34 ABA Rep 347 @ 365 (1909).

[27]Thomas J. Kernan, "The Jurisprudence of Lawlessness," 29 ABA Rep 450 @ 464 (1906).

[28]Woodrow Wilson, "The Lawyer and the Community," 35 ABA Rep 419 @ 438 (1910).

[29]Edgar H. Farrar, "Address of the President," 36 ABA Rep 229 @ 232, 239 (1911); Rogers, American Bar Leaders, p. 163. Farrar suggested to Roosevelt that the Postroad Clause of the Constitution would supply the necessary justification for federal control of corporations.

[30]N. Charles Burke, "The Struggle for Simplification of Legal Procedure: Legal Procedure and Social Unrest," 38 ABA Rep 445 @ 448, 451 (1913).

[31]Frederick Lehmann, "Address of the President," 34 ABA Rep 347 @ 369 (1909); Rogers, American Bar Leaders, pp. 151-156; cf. Alexander R. Lawton, "Address of the President," 6 ABA Rep 137 @ 176 (1883). Lawton was annoyed at "the self-prostration of society" before great wealth as a "dignity, a principality, a power"--terms used in the Bible to refer to evil.

[32]James Mills Woolworth, "Address of the President," 20 ABA Rep 203 @ 246 (1897).

[33]J. Randolph Tucker, "British Institutions and American Constitutions," 15 ABA Rep 213 @ 233 (1892). Tucker, one of the last of the Saratoga clique to be elected president of the Association, delivered his address in the old-fashioned oratorical manner.

[34]Charles Claflin Allen, "Injunction and Organized Labor," 17 ABA Rep 299 @ 323, 325 (1894); cf. Paul, pp. 146-49; see also the remarks of Grover Cleveland quoted in Frank H. Mott, "Grover Cleveland--An Appreciation," 52 ABA Rep 185 @ 188 (1927).

[35]Moorfield Storey, "The American Legislature," 17 ABA Rep 245 @ 256-57 (1894). Paul does not treat this speech in Conservative Crisis and the Rule of Law. Cf. the very similar sentiments expressed by Elihu Root in his commencement address at Hamilton College in 1879, Utica Morning Gazette, June 26, 1879 quoted in Philip C. Jessup, Elihu Root (New York: Dodd, Mead and Company, 1937), I, 207.

[36]Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. (New York: Alfred A. Knopf, 1955), p. 161. Hofstadter points out that the "smaller independent ~~practitioner~~ was affected in another, still more serious way: much of his work was taken from him by real estate, trust, and insurance companies, collection agencies, and banks, which took upon themselves larger and larger amounts of what had once been entirely legal business." (p. 159)

[37]Woodrow Wilson, "The Lawyer and the Community," 35 ABA Rep 419 @ 435 (1910).

[38]Cortlandt Parker, "Alexander Hamilton and William Wirt," 3 ABA Rep 149 @ 165 (1880); Robert T. Platt, "The Decadence of Law as a Profession and its Growth as a Business," 12 Yale Law Journal 441-45 (1902-03); Walter George Smith, "Address of the Chairman," [Section of Legal Education] 38 ABA Rep 761 (1913); Clarence A. Lightner, "A

More Complete Inquiry into the Moral Character of Applicants for Admission to the Bar," [Section of Legal Education] 38 ABA Rep 779 (1913); Andrew A. Bruce, 40 ABA Rep 737 (1915); Hofstadter also provides a brief listing of journal articles on this issue, p. 160, fn. 6.

[39]Seymour D. Thompson to Francis Rawle, March 12, 1901, Autograph Collection of the Historical Society of Pennsylvania, Philadelphia.

[40]Root to James B. Reynolds, quoted in Jessup, I, 206; cf. Nathan William MacChesney, 30 ABA Rep 8 (1906); U. M. Rose, "Address of the President," 25 ABA Rep 199 @ 230 (1902).

[41]Alexander R. Lawton, "Address of the President," 6 ABA Rep 137 @ 176-77 (1883).

[42]John Lowell, President of the Boston Bar Association, in welcoming remarks to the ABA annual meeting, 14 ABA Rep 4 (1891).

[43]Walter S. Logan, 26 ABA Rep 12 (1903).

[44]Frank B. Kellogg, "New Nationalism" 37 ABA Rep 341 @ 370 (1912); Rogers, American Bar Leaders, p. 171; cf. Robert T. Swayne, "The Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar," 35 ABAJ 89 @ 171 (1949); Roscoe Pound, "The Need of Sociological Jurisprudence," 31 ABA Rep 911 @ 925-926 (1907); Emory A. Storrs, 6 ABA Rep 37 (1883) cf. Barbara C. Steidle, "Conservative Progressives: A Study of the Attitudes and Role of Bar and Bench, 1905-1912," Ph.D. dissertation, Rutgers University, 1969, p. 383.

[45]Joseph C. France, "The American Judicial System: The Lawyers," 37 ABA Rep 411 (1912). The Chicago Legal News (July 25, 1896) p. 392, similarly suggested that the bar should allow "the criminal rich and the criminal poor go to the devil together." cf. Lawrence E. Sommers, "Lawyers and Progressive Reform: A Study of Attitudes and Activities in Illinois, 1890 to 1920" Ph.D. dissertation, Northwestern University, 1967, p. 19.

[46]George M. Sharp to Simeon Baldwin, January 13, 1898, Baldwin Papers, Yale; David J. Brewer, "A Better Education the Great Need of the Profession," 18 ABA Rep 441 (1895). Commenting on a speech by Charles Noble Gregory before the Section of Legal Education, the American Law Review noted Gregory's statistical survey showing that Russia had the

fewest lawyers per capita and the United States the most; "in other words, the freer the people the more lawyers they have; a free people is a people guided by lawyers." 34 Am. L. Rev. 743 (1900).

[47]Henry Hitchcock, "Annual Address," 10 ABA Rep 233 @ 251-255 (1887).

[48]Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), p. 457.

[49]Edgar H. Farrar, "Address of the President," 36 ABA Rep 229 @ 244 (1911); cf. Charles F. Libby, "Address of the President," 35 ABA Rep 331 @ 351 (1910); Alton B. Parker, "Address of the President," 31 ABA Rep 339 @ 344 (1907).

[50]Frank B. Kellogg, "New Nationalism" 37 ABA Rep 341 @ 362 (1912).

[51]Thomas J. Kernan, "The Jurisprudence of Lawlessness," 29 ABA Rep 450 @ 467 (1906).

[52]28 ABA Rep 92-122 (1905); John F. Dryden, "The Federal Regulation of Insurance," World's Work 10 (1905), 6782-4. (Dryden was a Senator from New Jersey and President of Prudential Insurance Company.) Paul v. Virginia 75 U.S. 168 (1869); Friedman, A History of American Law, p. 479; New York Times, August 24, 1905, p. 6.

[53]Ralph Breckenridge, 28 ABA Rep 144 (1905). Breckenridge was an insurance lawyer and author of many articles on insurance law and law reform. The other members of the Committee were Burton Smith of Atlanta; Alfred Hemenway of Boston; Rodney Mercur of Towanda, Pennsylvania; and William R. Vance of Washington, D. C. (Vance dissented from the report of the Committee.) James M. Beck, 28 ABA Rep 116 (1905). The report was recommitted by a vote of 113 to 29.

[54]"Report of the Committee on Commercial Law," 26 ABA Rep 429-448 (1903); quotation from p. 430.

[55]Ibid., pp. 12, 444-447.

[56]37 Am. L. Rev. 728 (1903); the journal also called Logan's report "one of the ablest documents which had ever been presented before that association."

[57]The entire debate is reported at 26 ABA Rep 11-53 (1903); see especially the remarks of Charles Manderson, p.

14; Fabius H. Busbee, p. 35; Oscar R. Hunley, p. 42; Everett P. Wheeler, p. 39.

[58]37 Am. L. Rev. 728-730 (1903); the member hooted down was Waldo G. Morse, 26 ABA Rep 45-48 (1903); ibid., p. 53; Rogers, American Bar Leaders, p. 130; 27 ABA Rep 391-413 (1904); Charles Claflin Allen, 28 ABA Rep 70 (1905); Walter S. Logan, ibid., p. 63. The vote on Logan's minority report was 68 to 70. Curiously, Logan died in 1906 immediately after dictating a letter concerning committee business to George Whitelock, the only other member of the 1903 Commercial Law Committee continued in office. James M. Beck, 29 ABA Rep 299 (1906).

[59]Cf. Lawrence M. Friedman, "Law Reform in Historical Perspective," 13 St. Louis University Law Journal 351 (1969).

[60]Only Alexander R. Lawton, president of the Association in 1883, questioned the legitimacy of labor unions; "Address of the President," 6 ABA Rep 137 @ 138 (1883).

[61]Henry B. Brown, "The Distribution of Property," 16 ABA Rep 213, 214 (1893); cf. the extensive and illuminating analysis of this curious speech in Paul, Conservative Crisis and the Rule of Law, pp. 84-85.

[62]William Howard Taft, "Recent Criticism of the Federal Judiciary," 18 ABA Rep 237 @ 265-66 (1895).

[63]U. M. Rose, "The Law of Trusts and Strikes," 16 ABA Rep 287 @ 297 (1893); cf. Paul, pp. 123-124.

[64]N. Charles Burke, "The Struggle for Simplification of Legal Procedure: Legal Procedure and Social Unrest," 38 ABA Rep 445 @ 450, 452-53 (1913); cf. John W. Stevenson, "Address of the President," 8 ABA Rep 149 @ 171 (1885).

[65]Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America (Cambridge: Harvard University Press, 1977), pp. 397, 399.

[66]Ibid., p. 399.

[67]U. M. Rose, "The Law of Trusts and Strikes," p. 296. In this speech Rose made the first public reference to Marx and Engels before an ABA annual meeting.

[68]Samuel P. Hays, The Response to Industrialism, 1885-1914 (Chicago: University of Chicago Press, 1957), p. 85; Keller, Affairs of State, p. 404.

[69]William Allen Butler, "Address of the President," 9 ABA Rep 153 @ 168 (1886). During his lifetime, Butler, a wealthy but public-spirited New York corporation lawyer, was best known for a piece of satirical verse, "Nothing to Wear," which pointedly compared the society girls' "lack" of clothing to the real material needs of the urban poor.

[70]Charles Claflin Allen, "Injunction and Organized Labor," 17 ABA Rep 299 @ 324 (1894): "In the aid of strikes and boycotts, they invoke the rule of law and morals that a man may place his labor where he pleases, at such wages as he pleases; but deny the same right to the men who take the places thus voluntarily made vacant."

[71]William Howard Taft, "Recent Criticism of the Federal Judiciary," 18 ABA Rep 237 @ 266 (1895).

[72]James Mills Woolworth, "Address of the President," 20 ABA Rep 203 @ 250-51 (1897).

[73]For an examination of the role of prominent individuals who participated in lynch mobs, see Richard Maxwell Brown, "Legal and Behavioral Perspectives in American Vigilantism," in Donald Fleming and Bernard Bailyn, eds., Law in American History (Boston: Little, Brown and Company, 1971), pp. 95-144.

[74]Thomas J. Kernan, "The Jurisprudence of Lawlessness," 29 ABA Rep 450 @ 455-56 (1894). It is obvious that Kernan's chief concern was not the injustice of lynching per se but the stability of the legal order. To remedy the problem, he suggested censorship of courtroom testimony, hasty trials with no appeals, and public execution "by some form of death so supremely horrible as to strike terror even to the hearts of fiends themselves." (p. 458) Kernan practiced law in Baton Rouge.

Cf. Henry B. Brown, "Judicial Independence," 12 ABA Rep 265 @ 286 (1889); "Report of the Committee on Delay and Uncertainty in the Law, 9 ABA Rep 351 (1886). In 1915, the ABA unanimously adopted a resolution condemning the Leo Frank lynching as "a willful and deliberate murder by mob violence, concerted and accomplished in a spirit of savage and remorseless cruelty unworthy of our age and time." (New York Times, August 20, 1915, p. 4)

[75]Thomas Cooley, "Address of the President," 17 ABA Rep 181 @ 219 (1894).

[76]Woolworth, "Address of the President," 20 ABA Rep 203 @ 252-255 (1897).

[77]John W. Stevenson, "Address of the President," 8 ABA Rep 149 @ 171 (1885); cf. Cortlandt Parker, "Address of the President," 7 ABA Rep 147 @174 (1884).

[78]William E. Akin, "Arbitration and Labor Conflict: The Middle Class Panacea, 1886-1900," Historian ,29 (1967), 565-583; Keller, p. 400.

[79]E. B. Sherman, 10 ABA Rep 32-33 (1887); cf. Moorfield Storey, "The American Legislature," 17 ABA Rep 245 @ 271 (1894).

[80]Charles C. Lancaster, 10 ABA Rep 36 (1877); George W. Biddle, "An Inquiry into the Proper Mode of Trial," 8 ABA Rep 201 @ 218-19 (1885); cf. D. S. Troy, 10 ABA Rep 34-36 (1887); [Irving Browne], "Current Topics," 36 Albany Law Journal 161 (August 27, 1887): "A report in favor of a Federal Court of arbitration was the subject of an interesting and amusing discussion of two hours, exhibiting the jealousy of their prerogatives by the legal profession."

[81]Keller, p. 400.

[82]"Report of the Committee on Jurisprudence and Law Reform," 11 ABA Rep 301 @ 306 (1888).

[83]Arnold Paul has written that "all elements of the [legal] profession, conservative and progressive, were critical of Debs and the boycott and were laudatory of Cleveland's use of the military." (Conservative Crisis, p. 146) An examination of the ABA Reports confirms this view with some qualification of the final phrase.

[84]Thomas M. Cooley, "Address of the President," 17 ABA Rep 181 (1894), especially pp. 225-233. Cooley was not present, and his speech was read by the vice president for Ohio. The New York Times considered the speech important enough to print long extracts from it, and three editorials referring to it in the most complimentary terms were published thereafter. (New York Times, August 23, 1894, pp. 4, 8; August 24, p. 4; August 26, p. 4).

Altgeld replied that Cooley was simply "grateful" to Cleveland for his appointment to the Interstate Commerce

Commission and that Cooley's "bright reputation" ought "not be clouded by utterances that are born of a grateful dotage....In addressing the bar association he was in the position of a fashionable preacher who, if he wished to be popular with his audience, must cater to its tastes. The American Bar Association is a small body of men, most of whom have corporations for clients. They are shrewd and able men who know where fat fees come from. A lawyer whose clients are poor could not afford to go to Saratoga and have a good time and attend a bar meeting. Judge Cooley's utterance there must be taken with some others recently made, and the question is, how much importance attaches to them simply because they came from Cooley?" John P. Altgeld, Live Questions (Chicago: George S. Bowen and Co., 1899), pp. 418-420, quoted in Harry Barnard, Eagle Forgotten: The Life of John Peter Altgeld (New York: Duell, Sloan and Pearce, 1938), p. 329.

Altgeld made no mention of his membership in the ABA, nor did any official of the Association. Presumably both parties were embarrassed by the relationship. Altgeld was a member of the Association from 1889 until 1897. Whether he resigned or simply allowed his membership to lapse can no longer be determined. According to Clarence Darrow, Altgeld "didn't like law"; after a few years of undistinguished practice it "became a sideline to his real estate and construction ventures." (Barnard, p. 61)

[85]Taft, "Recent Criticism of the Federal Judiciary," 18 ABA Rep 237 @ 271-72 (1895); Paul, p. 146.

[86]Charles Claflin Allen, "Injunction and Organized Labor," 17 ABA Rep 299 @ 324 (1894). Allen replied to criticism of the speech at 17 ABA Rep 50 (1894); cf. Paul, pp. 146-49.

[87]Henry Budd, 17 ABA Rep 31-34 (1894); Waldo C. Morse, 17 ABA Rep 47 (1894); Richard Wayne Parker, "The Tyrannies of Free Government," 18 ABA Rep 295 @ 306 (1895); Taft, "Recent Criticism," p. 272.

[88]William Wirt Howe, 17 ABA Rep 22-23 (1894).

[89]E. B. Sherman, 17 ABA Rep 38-39 (1894); cf. Edward F. Bullard, 17 ABA Rep 25-26 (1894); Judson Starr, 17 ABA Rep 15 (1894).

[90]George Tucker Bispham, 17 ABA Rep 27-28 (1894). In 1905, after Theodore Roosevelt had attacked the legal profession, Alfred Hemenway, a millionaire Boston lawyer, said that for the lawyer to "join in the outcry against

government by injunction was "a violation of his oath." "If 114,000 lawyers in the United States were to refrain from abusing injunctions, and each according to his knowledge and discretion should strive to teach the people that the doctrines of equity are for the common good, it would in these days of agitation immeasurably promote that 'general welfare' for which the government was established." ("The American Lawyer," 28 ABA Rep 390 @ 399-400 [1905].)

[91]James Willard Hurst, The Growth of American Law: The Lawmakers (Boston: Little, Brown and Company, 1950), p. 187.

[92]Winston Churchill, A Far Country (New York: The Macmillan Company, 1914), pp. 133-34; cf. the analysis of this novel in Maxwell Bloomfield, "Law and Lawyers in American Popular Culture," in Carl Smith, et al., Law and American Literature (New York: Alfred A. Knopf, 1983), p. 156.

Cf. Alfred H. Kelly and Winfred A. Harbison, The American Constitution (New York: W. W. Norton & Company, Inc. 1976), 5th edition, p. 509: "The prevailing theory of jurisprudence around 1900 was that of 'received law.' This conception held that judges did not make or formulate law, but simply discovered and applied it. The Constitution, the theory held, was fundamental, absolute, and immutable....All that was necessary was for the Court to apply the appropriate word or clause of the Constitution to the law in question."

[93]J. Randolph Tucker, "British Institutions and American Constitutions," 15 ABA Rep 213 (1892). Tucker had become attorney general of Virginia in 1857 and remained at this post throughout the Civil War. Afterwards he served as professor and dean at Washington and Lee and also was a member of Congress, 1875-1887.

[94]E. J. Phelps, "Chief Justice Marshall," 2 ABA Rep 173 @ 192 (1879). Phelps (1822-1900) made a fortune in railroad litigation before becoming professor of law at Yale, 1881-1900. He served as minister to Great Britain, 1885-1889.

Cf. John F. Dillon, "Address of the President," 15 ABA Rep 167 @ 210-211 (1892); Hampton L. Carson, "Great Dissenting Opinions," 17 ABA Rep 273 @ 298 (1894); Lindley M. Garrison, "Democracy and Law," 41 ABA Rep 382 (1916). Garrison, who resigned as Secretary of War in 1916, was the last ABA speaker to use the "Ark of the Covenant" metaphor.

[95]Cf. Twiss, pp. 149-151, 159-161; Brockman, "Laissez-Faire Theory in the Early American Bar Association," 39 Notre Dame Lawyer 270 @ 280 (1964); Paul, pp. 62-63, 76-77; Sidney Fine, Laissez-Faire and the General Welfare State (Ann Arbor: University of Michigan Press, 1956).

[96]Charles F. Amidon, "The Nation and the Constitution," 31 ABA Rep 463 @ 467-68 (1907). In support of his position, Amidon quotes Thomas Cooley.

[97]Frank B. Kellogg, "New Nationalism," 37 ABA Rep 341 @ 369 (1912).

[98]Richard M. Venable, "Partition of Powers Between the Federal and State Governments," 8 ABA Rep 235 @ 257, 256 (1885).

[99]George Sutherland, "The Courts and the Constitution," 37 ABA Rep 371 @ 391, 371, 385 (1912).

[100]Edward Quinton Keasby, "New Jersey and the Great Corporations," 22 ABA Rep 379 @ 412-413 (1899).

[101]LeBaron B. Colt, "Law and Reasonableness," 26 ABA Rep 341 @ 361 (1903).

[102]Cf. for instance the diffuse theoretical ramblings of J. M. Woolworth, "Jurisprudence Considered as a Branch of the Social Science," 11 ABA Rep 279 (1888) with the forthright declaration of Roscoe Pound that law must be found in the "needs and interests and opinions of society today." ("The Need of a Sociological Jurisprudence," 31 ABA Rep 911 @ 917 [1907]). See also Robert Lynn Batts, "The New Constitution of the United States," 44 ABA Rep 208 (1919), although this speech was delivered somewhat after the period under consideration.

[103]John F. Dillon, "Law Reports and Law Reporting," 9 ABA Rep 257 @ 260 (1886). Dillon exaggerated when he said that judicial legislation was no longer anywhere denied. His fellow New Yorker and influential leader of the Association of the Bar of the City of New York, James C. Carter, denied it flatly before the annual meeting of 1890. However, Carter's address was couched in such theoretical terms that perhaps even this single strong exception might have been interpreted by listeners as only a satisfying legal fiction appropriate for the ethereal level of the discourse. James C. Carter, "The Ideal and the Actual in the Law," 13 ABA Rep 217 @ 224, 231 (1890); cf. U. M. Rose, "Title of Statutes," 5 ABA Rep 221 (1882).

[104]John M. Shirley, "The Future of Our Profession," 6 ABA Rep 195 @ 215 (1883); cf. also p. 211.

[105]Henry D. Estabrook, "The American Judicial System: The Judges," 37 ABA Rep 393 @ 400 (1912); cf. John W. Griggs, "Lawmaking," 20 ABA Rep 257 @ 268 (1897); Alfred Russell, "Avoidable Causes of Delay and Uncertainty in Our Courts," 14 ABA Rep 197 @ 211 (1891).

[106]James M. Broadhead, "Address of the President," 2 ABA Rep 51 @ 70 (1897): cf. Robert Green McCloskey, American Conservatism in the Age of Enterprise, 1865-1910 (New York: Harper and Row, 1951), pp. 26-31.

[107]Richard M. Venable, "Growth or Evolution of Law," 23 ABA Rep 278 @ 286 (1900).

[108]John W. Griggs, "Lawmaking," p. 267. Henry Estabrook took the comparison between natural scientists and legal theorists one step further by asking if anyone of his hearers could "doubt that Lyell, Darwin, Spencer and Huxley were great lawyers in the domain of natural science?"--a curious professional conceit. Henry D. Estabrook, "The Lawyer, Hamilton," 24 ABA Rep 351 @ 352 (1901).

[109]Charles F. Manderson, "Address of the President," 22 ABA Rep 219 @ 228 (1899).

[110]George R. Peck, "Address of the President," 29 ABA Rep 297 @ 301-02 (1906); cf. Richard Venable, "Growth or Evolution of Law," pp. 297ff.; Richard L. Hand, "Government by the People," 28 ABA Rep 407 (1905).

[111]Mark Norris, "Some Notions about Legal Education," 30 ABA Rep 71 (1906).

[112]Clarence B. Carson, The Fateful Turn (Irvington-on-Hudson, New York: Foundation for Economic Education, 1963), p. 48; Bryan quoted in Robert C. Bannister, Social Darwinism (Philadelphia: Temple University Press, 1979), p. 244.

[113]James O. Broadhead, "Address of the President," 2 ABA Rep 51 @ 69 (1879); Emory A. Storrs, 6 ABA Rep 37 (1883); William P. Wells, "The Dartmouth College Case and Private Corporations," 9 ABA Rep 229 @ 254 (1886); Frederick N. Judson, "Liberty of Contract under the Police Power," 14 ABA Rep 231 @ 258 (1891); Montague Crackanthorpe, "The Uses of Legal History," 19 ABA Rep 343 @ 356 (1896); Edmund

Wetmore, "Address of the President," 24 ABA Rep 203 @ 236 (1901); Roscoe Pound, "The Need of a Sociological Jurisprudence," 31 ABA Rep 911 @ 925 (1907); Frank B. Kellogg, "New Nationalism," 37 ABA Rep 341 @ 346 (1912).

[114]E. J. Phelps, "Chief Justice Marshall," 2 ABA Rep 173 @ 183 (1879).

[115]Morton Keller, In Defense of Yesterday: James M. Beck and the Politics of Conservatism, 1861-1936 (New York: Coward-McCann, Inc., 1958), p. 45; cf. William Howard Taft, "Recent Criticism of the Federal Judiciary," 18 ABA Rep 237 @ 251 (1895).

[116]Moorfield Storey, "Address of the President," 19 ABA Rep 179 @ 251 (1896).

[117]James D. May to William Howard Taft, February 2, 1914, Taft Papers; cf. Thomas M. Cooley, "Address of the President," 17 ABA Rep 181 @ 212 (1894); William P. Wells, "The Dartmouth College Case and Private Corporations," 9 ABA Rep 229 @ 255 (1886); Audra L. Prewitt, "American Lawyers and Social Ferment: Prelude to Progressivism, 1870-1900," Ph.D. dissertation, Northwestern University, 1973, p. 150.

[118]Robert G. Street, "How Far Questions of Public Policy May Enter into Judicial Decisions," 6 ABA Rep 179 (1883).

[119]"Current Topics," 28 Alb. Law J. 161 (1883); cf. 17 American Law Review 790-91 (1883); 6 ABA Rep 14 ff. (1883). Ironically, in 1915, when Street was 72, he served on the ABA Committee to Oppose the Judicial Recall.

[120]C. C. Bonney, 6 ABA Rep 18 (1883).

[121]James Bryce, The American Commonwealth (New York: Macmillan Company, 1910), rev. ed., I, 266.

[122]14 ABA Rep 4 (1891); cf. James O. Broadhead, 1 National Bar Association Proceedings 21 (1888).

[123]Henry D. Estabrook, "The Lawyer, Hamilton," 24 ABA Rep 351-352 (1901).

[124]Lawrence M. Friedman, "Law Reform in Historical Perspective," 13 St. Louis University Law Journal 351 @ 358 (1969).

[125]Alfred Russell, "Avoidable Causes of Delay and Uncertainty in Our Courts," 14 ABA Rep 197 @ 208 (1891). Russell was a graduate of Dartmouth and Harvard Law School and was general attorney for the Michigan and Canada Wabash Railroad Company; cf. John M. Shirley, "The Future of Our Profession," 6 ABA Rep 195 @ 216-222 (1883).

[126]Edward B. Sturges, 9 ABA Rep 415 (1886); Russell, "Avoidable Causes," p. 208. Attacks upon the intelligence and integrity of jurymen are not difficult to find in the pages of the Reports. Rufus King of Cincinnati called the jury "a sort of eleemosynary refuge for the impecunious." 9 ABA Rep 412 (1886). The Committee on Delay and Uncertainty in the Law reported in 1886 that the jury system was favored most by those who wished to have a "negative upon the execution of the laws." 9 ABA Rep 338 (1886). Cf. L. C. Krauthoff, "Malice as an Ingredient of a Civil Cause of Action," 21 ABA Rep 335 @ 386 (1898); "Minority Report of the Committee on Judicial Administration and Remedial Procedure," 14 ABA Rep 299 (1891).

[127]Charles C. Lancaster, 14 ABA Rep 40 (1891); Russell, "Avoidable Delay," p. 206.

[128]14 ABA Rep 38ff., 281ff. (1891).

[129]Charles C. Lancaster, 14 ABA Rep 40 (1891); Henry B. Brown, "Judicial Independence," 12 ABA Rep 265 @ 287 (1889).

[130]John F. Dillon, "American Institutions and Laws," 7 ABA Rep 203 @ 219 (1884); cf. George W. Biddle, "An Inquiry into the Proper Mode of Trial," 8 ABA Rep 201 (1885). Biddle recommended a smaller jury to obtain a more intelligent panel, to increase individual responsibility, and to decrease the expense of trials; he also argued that the time of courtroom activities ought to be changed to non-business hours.

[131]J. M. Woolworth, "Address of the President," 20 ABA Rep 253 (1897).

[132]Harvey N. Shepard, 28 ABA Rep 17 (1905); in the absence of an expected speaker in 1905, Shepard led a discussion on the topic of what could be done to improve the jury. Absent were any suggestions that the jury ought to be abolished.

[133]Woolworth, "Address," p. 253; Joseph H. Choate, "Trial by Jury," 21 ABA Rep 285 @ 288, 301 (1898). Choate insisted that men of affairs be brought into the jury box "by force of compulsion if need be." (p. 311) The American Law Review commented favorably on the speech and boasted that Choate was behaving in a suitably disinterested fashion when promoting jury trials. "Trial by jury is the very last thing [Choate's clients] want. They would a great deal sooner be tried by appointive judges in every instance." 33 Am. L. Rev. 256 (1899).

[134]See above pp. 65-70.

[135]Seymour D. Thompson, "Abuses of the Writ of Habeas Corpus," 6 ABA Rep 243-267 (1883); 7 ABA Rep 28-43 (1884). In this case Congress actually passed remedial legislation because of the influence of Executive Committee Chairman Luke P. Poland.

[136]7 ABA Rep 45, 74 (1884); Sunderland, p. 68.

[137]Sunderland, p. 27. Even the Supreme Court was not spared criticism; cf. Walter B. Hill, "The Federal Judicial System," 12 ABA Rep 289 (1889).

[138]26 ABA Rep 10-11 (1903).

[139]M. A. Spoonts, 34 ABA Rep 69 (1909); John H. Wigmore, "Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress," 20 Journal of the American Judicature Society 176-178 (1937); Paul L. Sayre, The Life of Roscoe Pound (Iowa City: State University of Iowa, 1948), p. 146; Sylvester C. Smith, Jr., "The President's Annual Address: Where Does the Organized Bar Go from Here?" 49 ABAJ 847 (1963); Wayne K. Hobson, "The American Legal Profession and the Organizational Society, 1890-1930," Ph.D. dissertation, Stanford University, 1977, pp. 273-74.

[140]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 ABA Rep 395-417 (1906).

[141]29 ABA Rep 12, 55-65 (1906); 31 ABA Rep 52, 505-512 (1907); Sunderland, pp. 128-29.

[142]John H. Wigmore's article is certainly the most wide-eyed example; cf. Smith's, "Address," and to a lesser extent Max Radin, "The Achievements of the American Bar Association: A Sixty Year Record," 25 ABAJ 1010 (1939);

Norbert Brockman, "The Politics of the American Bar Association," Ph.D. dissertation, Catholic University of American, 1963, pp. 62-63; more restrained is Whitney North Seymour, "The First Century of the American Bar Association," 64 ABAJ 1038 @ 1041 (1978).

[143]Roscoe Pound to Norbert Brockman, May 24, 1960, copy in possession of the author; for some insight into the character of Andrews, see the discussion at 47 ABA Rep 82-94 (1922); James D. Andrews to Roscoe Pound, August 20, 1921, Pound Papers, Box 160, folder 2.

[144]James D. Andrews, 29 ABA Rep 56 (1906).

[145]Pound to Brockman, May 24, 1960; Henry D. Estabrook, "Report of the Committee on Judicial Administration and Remedial Procedure," 31 ABA Rep 505 @ 506 (1907). Estabrook was stingingly sarcastic in his recapitulation of the previous year's discussion.

[146]Roscoe Pound to Edward A. Ross, November 2, 1906, in David Wigdor, Roscoe Pound: Philosopher of Law (Westport, Conn.: Greenwood Press, 1974), p. 127; Pound to Brockman, May 24, 1960.

[147]Pound, "Dissatisfaction with the Administration of Law," 29 ABA Rep 395 @ 417 (1906). For an excellent example of an attack on Progressivism combined with high praise of Pound and sociological jurisprudence see Henry D. Estabrook, "The American Judicial System: The Judges," 37 ABA Rep 393-410 (1912).

[148]Lawrence M. Friedman, "Law Reform in Historical Perspective," 13 St. Louis University Law Journal 351 @ 358 (1969).

[149]Sunderland, pp. 130-134; 31 ABA Rep 193 (1907).

[150]50 ABA Rep 407 (1925).

[151]Edward J. Phelps, "Address of the President," 4 ABA Rep 141 @ 172 (1881).

[152]Moorfield Storey, "The American Legislature," 17 ABA Rep 245 @ 248-250 (1894).

[153]Frederick N. Judson, "Liberty of Contract under the Police Power," 14 ABA Rep 231 @ 232 (1891); Alton B. Parker, "Address of the President," 31 ABA Rep 339 @ 344 (1907); George Sutherland, "The Courts and the

Constitution," 37 ABA Rep 371 @ 373 (1912); S. S. Gregory, "Address of the President," 37 ABA Rep 255 @ 284 (1912); cf. Charles F. Manderson, "Address of the President," 23 ABA Rep 179 @ 213 (1900); Charles F. Libby, "Address of the President," 35 ABA Rep 331 @ 333 (1910). As usual David Dudley Field took the opposite position: "It is a bad omen when there is fomented, as there is now, a general disrespect for legislatures." David Dudley Field, "Address of the President," 12 ABA Rep 149 @ 150 (1889).

[154]Edmund Wetmore, "Address of the President," 24 ABA Rep 203 @ 239 (1901); cf. Simon Sterne, "The Prevention of Defective and Slipshod Legislation," 7 ABA Rep 275 @ 301 (1884); George R. Peck, "Address of the President," 29 ABA Rep 297 @ 306, 308 (1906); Richard C. Dale, "Implied Limitations upon the Exercise of the Legislative Power," 24 ABA Rep 294 @ 308 (1901).

[155]Simeon Baldwin to Charles Train, et al., May 23, 1878, in Simeon Baldwin, "The Founding of the American Bar Association," 3 ABAJ 658 @ 665 (1917).

[156]Constitution, Art. VIII, 2 ABA Rep 22 (1879).

[157]New York Times, August 18, 1881, p. 4; cf. George G. Wright, "Address of the President," 11 ABA Rep 169 @ 211-212 (1888).

[158]Alexander R. Lawton, "Address of the President," 6 ABA Rep 137 @ 175 (1883); cf. John W. Stevenson, "Address of the President," 8 ABA Rep 149 @ 150 (1885).

[159]Edward J. Phelps, "Address of the President," 4 ABA Rep 141 @ 171 (1881).

[160]John W. Griggs, "Lawmaking," 20 ABA Rep 257 @ 269 (1897); cf. William A. Glasgow, "A Dangerous Tendency of Legislation," 26 ABA Rep 376 @ 382 (1903); Henry D. Estabrook, "The American Judicial System: The Judges," 37 ABA Rep 393 @ 405 (1912).

[161]Alton B. Parker, "Address of the President," 31 ABA Rep 339 @ 341 (1907). Only one direct attack was made upon judicial legislation during this period, except for that of Robert Street in 1883: Richard C. Dale, "Implied Limitations upon the Exercise of the Legislative Powers," 24 ABA Rep 294 (1901). Dale was an insignificant figure in both the profession and the Association.

[162]Ethelbert Callahan, 12 ABA Rep 381 (1889).

[163]Maxwell Bloomfield, American Lawyers in a Changing Society, 1776-1876 (Cambridge: Harvard University Press, 1976), p. 149.

[164]"Codification," 7 Monthly Law Reporter 350 (1844), quoted in Bloomfield, ibid. Luke P. Poland (1815-1887), who played a significant role in establishing the American Bar Association on a firm footing, held more political offices than most of the bar elite. James Fairbanks Colby, his DAB biographer, comments that the "interruptions in his political career were due to his conservative character, aristocratic bearing, unwillingness to sacrifice his self-respect in order to win popularity and, more than all, to his complete lack of the small arts of the politician." (DAB, VIII, 34) The same could be said for Simeon Baldwin and other ABA leaders of this period.

[165]Bloomfield, p. 152.

[166]Ethelbert Callahan, 12 ABA Rep 381 (1889); John W. Griggs, "Lawmaking," 20 ABA Rep 257 @ 272 (1897).

[167]Reuben C. Benton, "The Distinction between Legislative and Judicial Functions," 8 ABA Rep 261 @ 265 (1885).

[168]J. Randolph Tucker, "Address of the President," 16 ABA Rep 159 @ 203 (1893); cf. "The American Bar Association--Tenth Annual Meeting," 21 Am. L. Rev. 619 (1887).

[169]Henry D. Estabrook, "The American Judicial System," 37 ABA Rep 393 @ 405 (1912); L. C. Krauthoff, "Malice as an Ingredient of a Civil Cause of Action," 21 ABA Rep 335 @ 386 (1898); cf. John F. Dillon, "Address of the President," 15 ABA Rep 167 @ 204 (1892); Alexander R. Lawton, "Address of the President," 6 ABA Rep 137 @ 139 (1883). Lawton urged judges to strictly construe any statutes in derogation of the common law "so as to encourage any alteration of the existing law as little as possible, or as the objectors to this rule would sneeringly state it, 'That reformatory legislation must be prevented as far as practicable from working the reform intended.'"

[170]John W. Cary, "Limitations of the Legislative Power in Respect to Personal Rights and Private Property," 15 ABA Rep 245 @ 275 (1892). Cary was the chief legal adviser to the Chicago, Milwaukee & St. Paul Railway and had served three terms in the Wisconsin state senate.

[171]Alton B. Parker, "Address of the President," 31 ABA Rep 339 @ 360 (1907). George A. Mercer, "The Relationship of Law and National Spirit," 2 ABA Rep 143 @ 170 (1879).

[172]Charles F. Libby, "Address of the President," 35 ABA Rep 331 @ 333 (1910). Libby, an extreme conservative by any definition, compared the professional politician to the biblical enemy who sowed tares in a wheat field while "men slept."

[173]E. J. Phelps, "Chief Justice Marshall," 2 ABA Rep 173 @ 189-191 (1879); cf. John F. Dillon, "Address of the President," 15 ABA Rep 167 @ 199 (1892).

[174]Charles L. Jewett, 36 ABA Rep 34 (1907).

[175]Francis Kernan, "Address of the President," 5 ABA Rep 167 @ 175 (1882); Cortlandt Parker, "Address of the President," 7 ABA Rep 147 @ 149-150 (1884); William Allen Butler, "Address of the President," 9 ABA Rep 153 @ 155 (1886); Henry Hitchcock, "Address of the President," 13 ABA Rep 147 @ 214 (1890); cf. Edward J. Phelps, "Address of the President," 4 ABA Rep 141 @ 171 (1881). Simon Sterne, "The Prevention of Defective and Slipshod Legislation," 7 ABA Rep 275 @ 296-98 (1884). Morton Keller, Affairs of State, pp. 319-322.

[176]Maxwell Bloomfield, American Lawyers in a Changing Society, p. 153.

[177]5 ABA Rep 13, 305 (1882); 46 ABA Rep 68 (1921); Sunderland, pp. 75-76, 147-48. In 1981, Chief Justice Warren Burger complained of sloppy draftsmanship in legislation drawn by inexperienced congressmen. "I recall a time," said Burger, "when legislation was handled by a relative handful of expert draftsmen." (Philadelphia Bulletin, June 1, 1981, p. 1.)

[178]C. C. Bonney, 7 ABA Rep 57 (1884).

[179]John W. Griggs, "Lawmaking," 20 ABA Rep 257 @ 274-75 (1897).

[180]Bloomfield, American Lawyers in a Changing Society, p. 153. I am indebted to Bloomfield for suggesting these ideas; however, the quotes themselves have been somewhat out of context.

[181]J. Randolph Tucker, "British Institutions and American Constitutions," 15 ABA Rep 213 @ 231 (1892). Tucker's speech was devoted to an attack on "paternalism," and, according to the American Law Review (26 Am. L. Rev. 746 [1892]), it "called forth much applause."

[182]Charles Manderson, "Address of the President," 22 ABA Rep 219 @ 239 (1899). (Because of the absence of Joseph Choate as Ambassador to Great Britain in 1899, Manderson delivered two consecutive presidential addresses.) The implication was that as man had reached a level of evolution requisite for his own self-government, paternalism was retrogressive; cf. Henry Jackson, "Indemnity the Essence of Insurance," 10 ABA Rep 261 @ 280 (1887); James Woolworth, "The Development of the Law of Contracts," 19 ABA Rep 287 @ 317 (1896).

[183]William A. Glasgow, Jr., "A Dangerous Tendency of Legislation," 26 ABA Rep 376 @ 393 (1903); cf. Henry St. George Tucker, "Address of the President," 28 ABA Rep 299 @ 379-81 (1905).

[184]Henry Estabrook, "The American Judicial System: The Judges," 37 ABA Rep 393 @ 404 (1912). "No free people will ever submit to any such doctrine," said Edgar H. Farrar, "It is the socialism of Marx and Engel [sic] pure and simple." Farrar, "Address of the President," 36 ABA Rep 229 @ 250 (1911); cf. John W. Cary, "Limitations of the Legislative Power in Respect to Personal Rights and Private Property," 15 ABA Rep 245 @ 277-278 (1892).

[185]U. M. Rose, "The Law of Trusts and Strikes," 16 ABA Rep 287 @ 308-09 (1893); cf. J. Randolph Tucker, "British Institutions," 15 ABA Rep 213 @ 232-33, 243 (1892).

[186]J. Randolph Tucker, "Congressional Power over Interstate Commerce," 11 ABA Rep 247 @ 276 (1888); 26 American Law Review 746 (1892). Of course the Interstate Commerce Act had been drafted and was administered by lawyers, not by special interests.

[187]William A. Glasgow, Jr., "A Dangerous Tendency of Legislation," 26 ABA Rep 376 @ 383-384 (1903).

[188]Richard M. Venable, "Partition of Powers between the Federal and State Governments," 8 ABA Rep 235 @ 259 (1885).

[189]Charles F. Amidon, "The Nation and the Constitution," 31 ABA Rep 463 @ 480 (1907); cf. Johnson T. Platt, "The

Opportunity for the Development of Jurisprudence in the United States," 9 ABA Rep 215 @ 223 (1886).

[190]George G. Wright, "Address of the President," 11 ABA Rep 169 @ 214 (1888).

[191]Thomas J. Semmes, "Address of the President," 10 ABA Rep 157 @ 231 (1887); Eugene Wambaugh, "The Present Scope of Government," 20 ABA Rep 307 @ 322-23 (1897); John W. Stevenson, "Address of the President," 8 ABA Rep 149 @ 167, 183 (1885); Cortlandt Parker, "Address of the President," 7 ABA Rep 147 (1884), passim.

[192]Frederick W. Lehmann, "Address of the President," 34 ABA Rep 347 @ 371 (1909); Amos M. Thayer, "The Louisiana Purchase," 27 ABA Rep 312 @ 333 (1904).

[193]Alexander R. Lawton, "Address of the President," 6 ABA Rep 137 @ 170-71 (1883). Lawton was so hard nosed that he criticized a Tennessee liability compensation law that provided damages to the next-of-kin for accidental death. "If the damages referred to are pecuniary," said Lawton, "the next of kin can scarcely suffer them by the death of a relative. They often have their condition much improved by 'his taking off.'" The best that can be said for such a crack is that Lawton had spent a good deal of his life in armies and in litigating for railroads.

[194]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 ABA Rep 395 @ 403; Pound, "The Need of a Sociological Jurisprudence," 31 ABA Rep 911 (1907); Eugene Wambaugh, "The Present Scope of Government," 20 ABA Rep 307 @ 321, 324 (1897); Charles F. Amidon, "The Nation and the Constitution," 31 ABA Rep 463 @ 474, 485 (1907).

[195]Henry B. Brown, "The Distribution of Property," 16 ABA Rep 213 (1893); Arnold M. Paul, Conservative Crisis and the Rule of Law, pp. 84-88. In his biography of Brandeis, Alpheus Thomas Mason attempts to prove that the bar elite were laissez-faire conservatives: "Economic activity, they all held, is governed by natural laws of its own; so long as government does not interfere, these basic laws work inevitably for universal human betterment. To these partisans, all movements of dissent were stimulated by 'foreign agitators,' and had to be ruthlessly suppressed if American institutions were to endure." Mason continues with the surprising statement that this "dogma was very clearly stated in 1893, in an address before the American Bar Association, by Supreme Court Justice Henry Billings

Brown," Mason goes on to quote a few carefully edited sentences, which even then do not support his argument. There were other speeches that would have served Mason's purposes much better, and it would be curious to know how Mason settled on Brown to buttress his thesis. Alpheus Thomas Mason,, Brandeis: A Free Man's Life (New York: Viking Press, 1956), p. 101.

[196]George R. Peck, "Address of the President," 29 ABA Rep 297 @ 314, 318, 320 (1906).

Chapter 6

[1]James Willard Hurst, The Growth of American Law: The Lawmakers (Boston: Little, Brown and Company, 1950), p. 287.

[2]George Whitelock, "Secretary's Report," 36 ABA Rep 66 (1911).

[3]National Cyclopaedia of American Biography, XXVIII, 269-270; perhaps psychohistorians would appreciate knowing that during the years of his greatest success in increasing ABA membership, Alexander was engaged in a messy public divorce proceeding. (unidentified newspaper clipping, February 4, 1914, Taft Papers, Reel 136). "Organization and Plan of the Membership Committee," 7 ABAJ 26-27 (1921).

[4]George Whitelock to William Howard Taft, November 16, 1917, Taft Papers; 38 ABA Rep 676 (1913); 2 ABAJ 489 (1916); Lucien H. Alexander to Charles H. Carey et al., May 27, 1913, Carey Papers, Oregon Historical Society; Nathan William MacChesney, 41 ABA Rep 631-32 (1916); F. Dumont Smith, 52 ABA Rep 76 (1927); Edson R. Sunderland, History of the American Bar Association and its Work (Chicago: American Bar Association, 1953), p. 97.

[5]Lucien Hugh Alexander to Vice Presidents of the American Bar Association, et al., June 24, 1913; Alexander to the Vice Presidents and Members of the Local Council for Oregon, May 27, 1913; Alexander to Charles Carey, September 5, 1914, Carey Papers.

[6]Alexander to Carey, June 24, 1913; Alexander to Carey, September 5, 1914; Alexander to D. Webster Dougherty, May 31, 1913, Carey Papers.

Alexander listed the preferred prospects as leaders of the bar, prominent judges, professors of law, bar

examiners, district attorneys, prominent lawyer-legislators, lawyer-executive officials (mayors, governors, etc.) and rising members of the junior bar. In 1916 the Membership Committee received an appropriation of $3000. The next highest amount was a thousand dollars each for the Committee on Noteworthy Changes in Statute Law and the NCCUSL.

[7]Cf. Alton B. Parker Papers, Box 3, August, 1913, Library of Congress, for numerous replies to his "process letter." There are also a few such replies in the Taft Papers, but since Alexander asked for them, most addressed to Taft have now disappeared.

Alexander to Taft, March 28, 1914, May 19, 1914, Taft Papers. Alexander advised Taft that it would "add very much to the force of the letters if, in the cases of Judges whom you know well, you were to add a few words, even if only two or three holographically." Alexander to Taft, March 21, 1914, Taft Papers. J. M. Dickinson, "Address of the President", 33 ABA Rep 341 @ 355 (1908).

[8]Lucien H. Alexander, "The Legal Profession and the War," 5 ABAJ 681 @ 689 (1919); Sunderland, pp. 41, 97-98; cf. Alton Parker Papers, Box 7.

[9]"Report of the Committee on Membership," 53 ABA Rep 94 @ 95 (1928); however, even in this mailing, four thousand special letters were sent to judges and law school professors. The letters were printed or mimeographed, but some effort was made to have them at least personally addressed and signed; cf. "Report of the Standing Committee on Membership," 50 ABA Rep 465 (1925). Lucien Hugh Alexander, "The Legal Profession and the War," p. 681. In all probability the membership declined slightly during 1919 both for economic reasons and because the Association had waived dues for members in military service during the war.

[10]Sunderland, pp. 97-98, 41; "The Organized Lawyer and His Beneficiaries," 13 ABAJ 706-707 (1927).

[11]The lawyer's name was David W. Mosessohn. W. Thomas Kemp to Charles Carey, September 26, 1912; Carey to Kemp, October 1, 1912, Carey Papers; cf. Samuel P. Goldman, 41 ABA Rep 17 (1916).

[12]Oliver Wendell Holmes to Lucien Alexander, December 12, 1907, Alexander Papers, William L. Clements Library, University of Michigan, Ann Arbor; Taft to George

Whitelock, March 11, 1914, Taft Papers; cf. Alexander to Taft, March 21, 1914, Taft Papers.

Holmes claimed that he preferred not to join any association in which he could not expect to take an active part. "I will not go into reasons, which might not prove very weighty but stop at the point of preference and a kind of invincible ignorance." The four justices who refused to join were Holmes, Reynolds, McKenna, and Chief Justice White. Pitney, Lamar, Day Van Devanter, and Charles Evans Hughes were already members before the membership drive began.

While it would be fascinating to know if the rejections were due to ideological or financial reasons, or simply to indifference, the few extant letters are of little assistance in making such determinations. Cf. Carey Papers, July, 1913. One recipient of Carey's form letter replied, "I should be delighted to accept your kind proposal to submit my name, but as I have been a member of the Association for six or seven years, I don't know how we can arrange it. Do you?" Gearin to Carey, July 19, 1913, Carey Papers.

[13]During the thirteen years from 1929 to 1942, the Association had a net gain of only 2303 members, a growth rate of less than one percent a year. Obviously, the Depression and World War II were significant factors. On the other hand, membership rose at a rate of 27% a year between 1911 and 1914, the years during which the Association was most actively engaged in the fight against judicial recall. The ABCNY grew at a similar rate immediately following a moment of courage when it had supported the five socialists expelled from the New York Assembly in 1919. George Martin, Causes and Conflicts (Boston: Houghton Mifflin Company, 1970), p. 213.

[14]"Report of the Standing Committee on Membership," 50 ABA Rep 465 @ 466 (1925); "Report of the Committee on Membership," 53 ABA Rep 94 @ 95 (1928).

[15]John H. Wigmore, "The Movement to Amend the Organization and Procedure of the Association," 1 ABA 564 @ 581, 590 (1915). Wigmore published sample replies to his survey about the American Bar Association from bar leaders around the country. Cf. Hampton Carson, 45 ABA Rep 78 (1920).

[16]"The Membership Situation," 2 ABAJ 488 @ 492 (1916). Hampton Carson to Simeon Baldwin, November 12, 1919; Baldwin to Carson, November 13, 1919, Baldwin Family Papers, Yale University.

Carson entreated Baldwin to reconsider since the absence of his name on the letterhead "would occasion much loss of prestige and perhaps misunderstanding." Baldwin scribbled at the bottom of the letter, "I surrender unconditionally." Carson to Baldwin, December 2, 1919, Baldwin Papers.

[17]Wigmore, "The Movement," pp. 566-67, as well as the replies to his questionnaire.

[18]Lawrence E. Sommers, "Lawyers and Progressive Reform: A Study of Attitudes and Activities in Illinois 1890 to 1920," Ph.D. dissertation, Northwestern University, 1967, p. 100; Margaret F. Sommer, "The Ohio State Bar Association: The First Generation, 1880-1912," Ph.D. dissertation, Ohio State University, 1972, pp. 63-67; George Martin, Causes and Conflicts, pp. 201-02, 216-18.

[19]"The Association's 'Semi-Centennial Year,'" (editorial) 13 ABAJ 512 (1927).

[20]August Meier, Negro Thought in America, 1880-1915 (Ann Arbor: University of Michigan Press, 1963), pp. 113, 241; Stephen R. Fox, The Guardian of Boston: William Monroe Trotter (New York: Atheneum, 1970), pp. 18, 159-160; "The Color Line at the Bar," Nation 94 (May 23, 1912), 509-510; "Fight for Negro Lawyer," New York Times, August 25, 1912, III, 5.

Lewis was a fine athlete as well as a scholar and should be perhaps remembered as one of American's first black football stars. After leaving office with Taft in 1913, Lewis returned to Boston and established a lucrative criminal law practice with "a jovial Irishman more noted for his ability to find clients than for his legal skill." Lewis, on the other hand, had a "natural genius as an orator." His funeral in January 1949 was attended by the politically important of Boston. (Peter Shiver, Jr., "William Henry Lewis," DAB, Supplement 4, 492-94.)

[21]George M. Sharp to Simeon Baldwin, February 25, 1893, Baldwin Papers; cf. Moorfield Storey to Members of the American Bar Association, undated (1913), Carey Papers.

[22]New York Times, September 3, 1911, p. 7.

[23]New York Times, March 1, 1912, p. 5; April 1, 1912, p. 12; "The Color Line at the Bar," Nation 94 (May 23, 1912), 510; George Whitelock to George Wickersham, February 8, 1912, April 6, 1912, NAACP Papers, Library of Congress; James Grafton Rogers, "The American Bar Association in

Retrospect," in Law: A Century of Progress (New York: New York University, 1937), p. 179; cf. Lucien H. Alexander to Moorfield Storey, January 24, 1914, Taft Papers; George Wickersham to George Sutherland, September 2, 1916, Sutherland Papers, Library of Congress.

[24]New York Times, August 25, 1912, III, 5; "The Color Line at the Bar," Nation 94 (May 23, 1912), 510.

[25]James Grafton Rogers, American Bar Leaders (Chicago: American Bar Association, 1932), p. 124; J. M. Dickinson, 37 ABA Rep 12 (1912); 37 ABA Rep 13-16 (1912); Moorfield Storey to Members of the American Bar Association, undated (1913), Carey Papers.

[26]"WHEREAS three persons of the colored race were elected to membership in this Association without knowledge upon the part of those electing them that they were of that race, and are now members of this Association, Resolved, That as it never has been contemplated that members of the colored race should become members of this association, the several local councils are directed if at any time any of them shall recommend a person of the colored race for membership to accompany the recommendation with a statement of the fact that he is of such race."

[27]37 ABA Rep 29 (1912).

[28]A summary of newspaper comments is given in "Lawyers and the Color Line," Literary Digest 45 (September 7, 1912), 361; "A Select Jury," Independent 73 (September 5, 1912), 576-77; "The Bar Association and the Negro," Outlook 102 (September 7, 1912), 1. The first entries in the Reader's Guide to Periodical Literature for "American Bar Association" refer to this episode.

[29]Unfortunately the number of resignations resulting from this issue can no longer be determined; cf. Page Morris to Taft, April 9, 1914; H. J. Jaquith to Taft, August 3, 1914; Sanford Dole to Taft, May 6, 1914, Taft Papers; Wood, Montague and Hunt to Carey, July 24, 1913, Carey Papers. For the Pillsbury resignation see New York Times, July 16, 1913, p. 2, and Lucien H. Alexander to Moorfield Storey, January 24, 1914, Taft Papers. Alexander called Pillsbury's public letter to Treasurer Frederick Wadhams a "miserable and undignified screed" written "to make cheap political capital of the situation."

Morris Ernst, a founder of the National Lawyers' Guild, enjoyed twitting the membership committee. Every year, he said, the Association would send him a letter soliciting

his membership, and he would write back inquiring whether Negroes were accepted. Then he would receive the reply, "We're sorry, we didn't know you were a Negro." New York Times, December 23, 1936, p. 13.

[30]Moorfield Storey to Members of the American Bar Association, undated (1913), Storey to Members of the American Bar Association, April 9, 1913, Carey Papers; Storey to Charles Francis Adams, August 12, 1912, in M. A. DeWolfe Howe, Portrait of an Independent: Moorfield Storey (Boston: Houghton Mifflin, 1932), p. 301; cf. pp. 273, 304.

[31]Alexander to Storey, January 24, 1914, Taft Papers.

[32]Storey to Taft, January 20, 1914; Whitelock to Taft, January 27, 1914, February 5, 1914; Taft to Whitelock, June 30, 1914, Taft Papers.

[33]Henry St. George Tucker, 39 ABA Rep 64 (1914); Moorfield Storey, 39 ABA Rep 62 (1914); Washington Star, October 23, 1914, p. 5; New York Times, October 23, 1914, p. 10; Taft to Mabel Boardman, October 27, 1914, Taft Papers. A New York Times editorial of October 26 (p. 8) viewed the second compromise as even less courageous than the first.

[34]39 ABA Rep 64 (1914).

[35]Taft to Mabel Boardman, October 27, 1914, Taft Papers.

[36]Sidney Gunn, "Moorfield Storey", DAB, XVIII, 97. In 1943 the Association adopted a resolution which declared "that membership in the American Bar Association is not dependent upon race, creed or color," and the Board of Governors--the lineal descendent of the Executive Committee--admitted a black municipal court judge into membership. However, it ignored the application of Francis Ellis Rivers, a Yale Phi Beta Kappa and an assistant attorney general for New York, who had publicly challenged discrimination in the Association.

In May, 1956, the question concerning race was removed from the application. Though "it is simply not possible to determine a date when the ABA began to treat black lawyers exactly as white lawyers with regard to ABA membership," a records keeper at the Association headquarters believes it to have occurred sometime between 1943 and 1956. Time, 42 (September 6, 1943), 20; Judith W. Smith to author, October 15, 1980.

[37]John H. Wigmore, 1 ABAJ 569 (1915); Lucien H. Alexander, 39 ABA Rep 51 (1914).

[38]Whitelock to Taft, June 30, 1914; Taft to Whitelock, July 3, 1914, Taft Papers. Neither Crockett nor Heen were admitted.

[39]Taft to Whitelock, October 12, 1914, Taft Papers.

[40]"Minutes of Meeting of the Executive Committee of the American Bar Association, January 9-11, 1922," Carson Papers, Pennsylvania Historical Society.

[41]Frederick Wadhams to Thomas Shelton, October 20, 1922, John W. Davis Papers, Series III, Box 14, Yale University. Back believed himself to be the first person of Chinese descent to be admitted to the bar in the United States. (Seid Back to L. H. Alexander, February 18, 1909, Alexander Papers.)

There was more consistency to Back's rejection than Wadhams allowed. The Association's Japanese, "Chinese-Hawaiian," and Filipino members lived on far away islands and could not participate in the social activities of the organization. During the Association's cruise to Great Britain in 1924, meetings of Harvard alumni, D. K. E. members, and other elite groups were announced on the ship's bulletin boards. Some joker added the notice of a meeting for all lawyers from the Phillippines, Puerto Rico, and Guam. "The Veracious Log of the London Fleet," 10 ABAJ 665 @ 666 (1924).

[42]Lucien H. Alexander to Moorfield Storey, January 24, 1914, Taft Papers; 24 ABA Rep 37-38, 470-77 (1901); 25 ABA Rep 5 (1902).

[43]Washington Star, October 21, 1914, p. 5; New York Times, October 24, 1914, p. 12; Thomas J. O'Donnell, 43 ABA Rep 29 (1918). The first woman admitted to the bar in England was called only in 1922.

[44]Mary Lathrop to John W. Davis, September 30, 1922, John W. Davis to W. Thomas Kemp, September 20, 1922, Davis Papers; "Women and the American Bar Association," 7 ABAJ 440 (1921); 13 ABAJ 528 (1927).

[45]Rose Fall Bres to Margaret J. Carns, June 29, 1925, Carns Papers, Nebraska State Historical Society; Lathrop to Davis, September 30, 1922, Davis Papers.

[46]George Wickersham to George Sutherland, September 2, 1916, Sutherland Papers; Wickersham to Taft, November 5, 1914, Taft Papers; Roscoe Pound to Everett Wheeler, July 25, 1919, Wheeler Papers, New York Public Library; cf. W. A. Hayes to Wheeler, August 6, 1919, Wheeler Papers; New York Times, June 1, 1916, p. 9; John W. Davis to Frederick Wadhams, November 6, 1922, Davis Papers; cf. Frank Kellogg to Taft, November 17, 1913, Taft Papers.

Dio Casius complained that he had difficulty writing the history of the Roman Empire because decisions were made privately by a few persons in authority. There was, he said, much noise about things which never occurred at all, while much that was done was not reported. Dio Cassius 53.19.3-4.

[47]Between his election loss in 1912 and his nomination to the Supreme Court by Warren Harding, William Howard Taft was an especially influential figure in Association affairs; cf. for instance, 40 ABA Rep 45 (1915); 52 ABA Rep 122; Henry Lamm to Charles Nagel, July 13, 1915, Taft Papers; C. W. Thomas, "Impressions of the American Bar Association Meeting at Philadelphia," 4 Oregon Law Review 40 @ 42 (1924).

[48]James Grafton Rogers, "Fifty Years of the American Bar Association," 53 ABA Rep 518 @ 529 (1928).

[49]On Whitelock, see obituary at 45 ABA Rep 22 (1920); Who Was Who, I, 1337; on Wadhams, see National Cyclopaedia of American Biography, XXIV, 277; ABCNY Reports (1927), p. 388; 52 ABA Rep 388 (1927). Hampton Carson to Frederick Lehmann, June 19, 1916, Lehmann Papers, Washington University, St. Louis.

[50]Joseph Choate to Taft, October 14, 1914, Taft Papers; Taft to Root, August 25, 1921, Root Papers, Library of Congress; Whitelock to Taft, July 14, 1916, Taft Papers. Wadhams was let in on this popular "inside" joke, because he signed himself "The inevitable Wadhams" on at least one occasion; Wadhams to Taft, July 17, 1916, Taft Papers.

Mitchell Follansbee to John W. Davis, September 1, 1922, Davis Papers; "Memorandum of Conference between Frederick Wadhams and W. Thomas Kemp," June 4, 1923, Davis Papers, III, 15; R. E. L. Saner to Davis, December 14, 1922, Davis Papers; cf. Thomas Shelton to George T. Page, September ?, 1918, Thomas C. McClellan Papers, Alabama Department of Archives and History.

J. H. Hamiter to Davis, May 21, 1923, Davis Papers. Hamiter glowed in appreciation after Wadhams had extracted the thousand dollars: "I think Mr. Wadhams is a grand old

man. I never knew of many any more zealous than he is...he certainly keeps his hand on the helm and his eye on the track"; cf. William P. Rudd to T. Elliot Patterson, January 9, 1919, Carson Papers.

H. J. Jaquith to Taft, August 3, 1914, Taft Papers; Wadhams to Taft, August 11, 1914, Taft Papers. In fairness to Wadhams, Jaquith does seem to have been something of a crank, though Wadhams' reply is still unacceptable.

Harvey F. Smith to John W. Davis, September 23, 1922, Davis Papers; cf. Wadhams to Alton Parker, July 29, 1922, Parker Papers; Wadhams to William P. Rudd, January 8, 1919, Carson Papers. For other aspects of Wadhams' personality cf. William Lewis Draper to Davis, May 15, 1922; Davis to Root, May 15, 1923; W. Thomas Kemp to Davis, October 10, 1923, Davis Papers.

52 ABA Rep 32 (1927). The amendment did not receive the necessary 3/4 vote partially because former Treasurer Francis Rawle spoke against it on the grounds that there would then be "no continuity in this Association, and I maintain that its success is based upon continuity."

[51]James Grafton Rogers, American Bar Leaders, p. 222; Rome Brown to Hampton Carson, December 5, 1919, Taft to A. I. Vorys, October 28, 1914; Taft to George Wickersham, November 8, 1914; William Marshall Bullitt to Taft, November 12, 1914, Taft Papers; T. J. O'Donnell to Hampton Carson, July 7, 1919, Carson Papers; Harvey Smith to John W. Davis, September 23, 1922, Davis Papers; Rogers, "Fifty Years of the American Bar Association," pp. 229-230.

[52]For individual presidents see Rogers, American Bar Leaders. Cf. Wadhams to Taft, February 9, 1915, Taft Papers; G. B. Rose to Francis Rawle, June 13, 1923, Davis Papers; Rogers, American Bar Leaders, p. 225.

[53]There are two fairly large collections of letters which document ABA presidential campaigns: The Hampton Carson Papers, Pennsylvania Historical Society, and the Nathan William MacChesney Papers, Hoover Presidential Library. MacChesney's losing campaign is even more extensively documented than Carson's successful one.

Cf., for example, T. J. O'Donnell to Carson, January 13, 1919, Carson Papers; Frederick Wadhams to William Staake, July 18, 1919, T. Eliot Patterson to William P. Rudd, January 2, 1919, Carson Papers; F. M. Simonton to Charles H. Carey, February 5, 1913, Carey Papers.

[54]Chester Long, 48 ABA Rep 81 (1923); Charles C. Burlingham to John W. Davis, January 23, 1923, Davis Papers; Nathan William MacChesney, 45 ABA Rep 37 (1920);

Rome Brown to Hampton Carson, December 5, 1919, Taft Papers. If the elected member of the General Council was not in attendance, he was quickly deposed in favor of another member from the same state; cf. 51 ABA Rep 89 (1926).

[55]Carson to T. J. O'Donnell, August 9, 1919, Carson Papers; Charles W. Farnham to James B. Kerr, March 11, 1921, Carey Papers; 48 ABA Rep 85 (1923).

[56]Taft to A. I. Vorys, October 28, 1914, Taft Papers; Salt Lake Telegram, August 27, 1916, in "Scrapbook," Sutherland Papers, Box 9; Whitelock to Taft, October 12, 1914; William Marshall Bullitt to Taft, November 12, 1914; Taft to Mabel Boardman, October 27, 1914; Whitelock to Taft, August 15, 1915; Max Pam to Taft, February 27, 1915, Taft Papers.

[57]Rogers, American Bar Leaders, p. 222; Rogers, "Fifty Years," pp. 223-24; Whitelock to Taft, April 10, 1916, Taft Papers. The New York Times also mentioned, however, that Republicans tended to support Sutherland while Democrats were supporting Smith. (September 1, 1916, p. 20; September 2, 1916, p. 16); Silas H. Strawn, 52 ABA Rep 130 (1927); Gurney Newlin, 53 ABA Rep 154 (1928); George Sutherland to Hampton Carson, September 8, 1919; William Hunter to T. J. O'Donnell, February 13, 1919, Carson Papers.

For mentions of age see letters from T. J. O'Donnell in the Carson Papers. For the influence of the Secretary and Treasurer, cf. T. Elliot Patterson to William P. Rudd, January 2, 1919; Rudd to Patterson, January 9, 1919; Wadhams to Rudd, January 8, 1919; Henry Upton Sims to T. J. O'Donnell, February 17, 1919; Thomas Kemp to Carson, June 7, 1921, Carson Papers; Wadhams to Alton B. Parker, July 29, 1922, Parker Papers.

Curiously, in a letter to William H. Staake (July 18, 1919), Carson Papers), Wadhams claims that it "is not customary for me to take any part in the selection of our Presidents."

[58]Rogers, "The American Bar Association in Retrospect," p. 184; Francis Rawle to John W. Davis, June 18, 1923, Davis Papers; T. J. O'Donnell to Henry Upton Sims, February 27, 1919, Carson Papers; Thomas A. Bryson, Walter George Smith (Washington: Catholic University Press, 1977), p. 44.

[59]Sometimes newspaper reporters were enterprising enough to ask members about candidates for president. In 1916, the General Council vote of 26 for Sutherland and 22

for Walter George Smith was actually reported by the New York Times (September 2, 1916, p. 16); cf. New York Times, August 12, 1922, p. 5; August 31, 1923, p. 2; July 17, 1926, p. 4.

Candidates defeated in the General Council had no desire to challenge the nomination on the floor because their chances of being elected the following year were good--as long as they behaved as gentlemen. The first open challenge to a nomination of the General Council did not occur until 1935, and this seems to have been a reflection of national, rather than internal, politics. Cf. New York Times, July 20, 1935, p. 14; Hampton Carson, 45 ABA Rep 80 (1920); cf. William Hunter to T. J. O'Donnell, February 13, 1919, Carson Papers.

A recent article by an ABA House of Delegates member suggests that not much has changed in fifty years. "Though the House ostensibly elects, the fact is that the House rubber-stamps the selection of officers by a majority of the 50 state delegates. So in effect, it only takes 26 people to elect the president of an approximately 200,000 person professional group. The politicking is fierce. State Delegates are wined and dined, which is all part of the wooing process." Burton Young, "The American Bar Association: A New Look at the Old Guard," 51 Florida Bar Journal 441-42 (1977).

[60]"Farewell and Hail!" 8 ABAJ 560 (1922).

[61]Harvey F. Smith to John W. Davis, September 23, 1922; cf. Thomas Shelton to Davis, September 14, 1922, Davis Papers.

[62]Cf. Maxwell H. Bloomfield, American Lawyers in a Changing Society, 1776-1876 (Cambridge: Harvard University Press, 1976), pp. 148-151. An idealization of the "Saratoga clique" as a non-political guiding hand for the Association is evident in all of James Grafton Rogers' writings on the ABA.

[63]Rogers, American Bar Leaders, pp. 225, 244; Howe, Portrait of an Independent, p. 188; Bryson, Walter George Smith, p. 78; John W. Davis to Harvey Smith, September 20, 1922; Smith to Davis, September 23, 1922, Davis Papers; cf. Samuel Williston, "Salutations from Renowned Members of the Bar," 39 ABAJ 701 (1953).

[64]For examples of how major speakers were chosen, cf. Lynn Helm to Woodrow Wilson, January 17, 1910, in Arthur Lind, ed., The Papers of Woodrow Wilson (Princeton: Princeton University Press, 1975), vol. 20; Taft to

Whitelock, December 27, 1913; Whitelock to Taft, June 3, 1914, November 30, 1914, November 4, 1915, Taft Papers; John Hinkley to John Bassett Moore, April 3, 1900, Moore Papers, Library of Congress.

[65]"Lord Bryce" in "Autobiographical Portraits," Box 16, Alton B. Parker Papers; New York Times, August 29, 1907, p. 6. On average there was one foreign speaker per annual meeting during this period of ABA history.

[66]Taft to Mabel Boardman, September 2, 1913, Taft Papers; W. Thomas Kemp to John W. Davis, September 27, 1922, Davis Papers; New York Times, August 29, 1913, p. 9; September 2, 1913, p. 3.

[67]Whitelock to Taft, March 2, 1914, March 13, 1914, March 14, 1914, June 6, 1914; Taft to Whitelock, March 26, 1914; Taft to George Wickersham, April 2, 1914; Edward A. Harriman to Taft, June 11, 1914; Taft to Sir Charles Fitzpatrick, September 13, 1914; Taft to Sidney T. Miller, October 22, 1914; Francis Rawle to Taft, November 10, 1914, Taft Papers.

[68]Sunderland, pp. 150-151; Edmund Wetmore, "Address of the President," 24 ABA Rep 203 @ 204 (1901); 27 ABA Rep 58-61 (1904); George R. Peck to Alton Parker, June 14, 1907; John B. Sanborn to Parker, August 12, 1907, Parker Papers.

[69]George T. Page to Thomas C. McClellan, September 14, 1918, McClellan Papers; Wadhams to John W. Davis, October 4, 1922; Mary Lathrop to Davis, September 30, 1922, Davis Papers; J. B. Moore to Edgar H. Farrar, December 2, 1910, Moore Papers; Whitelock to Taft, September 30, 1913, November 21, 1913, December 7, 1913, February 2, 1914, August 22, 1914; Taft to Whitelock, September 2, 1913, December 2, 1913, Taft Papers; George Sutherland to Charles Thaddeus Terry, January 27, 1918, Sutherland Papers. For an example of the time and energy that went into the appointment process, see Davis Papers, Series III, Box 14 passim.

[70]36 ABA Rep 81 (1911); 53 ABA Rep 302 (1928); H. H. Brown to John W. Davis, October 18, 1922, Davis Papers.

[71]J. C. Slonecker to Everett R. Wheeler, May 6, 1919, Wheeler Papers.

[72]Edson Sunderland has provided a satisfactory summary, pp. 102-169.

[73]Ibid., pp. 106-107. Two committee members did get airplane rides during the 1921 Annual Meeting in Cincinnati. (New York Times, September 4, 1921, p. 18).

[74]Sunderland, pp. 117-120; 50 ABA Rep 83 (1925); 46 ABA Rep 53-54, 309 (1921); New York Times, March 21, 1928, p. 2.

[75]Sunderland, pp. 123-26; 50 ABA Rep 398 (1925).

[76]Sunderland, pp. 151-52; Robert S. Taylor, 36 ABA Rep 35 (1911); William Howard Taft, 36 ABA Rep 55 (1911); "Report of the Committee on Patent, Trade-Mark and Copyright Law," 38 ABA Rep 515 (1913); R. S. Taylor to Taft, September 14, 1914, Taft Papers; 45 ABA Rep 51-52, 398-399 (1920).

[77]Sunderland, p. 164.

[78]Ibid., pp. 164-165; 37 ABA Rep 435 (1912); 40 ABA Rep 32 (1915).

[79]Thomas J. Walsh to Jesse B. Roote, March 25, 1915, Taft Papers; New York Times, January 12, 1925, p. 20; "Senator Walsh Replies," 12 ABAJ 651 (1926); Thomas J. Walsh, "Rule-Making Power on the Law Side of Federal Practice," 13 ABAJ 87(1927).

[80]Thomas W. Shelton to the New York Times, January 21, 1925, p. 20; Everett Wheeler, "Procedural Reform in the Federal Courts," 66 University of Pennsylvania Law Review 1 @ 12 (1917); cf. Wheeler to John W. Davis, February 28, 1923, Davis Papers; New York Times, January 6, 1914, p. 12; Shelton to Taft, May 1, 1915; Shelton to members of the Committee on Uniform Judicial Procedure, February 10, 1917, June 20, 1919, Taft Papers; Thomas Shelton, 49 ABA Rep 96 (1924), 50 ABA Rep 120 (1925); 52 ABA Rep 119-121 (1927), 53 ABA Rep 138-141 (1928).

[81]Thomas Walsh, "The Law's Delay and the Remedy," New York Times, January 12, 1925, p. 20; Thomas Shelton to the New York Times, January 21, 1925, p. 20; Everett Wheeler to the New York Times, January 14, 1925, p. 20; "Senator Walsh Replies," 12 ABAJ 651-52 (1926); Sunderland, p. 166; New York Times, March 15, 1934, p. 5; cf. Merlo J. Pusey, "The Judiciary Act of 1925: The 'Judges Bill' after Half a Century," Supreme Court Historical Society Yearbook (1976), pp. 73-81. Curiously, a recent book by a political conservative, Gary L. McDowell, The Supreme Court, Equitable Relief, and Public Policy (Chicago: University of

Chicago Press, 1982), has attacked the Federal Rules of Civil Procedure of 1938 which united law and equity and has urged a return to a system in which they would be procedurally distinct.

[82]James Willard Hurst, The Growth of American Law, p. 361; John H. Wigmore, "The Movement to Amend the Organization and Procedure of the Association," 1 ABAJ 564 @ 567 (1915).

[83]Cf. Joseph B. Davis to Taft, February 3, 1914, Taft Papers; C. C. Carlin to John W. Davis, April 10, 1923; Davis to Anna W. Hochfelder, September 6, 1923, Davis Papers; Charles A. Boston to Robert R. Reed, July 22, 1914, Taft Papers.

[84]Seldon P. Spencer and Robert M. Hughes in Wigmore, "The Movement," pp. 586, 589; Arthur I. Vorys, 42 ABA Rep 76 (1917).

[85]Rogers, "Fifty Years," p. 527; Philip J. Wickser, "Bar Associations," 15 Cornell Law Quarterly 390 @ 415 (1930); Frank S. Dietrich and Robert M. Hughes in Wigmore, "The Movement," pp. 572, 581; Wilbur F. Bryant to the New York Times, September 16, 1923, VIII, 8; New York Times, September 2, 1921, p. 1; cf. George Sutherland to Charles Thaddeus Terry, January 27, 1918, Sutherland Papers.

[86]Brockman, "The Politics of the American Bar Association," p. 253; William Ransom, "The House of Delegates of the Legal Profession," 22 ABAJ 176 (1936); Sylvester Smith, "The A.B.A. House of Delegates," 26 Tennessee Law Review 48 (1959); William A. Ketcham, 42 ABA Rep 74 (1917); Elihu Root, 41 ABA Rep 45 (1916). At one session Taft frankly declared that there was "no remaining business that will keep anybody here, except those few who desire to commune with the Secretary," and he called Frank Kellogg to the chair to "discharge those routine duties that are so honorable--and so onerous." 39 ABA Rep 45 (1914); cf. Elihu Root, 43 ABA Rep 71 (1918).

[87]Rogers, "Fifty Years," p. 527.

[88]Charles H. Kinnane, "Review of History of the American Bar Association by Edson R. Sunderland," 29 Notre Dame Lawyer 328 @ 330 (1954); Hobson, pp. 415-18; Robert Stevens, Law School: Legal Education in America (Chapel Hill: University of North Carolina Press, 1983), pp. 114-115; Herbert Harley, "Organization of the Bar," Annals of the American Academy, 52 (March, 1914), 77-82. Harley said

that the organization of the ABA was "conspicuously inefficient" and suggested that the American Judicature Society, of which he was secretary, might "prove to be the logical response of the bar to the present insistent need for guidance." (pp. 81-82).

[89]Harry S. Mecartney, 31 ABA Rep 108-109; cf. Mecartney, 45 ABA Rep 33 (1920). Mecartney said that the suggestion was actually that of ABA President George R. Peck. 33 ABA Rep 106 (1908); J. M. Dickinson, "Address of the President," 33 ABA Rep 341 @ 355-358 (1908); 35 ABA Rep 94 (1910); Sunderland, pp. 84-85.

[90]Dickinson, pp. 357-58; H. A. Bronson, 35 ABA Rep 12 (1910); John H. Wigmore, "The Movement," 1 ABAJ 564 @ 565 (1915); cf. Lucien Alexander to Moorfield Storey, January 24, 1914, Taft Papers; Bates to Pound, March 16, 1916, Pound Papers.

[91]Sunderland, p. 85; 38 ABA Rep 20 (1913); William R. Roalfe, John Henry Wigmore: Scholar and Reformer (Evanston: Northwestern University Press, 1977), pp. 109-110.

[92]Wigmore, "The Movement," pp. 564-69, 572; Sunderland, pp. 85-87; Roalfe, pp. 110-111.

[93]Roalfe, p. 112; Sunderland, pp. 87-91; "Conference of Bar Association Delegates," 41 ABA Rep 588 (1916). Root had Simeon Baldwin made chairman of the first Conference to lend a weight of authority to the proceeding; thus Root used Baldwin for a purpose similar to that which Baldwin had used the leaders of the profession in 1878.

[94]3 ABAJ 580-629 (1917); Sunderland, pp. 87-91; "Conference of Bar Association Delegates," pp. 592-93, 605; Max Radin, "The Achievements of the American Bar Association: A Sixty Year Record," 26 ABAJ 227 @ 230 (1940); Philip J. Wickser, "Bar Associations," p. 399fn; Herbert Harley, 6 ABAJ 33 (1920): "The clique is necessary under the present style of constitutions and bylaws...but the clique government is standing in the way of the proper evolution of the power to make it responsible to the public, which is perhaps its ultimate purpose."

[95]Sunderland, p. 88; Wickser, pp. 399-400fn.; 41 ABA Rep 11-18.

[96]William H. Harbaugh, "Lawyers's Lawyer: The Life of John W. Davis (New York: Oxford University Press, 1973), p. 195; cf. New York Times, January 21, 1921, p. 16;

Sunderland, pp. 91-92; R. E. L. Saner, "Governmental Review," 49 ABA Rep 127 (1924) and "Memorandum of National Federalization of the Bar," 49 ABA Rep 152 (1924); John W. Davis, "Present Day Problems," 48 ABA Rep 193 @ 194 (1923).

[97]New York Times, January 16, 1923, p. 3; C. A. Severance, 48 ABA Rep 79 (1923).

[98]Sunderland, pp. 92-96; Radin, pp. 319-21; Brockman, "The Politics of the American Bar Association," pp. 89-90, 255-57.

[99]R. E. L. Saner, "Charles Thaddeus Terry," 9 ABAJ 331 (1923); Charles Thaddeus Terry, 44 ABA Rep 85 (1919); Boston Globe, September 5, 1919, p. 8; September 6, 1919, p. 14; Lucien H. Alexander to John W. Davis (on copy of letter to Henry Upton Sims), September 10, 1920, Davis Papers. A copy of the constitution may be found at 44 ABA Rep 121-131 (1919).

[100]Charles C. Lancaster, 13 ABA Rep 52-53 (1890); Hampton Carson to Frederick Wadhams, May 7, 1921; Wadhams to Carson, May 20, 1921, Carson Papers; 49 ABA Rep 313 (1924); New York Times, February 23, 1924, p. 12. Amasa M. Eaton, President of the Rhode Island State Bar Association, believed that incorporation "would give dignity and character, and would enable us to influence legislation and public opinion," Amasa M. Eaton in Wigmore, "The Movement," p. 578.

[101]H. S. Mecartney, 31 ABA Rep 105-111 (1907); Mecartney, 37 ABA Rep 61 (1912); cf. J. M. Dickinson, "Address of the President," 33 ABA Rep 341 @ 357 (1908); "Report of the Secretary," 50 ABA Rep 314-316 (1925), 51 ABA Rep 344 @ 357 (1926), 52 ABA Rep 212-214 (1927); "On a Business Basis," (editorial), 13 ABAJ 512-513 (1927); Maurice A. Langhorne, 53 ABA Rep 29-30 (1928).

[102]The Association did work through a press bureau in 1907 and presumably in other years as well. Chicago-Western Press Bureau to Alton B. Parker, August 17, 1907, Parker Papers; Roderick E. Rombauer, 40 ABA Rep 741 (1915).

[103]Charles A. Boston, 38 ABA Rep 33 (1913) and 44 ABA Rep 34 (1919); Mitchell D. Follansbee, 47 ABA Rep 60 (1922); Leo P. McNally to Arthur T. Vanderbilt, March 8, 1937, Newton D. Baker Papers, Library of Congress.

[104]In 1909, the Secretary, John Hinkley, resigned because he said that the editing of the annual Report required forty or fifty nights of hard work every year. John Hinkley to Simeon Baldwin, August 4, 1909, Baldwin Papers; Wadhams to John W. Davis, November 22, 1923, Davis Papers; Wadhams to Taft, October 28, 1914, Taft Papers; Leo McNally to Arthur T. Vanderbilt, March 8, 1937, Newton D. Baker Papers. 38 ABA Rep 11 (1913); 50 ABA Rep 477 (1925); 52 ABA Rep 112-113.

[105]J. M. Dickinson, "Address of the President," 33 ABA Rep 341 @ 357 (1908); B. E. Barlow to Simeon Baldwin, January 26, 1915; Barlow to Taft, January 26, 1915, Taft Papers; 1 ABAJ 1 (1915); James O. Burrow, AMA: Voice of American Medicine (Baltimore: Johns Hopkins Press, 1963), p. 13: "The establishment of the [AMA] Journal [in 1883] did more to enhance the prestige of the Association than any other action the organization took in the nineteenth century."

[106]Ibid.; on the problems of the Comparative Law Bureau see a letter and memorandum, "The Work of the Comparative Law Bureau," Axel Teisen to Robert P. Schick, September 6, 1916, Pound Papers; Roscoe Pound to Schick, September 23, 1927, Pound Papers; Barlow to Taft, January 26, 1915; W. Thomas Kemp to Edgar A. Bancroft, June 17, 1920, Taft Papers; Henry Upton Sims to T. J. O'Donnell, February 17, 1919, Carson Papers; Roalfe, Wigmore, p. 110.

[107]"Explaining Our Appearance," 6 ABAJ 34 (1920); 6 ABAJ 156, 118-124 (1920); 13 ABAJ 480 (1927). Some members of the Executive Committee insisted that the new periodical be titled Journal Issued by the American Bar Association, presumably to disassociate themselves from controversial expressions of personal opinion which might appear therein. However, this title was so awkward that it was soon quietly dropped.

[108]Wadhams to W. Thomas Kemp, June 15, 1921, Carson Papers; Samuel Williston, "Salutations from Renowned Members of the Bar," 39 ABAJ 701 (1953); Reginald H. Smith to John W. Davis, May 21, 1923, Davis Papers; cf. Wadhams to Pound, August 9, 1923; John W. Davis to Vice Presidents and Members of the General and Local Councils, May 10, 1923, Pound Papers; "Memorandum of Conference between Mr. Wadhams and Mr. Kemp in New York, June 4, 1923," Davis Papers.

Chapter 7

[1]William Draper Lewis, "Legal Education and the Failure of the Bar to Perform its Public Duties," 30 ABA Rep 41 (1906); William R. Johnson, Schooled Lawyers: A Study in the Clash of Professional Culture (New York: New York University Press, 1978), p. 173; Paul Starr, The Social Transformation of Medicine (New York: Basic Books, Inc., 1982), pp. 82-83.

[2]James G. Burrow, A.M.A.: Voice of American Medicine (Baltimore: The Johns Hopkins Press, 1963), p. 23; Burrow, Organized Medicine in the Progressive Era: The Move Toward Monopoly (Baltimore: Johns Hopkins University Press, 1977), pp. 12-13; Starr, pp. 134-140.

[3]Burrow, Organized Medicine, pp. 8-9; Rogers Hollingsworth, "Causes and Consequences of the American Medical System," Reviews in American History 11 (September, 1983), 327.

[4]Frances E. Kobrin, "The American Midwife Controversy: A Crisis of Professionalization," Bulletin of the History of Medicine, 40 (July-August, 1966), 362. The statistics arguing the superiority of midwives may not bear up under tougher scrutiny than Kobrin has given them; but cf. Judith Walzer Leavitt, "'Science' Enters the Birthing Room," Journal of American History, 70 (1983), 303.

[5]Abraham Flexner, Medical Education in the United States and Canada (New York: Carnegie Foundation for the Advancement of Teaching, 1910), p. 26; Stephen J. Kunitz, "Professionalism and Social Control in the Progressive Era: The Case of the Flexner Report," Social Problems 22 (October, 1974), 16-27; cf. Donald Fleming, William H. Welch and the Rise of Modern Medicine (Boston: Little, Brown and Company, 1954), p. 11.

[6]Robert H. Wiebe, The Search for Order (New York: Hill and Wang, 1967), pp. 115-16.

[7]Ibid., pp. 115, 147; cf. Fleming, Welch, p. 116.

[8]Kunitz, "Professionalism and Social Control," p. 25; J. Richard Woodworth, "Some Influences on the Reform Schools of Law and Medicine," Sociological Quarterly, 14 (1973), 513; Hollingsworth, "Causes and Consequences," p. 328; Burrow, Organized Medicine, p. 154.

[9]W. A. Henderson, "The Development of the Honorarium: A Dissertation on the Work and Wages of the Lawyer," 35 ABA Rep 478 (1910); cf. D. W. Cathell, The Physician Himself (Philadelphia: F. A. Davis, 1890), p. 94, quoted in Starr, p. 87.

[10]G. M. Stratton, "Lawyer and Physician: A Contrast," Atlantic, 111 (January, 1913), 52.

[11]Ibid., p. 48.

[12]Wiebe, Search for Order, p. 117.

[13]Charles A. Boston, "The Lawyer's Conscience and Public Service," Atlantic 114 (September, 1914), 400-410.

[14]Henry D. Estabrook, "The Lawyer, Hamilton," 24 ABA Rep 351 @ 352 (1901).

[15]"Report of the Committee on Legal Education and Admission to the Bar," 37 ABA Rep 596 @ 599 (1912); cf. Preble Stolz, "Training for the Public Profession of the Law (1921): A Contemporary Review," in Herbert Packer and Thomas Ehrlich, New Directions in Legal Education (New York: McGraw-Hill Book Company, 1973), p. 230.

[16]Pound to Taft, June 13, 1913, Taft Papers, Library of Congress.

[17]Edson R. Sunderland, History of the American Bar Association and its Work (Chicago: American Bar Association, 1953), p. 96: "In the discussions at the annual meetings there were frequent expressions of disappointment over the comparatively small proportion of American lawyers who had identified themselves with the Association, and the failure of the Bar Association to build up its membership brought it into unfavorable comparison with the American Medical Association," Cf. Burrow, A.M.A.: Voice of American Medicine, p. 49; Max G. Cohen, 33 ABA Rep 22 (1908); Lucien H. Alexander to Moorfield Storey, January 24, 1914, Taft Papers.

[18]David J. Brewer, "A Better Education the Great Need of the Profession," 18 ABA Rep 441 @ 451 (1895); Max Radin, "The Achievements of the American Bar Association: A Sixty Year Record," 25 ABAJ 1007 @ 1011 (1939). "One way in which an occupation...can document its high status is by being able to take its pick of the young people about to enter the labor market, and then to keep them in school a long time before admitting them to the charmed circle."

Everett C. Hughes, "Professions," in Kenneth S. Lynn, The Professions in America (Boston: Beacon Press, 1963), pp. 7-8.

[19]William Draper Lewis, 40 ABA Rep 724 (1915).

[20]William R. Johnson, Schooled Lawyers: A Study in the Clash of Professional Cultures (New York: New York University Press, 1978), pp. xiii-xiv. The Remington Model 2 typewriter, the first with a key shift and two letters mounted on each type bar, was introduced in 1878, the year the ABA was founded. Cf. Alfred Z. Reed, Training for the Public Profession of the Law (New York: The Carnegie Foundation for the Advancement of Teaching, 1921), p. 128, for a discussion of the profitability of the apprenticeship system to established lawyers.

[21]Johnson, Schooled Lawyers, pp. xiii-xiv.

[22]Wayne Karl Hobson, "The American Legal Profession and the Organizational Society, 1890-1930," Ph.D. dissertation, Stanford University, 1977, pp. 118-19; cf. Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980's (Chapel Hill: University of North Carolina Press, 1983), pp. 81-84.

[23]Hobson, "American Legal Profession," pp. 65, 140; Johnson, Schooled Lawyers, pp. xiii, 159.

[24]James Willard Hurst, The Growth of American Law: The Lawmakers (Boston: Little, Brown and Company, 1950), p. 361.

[25]"Henry Hitchcock," Dictionary of American Biography, IX, 75-76; members of the "Saratoga clique" with law school affiliations included Simeon Baldwin (Yale); James O. Broadhead (St. Louis Law School [Washington University]); William Allen Butler (City College of New York Law School); George Hoadly (University of Cincinnati); Carleton Hunt (University of Louisiana [Tulane]); Edward J. Phelps (Yale); Thomas J. Semmes (University of Louisiana); George G. Wright (Iowa).

[26]Sunderland, History of the ABA, pp. 72-73; 2 ABA Rep 209-236 (1879); Stevens, Law School, pp. 92-93.

[27]Edward J. Phelps, 3 ABA Rep 31 (1880).

[28]Max Radin, "The Achievements of the ABA," 26 ABAJ 19 @ 20 (1940); 3 ABA Rep 35-37 (1880); [Irving Browne], "The

American Bar Association," 20 Albany Law Journal 176 @ 177 (1879).

[29]Ibid.; Carleton Hunt to Simeon Baldwin, August 10 and October 30, 1881, Baldwin Family Papers, Yale; Carleton Hunt, 3 ABA Rep 15 (1880); "Carleton Hunt," DAB, IX, 382-83.

[30]4 ABA Rep 28, 30 (1881). The resolutions were adopted unanimously. However, Alfred Reed argues that the ABA actually "dodged the issue" of the diploma privilege on this occasion, and the wording was indeed "diplomatic." Cf. Reed, Training for the Public Profession, p. 266.

[31]Stevens, Law School, p. 94.

[32]The Committee on Legal Education was apologetic about requiring even two years of law school believing that the "sentiment of the profession and the public will not sustain, at least in some parts of the country, a longer course than two years, and even this is impracticable in some places." 15 ABA Rep 326 (1892). 14 ABA Rep 349-51 (1891); 15 ABA Rep 19-20 (1892); Sunderland, History of the American Bar Association, pp. 73-74; Reed, Training for the Public Profession, pp. 265-66; James Barr Ames, "Chairman's Address," (Section of Legal Education) 27 ABA Rep 508 (1904).

[33]Christopher Columbus Langdell, "Harvard Celebration Speeches," 3 Law Quarterly Review 123 @ 124 (1887); Stevens, Law School, pp. 52-59.

[34]"Report of the Committee on Legal Education," 14 ABA Rep 301 @ 331-340 (1891); 15 ABA Rep 340-41 (1892); cf. Moorfield Storey, 17 ABA Rep 379 (1894); Stevens, Law School, p. 57. Simeon Baldwin managed to keep the case method out of Yale until he relinquished the deanship to Henry Wade Rogers in 1903. The mutual admiration of the two men allowed Rogers to ease in the Harvard system, and according to Samuel Williston, Baldwin "accepted his defeat ungrudgingly," Samuel Williston, Life and Law: An Autobiography (Boston: Little, Brown and Company, 1940), pp. 232-33; Simeon Baldwin, "The Study of Elementary Law: The Proper Beginnings of a Legal Education," 13 Yale Law Journal 1-15 (1903).

[35]David J. Brewer, "A Better Education the Great Need of the Profession," 18 ABA Rep 441 @ 452 (1895).

[36]John H. Wigmore, 40 ABA Rep 736 (1915); cf. Andrew A. Bruce, 40 ABA Rep 737 (1915); Herbert Harley, "Organization of the Bar," Annals of the American Academy of Political and Social Science 52 (1914), 79-80. Harley suggested that the supply of lawyers be reduced by two-thirds.

[37]Elihu Root, "Public Service by the Bar," 41 ABA Rep 355 @ 359 (1916).

[38]"Report of the Committee on Legal Education and Admission to the Bar," 20 ABA Rep 362-64 (1897); cf. the "Report" of 1907, 31 ABA Rep 519.

[39]E. F. Trabue, 39 ABA Rep 809 (1914).

[40]Simeon Baldwin, 20 ABA Rep 430 (1897); cf. C. A. Severance, "The Constitution and Individualism," 47 ABA Rep 163 @ 178 (1922); Pierce Butler, "Some Opportunities and Duties of Lawyers," 48 ABA Rep 209 @ 214 (1923).

[41]Max Radin, "The Achievement of the ABA," 26 ABAJ 19 @ 23 (1940). It is noteworthy that in the Report of the Committee on Legal Education for 1891, the Committee asserted that "Admission to the [law] school should not be restricted to the graduates of colleges, as has sometimes been proposed, but should be open to all who have a good English education." (14 ABA Rep 331).

[42]George Hoadly, "Annual Address," 11 ABA Rep 219 @ 244 (1888); for an opposing view cf. James O. Crosby, 33 ABA Rep 21 (1908).

[43]Gustave Koerner to Carleton Hunt, July 27, 1881, printed at 4 ABA Rep 296 (1881); cf. Austin Abbott, 18 ABA Rep 15 (1895); "Report of the Committee on Legal Education and Admission to the Bar," 20 ABA Rep 372 (1897); P. P. Carroll, 33 ABA Rep 20 (1908).

[44]Cf., for instance, the belief of corporation lawyer, Frederick N. Judson, "Liberty of Contract under the Police Power," 14 ABA Rep 231 @ 257 (1891), that "a broader, more liberal and more thorough education," of American lawyers would make them more respectful of "constitutional limitations" and "liberty of contract." Ezra R. Thayer, dean of the Harvard Law School, asserted to the contrary that "unreasoned conservatism" was the "special trait of the primitive creature" and that "the lawyer with the slightest education" worshipped "mere forms and arid technicality." Ezra R. Thayer, "Law Schools and Bar Examinations," 38 ABA Rep 940 (1913).

[45]Henry Wade Rogers, 30 ABA Rep 167 (1906); cf. Elihu Root, "Address of the President," 41 ABA Rep 355 @ 361 (1916).

[46]Herbert Harley, "Group Organizations Among Lawyers," Annals of the American Academy of Political and Social Science, 101 (1922), 41; cf. Harley, "Organization of the Bar," p. 80: "If it be true that wickedness is after all only stupidity, the lawyer obtained by intellectual selection can better be relied upon to maintain the honor of the profession than if the attempt were made to plot the moral curve of each applicant in advance." Franklin Danaher, 3 American Law School Review 35 (1911); William Johnson, Schooled Lawyers, p. 155.

[47]"Legal Education," 8 ABAJ 160 (1922).

[48]Finley Peter Dunne, Mr. Dooley on Ivrything and Ivrybody, ed. by R. Hutchinson, (New York: Dover Publications, 1963), p. 193.

[49]Cf. Elihu Root, "The Layman's Criticism of the Lawyer," 39 ABA Rep 386 @ 401 (1914).

[50]Franklin M. Danaher, "Some Suggestions for Standard Rules for Admission to the Bar," 34 ABA Rep 784 @ 786 (1909); Danaher, 39 ABA Rep 824-25 (1914).

[51]John H. Wigmore, 40 ABA Rep 736 (1915).

[52]Lucien Hugh Alexander, "Some Admission Requirements Considered Apart from Educational Standards," 28 ABA Rep 619 @ 632 (1905).

[53]Lloyd K. Garrison, "A Survey of the Wisconsin Bar," 10 Wisconsin Law Review 131 @ 133-149 (1934); Johnson, Schooled Lawyers, pp. 170-71.

[54]George Sharp to Simeon Baldwin, April 27, 1893, Baldwin Family Papers; this does not mean that the merits of the case method of instruction were never discussed in the Section, cf. William S. Curtis, "Examination in Law Schools," 26 ABA Rep 691 (1903).

[55]20 ABA Rep 19-33 (1897); cf. Stevens, Law School, p. 95.

[56]Sunderland, History of the ABA, p. 31. The speakers for the first two years were Austin Abbott, Emlin McClain,

Samuel Williston, Henry Wade Rogers, John F. Dillon, John D. Lawson, Simeon Baldwin, Woodrow Wilson, John H. Wigmore, Edmund Wetmore, and William A. Keener, Cf. Hollis Bailey, "The Works and Aims of the Section of Legal Education," 37 ABA Rep 732 (1912); Roscoe Pound to Everette P. Wheeler, July 28, 1919, Wheeler Papers, New York Public Library.

[57]22 ABA Rep 565 (1899); 23 ABA Rep 569-575 (1900).

[58]23 ABA Rep 449, 456 (1900); cf. Emlin McClain, "Address of the President [of the AALS]," 25 ABA Rep 736 (1902).

[59]Hobson, "The American Legal Profession," p. 330.

[60]Henry Wade Rogers, "The Law School of the University of Michigan," 1 Green Bag 189 @ 194 (1889); cf. Johnson, Schooled Lawyers, pp. 126-27.

[61]For a somewhat different view see Jerold S. Auerbach, Unequal Justice (New York: Oxford University Press, 1976), pp. 74ff.

[62]"Legal Education," 8 ABAJ 160 (1922). The editorial continued: "It soon became plain, however, that no imputation was intended, that there was no retrospective implication, that the measure was one arising our of new conditions, applicable to the future only, and brought forward as a measure of protection from the host of ignorant and unfit applicants, who in the great cities, under existing rules, were threatening to deprive the profession of its hitherto undisputed right to be classed as 'learned.'" Cf. Auerbach, Unequal Justice, p. 97.

[63]40 ABA Rep 729 (1915).

[64]Max Radin, "The Achievements of the American Bar Association," 26 ABAJ 19 @ 26 (1940); 19 ABA Rep 448 (1896).

[65]William Howard Taft, "The Social Importance of Proper Standards for Admission to the Bar," 38 ABA Rep 924 (1913); as an example of Taft's complaint, cf. the remarks of J. N. Frierson, dean of the University of South Carolina Law School, New York Times, February 24, 1922, p. 12. Frierson complained that the proposed standards of the American Bar Association were "unjust and uncalled for," and he "pointed to Lincoln and other notable leaders who 'never saw the inside of a college.'"

[66]Edwin C. Goddard, "The Bar Examination," 42 ABA Rep 533 @ 534 (1917); cf. Elihu Root, 47 ABA Rep 490 (1922).

[67]Nicholas Murray Butler, "Preliminary Education for Lawyers," 47 ABA Rep 278 @ 279 (1922); cf. "Opportunity for Poor Boys," 13 ABAJ 141 (1927).

[68]H. Claude Horack, "The Standards and Ideals of the American Bar Association," National Education Association Addresses and Proceedings, 66 (1928), 155. Horack implied the standard argument as well, that changed conditions had produced an environment in which Lincoln could have gotten his education. "There is hardly a young man in America today who is not within a few hours' auto ride of a college--and hardly a boy that does not have a collegiate flivver in which to make the trip....It would be rash to suggest to a group, familiar with present educational conditions, that a young man of ability and determination cannot make his own way in college." (p. 156)

[69]Radin, "The Achievements of the ABA," 26 ABAJ 19 (1940).

[70]Sunderland, History of the ABA, pp. 140-143; 4 ABAJ 419, 423 (1918).

[71]Sunderland, pp. 47-49; Stevens, Law School, pp. 96-97.

[72]Ibid., pp. 97-98.

[73]Sunderland, pp. 48-49.

[74]Henry M. Bates to Taft, February 16, 1914; Taft to Bates, February 24, 1914, Taft Papers; cf. Henry Wade Rogers, "Address of the President of the AALS," 30 ABA Rep 148 (1906).

[75]Sunderland, p. 49.

[76]26 AALS Proceedings 30-31 (1926), quoted in Auerbach, Unequal Justice, p. 89; on Richards, cf. Johnson, Schooled Lawyers, pp. 121ff.

[77]Burrow, Organized Medicine in the Progressive Era, pp. 32-42.

[78]Quoted in Preble Stolz, "Training for the Public Profession," pp. 230-31.

[79]Abraham Flexner, I Remember: The Autobiography of Abraham Flexner (New York: Simon and Schuster, 1940), p. 130.

[80]Michael Schudson, "The Flexner Report and the Reed Report: Notes on the History of Professional Education in the United States," Social Science Quarterly 55 (1974), 351.

[81]Abraham Flexner, Medical Education, quoted in Burrow, Organized Medicine, p. 43.

[82]Ibid.; Magali Sarfatti Larson, The Rise of Professionalism: A Sociological Analysis (Berkeley: University of California Press, 1977), p. 163.

[83]Burrow, Organized Medicine in the Progressive Era, p. 43.

[84]Schudson, "The Flexner Report and the Reed Report," p. 350; Starr, p. 120.

[85]Ibid.; J. Richard Woodworth, "Some Influences on the Reform of Schools of Law and Medicine 1890 to 1930," Sociological Quarterly, 14 (1973), 503, 511; on the role of philanthropy in medical education, cf. Burrow, Organized Medicine, pp. 11-12; Ellen Condliffe Lagemann, Private Power for the Public Good: A History of the Carnegie Foundation for the Advancement of Teaching (Middletown: Conn.: Wesleyan University Press, 1983), pp. 72-73.

[86]Flexner, Medical Education, p. 11.

[87]Stevens, Law School, p. 75: "Schools like Columbian and Chicago-Kent could not have succeeded without, from the beginning, the existence of a powerful interest on the part of consumers in the marketplace. As the second generation of immigrants began to savor the benefits of rising living standards and free public education, the luxury of going on for higher education, once a preserve of the wealthier classes, became a feasible goal for some of the less well-to-do. Many grasped at the chance; a society mouthing the teachings of Darwin and Spencer, while demanding increasingly specialized workers, was no place for the uneducated." Harry First, "Competition in the Legal Education Industry," 53 New York University Law Review 311 @ 348 (1978).

[88]Stolz, "Training for the Public Profession of the Law," p. 231. Slightly higher figures are given in Reed,

Training for the Public Profession of the Law, p. 443, Stevens, Law School, p. 75; First, "Competition," pp. 347-48; Reed, Present-Day Law Schools in the United States and Canada (New York: Carnegie Foundation for the Advancement of Teaching, 1928), p. 29; cf. Edmund F. Trabue, 39 ABA Rep 810 (1914); Charles M. Hepburn, 6 ABAJ 80-82 (1920).

[89]Stevens, Law School, pp. 80, 102.

[90]William Draper Lewis, "Legal Education and the Failure of the Bar to Perform its Public Duties," 30 ABA Rep 44 (1906).

[91]Stevens, Law School, pp. 98, 103; cf. Max Radin, "The Achievements of the ABA." 25 ABAJ 1007 @ 1013 (1939). For the success of the medical profession in obtaining restrictive legislation, see Burrow, Organized Medicine, pp. 52-70.

[92]Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press, 1962), p. 151.

[93]Franklin M. Danaher, 6 ABAJ 78 (1920).

[94]Schudson, "The Flexner Report and the Reed Report," p. 351; Committee of Legal Education and Admission to the Bar to Henry S. Pritchett, President of the Carnegie Foundation, February 7, 1913, printed in Alfred Z. Reed, Training for the Public Profession of the Law, p. xviii.

[95]Ibid.; cf. Henry Wade Rogers, 38 ABA Rep 25 (1913).

[96]Thomas Gordon Barnes, Hastings College of the Law: The First Century (San Francisco: Hastings College of the Law Press, 1978), p. 207.

[97]Burrow, Organized Medicine, pp. 42, 181 (n. 31), 45-47. George R. West, dean of the Chattanooga Medical College, protested that Flexner had "condemned our railroads as he arrived, our hotels as he tarried, and our medical colleges as he passed on." (p. 45); Schudson, "The Flexner Report and the Reed Report," p. 351.

[98]Barnes, Hastings College of the Law, p. 208.

[99]Stevens, Law School, p. 126 (n. 20); Howard J. Savage, Fruit of an Impulse: Forty-Five Years of the Carnegie Foundation, 1905-1950 (New York: Harcourt, Brace, and Company, 1953), pp. 150-51; cf. Henry Wade Rogers, 42 ABA Rep 46 (1917); Lagemann, Private Power, p. 79.

[100]Barnes, Hastings College of the Law, p. 210.

[101]Reed, Training for the Public Profession of the Law, p. xviii; Alfred Z. Reed, Present-Day Law Schools in the United States and Canada (New York: The Carnegie Foundation for the Advancement of Teaching, 1928).

[102]Stolz, "Training for the Public Profession of the Law," p. 243; Reed, Training for the Public Profession of the Law, p. 3.

[103]Ibid., pp. 59-60, 77-78, 416-20.

[104]Ibid., pp. 212-220, quotation at p. 214.

[105]Alfred Z. Reed, "Criticism of Carnegie Foundation Bulletin," 8 ABAJ 114 (1922).

[106]John B. Sanborn, "Training for Public Profession of the Law," 7 ABAJ 615 (1921); Harlan F. Stone, "Legal Education and Democratic Principle," 7 ABAJ 639 (1922); William Draper Lewis, "American Bar Association's Position on Legal Education," 8 ABAJ 39 (1922); cf. "Dean Stone's Rejoinder to Mr. Reed's Reply," 8 ABAJ 187 (1922).

It should be noted that the leadership of the AALS was just as opposed--if not more so--to the idea of the "differentiated bar." In 1921, Arthur Corbin devoted most of his presidential address before the AALS to refuting the proposal.

[107]Reed, "Criticism," p. 115; Stone, "Legal Education," pp. 640, 643.

[108]Lewis, "ABA's Position," p. 41.

[109]Harley, "Group Organizations Among Lawyers," p. 43.

[110]Charles E. Hughes, "Liberty and Law," 50 ABA Rep 183 @ 196 (1925).

[111]Pierce Butler, "Some Opportunities and Duties of Lawyers," 48 ABA Rep 209 @ 214 (1923). "Of course," he added, "the purpose is not to control the number so that competition may be lessened."

[112]Quoted in Stolz, "Training for the Public Profession of the Law," pp. 248-49; cf. Reed, Present-Day Law Schools, p. 109.

[113]Reed, "Criticism," p. 114.

[114]First, "Competition in the Legal Education Industry," p. 355; Reed, Present-Day Law Schools, pp. 30-35.

[115]William R. Vance, AALS Proceedings 32 (1915).

[116]Roscoe Pound to Everette Wheeler, July 28, 1919, Wheeler Papers.

[117]William Draper Lewis, AALS Proceedings 28 (1915).

[118]Harry S. Richards, "Progress in Legal Education," AALS Proceedings 61-76 (1915).

[119]Walter Wheeler Cook, "A Plan for the Improvement of Legal Education and Standards of Admission to the Bar," AALS Proceedings 110 (1916), passim.

Ironically, Cook was repeating the suggestion of another Yale professor, Wesley Hohfeld, that the legal profession might try to establish a bar of two grades. Since Hohfeld had made his suggestion in an unpublished report to the Carnegie Foundation before 1916, Alfred Reed certainly had knowledge of it. Yet nowhere did Reed give Hohfeld or Cook credit (or blame) for the idea. Stolz, "Training for the Public Profession of the Law," pp. 246-47.

[120]Cook repeated his speech to the Section of Legal Education the following year as "The Improvement of Legal Education and of Standards for Admission to the Bar," 42 ABA Rep 547 (1917). He eliminated the reference to the "differentiated bar" but added the appeal for representation on the Council of Legal Education by non-law school men. (pp. 558-59.)

[121]42 ABA Rep 90-92, 95 (1917); 42 ABA Rep 76-77 (1918); Stolz, pp. 236-37.

[122]44 ABA Rep 34, 124, 256 (1919); Stolz, p. 237; "Report of the Council on Legal Education," 44 ABA Rep 264 @ 268 (1919). The Executive Committee also curbed the Red-baiting activities of the Committee to Oppose Judicial Recall and Allied Measures at the same time. Cf. the comments of George T. Page, ABA President, 4 American Law School Review 458-59 (1919).

[123]"Report of the Council," pp. 267-68; 14 Illinois Law Review 205-07. The procedure by which the revised constitution was pushed through to approval--by one-half vote--remains highly suspicious.

[124]AALS Proceedings 38-39, 107-08 (1919); cf. First, "Competition," pp. 355-56; Stolz, "Training for the Public Profession of the Law," pp. 237-38.

[125]Ibid., p. 238; AALS Proceedings 40-41 (1919).

[126]Ibid., p. 91; cf. Edward T. Lee, 46 ABA Rep 666-67 (1921).

[127]Stolz, pp. 238-39; cf. George E. Price, 46 ABA Rep 673 (1921). Root declared that his Committee agreed with Reed and even based its recommendations on his report. For his own reasons, Reed was happy to adopt this legal fiction himself. Elihu Root, 46 ABA Rep 38 (1921).

[128]The resolutions are given at 46 ABA Rep 38 (1921); cf. Stolz, pp. 239.

[129]46 ABA Rep 661-62 (1921). As Stolz has written, Taft's seconding speech reflected "rather more regard for Mr. Root than familiarity with the details of the Committee's report." Stolz, p. 239. Elihu Root, 46 ABA Rep 38 (1921).

[130]Edward T. Lee, 46 ABA Rep 42-43, 665-672 (1921); Lee, the son of Irish immigrants, had worked his way through both Harvard and Columbian (George Washington) Law School.

[131]George E. Price, 46 ABA Rep 672-677 (1921). Price presumably intended the last word of the final quotation to be "taught" rather than as printed, "thought." The Reports have very few typographical errors, and Price may have mistakenly said "thought."

[132]Nathan William MacChesney, 46 ABA Rep 44-45 (1921).

[133]46 ABA Rep 46-47 (1921).

[134]New York Times, February 25, 1922, p. 12. The minutes of the meeting are printed at 47 ABA Rep 482-591 (1922).

[135]Stolz, "Training for the Public Profession of the Law," p. 241.

[136]New York Times, February 25, 1922, p. 12; 47 ABA Rep 490-92, 563 (1922). The ABA leadership also brought in the highly influential Carnegie Foundation advisor, Dr. William

H. Welch, to explain how educational standards had been raised in the medical profession. 47 ABA Rep 529 (1922).

[137]Thomas Patterson, 47 ABA Rep 567 (1922).

[138]Elihu Root, 47 ABA Rep 583-84 (1922): "All that the opposition here comes to is simply to stop, to stop! to do nothing! How much better, instead of beating over the prejudices and memories of a past that is gone, it is to take dear old Edward Everett Hale's maxim, 'Look forward, not back; look upward, not down, and lend a hand.'"

[139]Auerbach, Unequal Justice, p. 118.

[140]Pound to Stone, January 2, 1923, Pound Papers, quoted in Auerbach, Unequal Justice, p. 119.

[141]Walter George Smith, "Civil Liberty in America," 43 ABA Rep 209 @ 219 (1918); cf. Stevens, Law School, p. 172.

[142]Johnson, Schooled Lawyers, pp. 160-61; First, "Competition," pp. 358-59. Predictably, the classification system itself was borrowed from the American Medical Association. Starr, p. 118.

[143]"Comments of the Press," 8 ABAJ 156-57 (1922); "Admission to the Bar," New York Times, February 25, 1922. Of course the editorials were not all favorable to the position of the elite.

[144]Silas Strawn to Roscoe Pound, August 15, 1927; Gleason Archer to Members of the American Bar Association, September, 1927; Roscoe Pound to Silas Strawn, October 8, 1927; Silas Strawn to Gleason Archer, October 11, 1927; Roscoe Pound to Silas Strawn, October 25, 1927, Roscoe Pound Papers, Box 1, Harvard Law School. Also filed in the same box are resolutions presented to the ABA in 1927, including a very much watered-down proposal calling for state supported collegiate training, which was passed by the annual meeting.

[145]Gleason Archer to Members of the American Bar Association, September, 1927, Pound Papers; cf. Charles F. Carusi, dean of the National Union Law School, to the New York Times, December 14, 1926, p. 26.

[146]54 ABA Rep 732-38 (1929).

[147]Quoted in Stevens, Law School, pp. 175-76.

[148]James Brennan, 54 ABA Rep 640 (1929).

[149]Cf. 53 ABA Rep 620ff. (1928). There is a note of condescension in Lewis' ostentatiously fair-minded approach towards his opponents. In 1930 Archer and Lee finally got a resolution to the floor proposing that one-half of each law school faculty be composed of practicing lawyers. They were "defeated handsomely," and the ABA passed a resolution attacking proprietary law schools. Stevens, Law School, p. 176.

[150]Ibid.

[151]Elihu Root, 47 ABA Rep 491 (1922); Henry Drinker, 54 ABA Rep 622-23 (1929).

[152]Johnson, Schooled Lawyers, p. 157.

[153]Stevens, Law School, p. 101.

[154]Flexner, Medical Education, pp. 167-173 quoted in Kunitz, "Professionalism and Social Control," p. 23; John P. Hubbard, Measuring Medical Education (Philadelphia: Lea & Febiger, 1971), p. 4-8.

[155]Reed, Training for the Public Profession of the Law, pp. 102-103; Sunderland, History of the ABA, pp. 55-58.

[156]Francis M. Finch, "Presidential Address," 24 New York State Bar Association Reports 47 (1901); Frank Sullivan Smith, 37 ABA Rep 721-22 (1912).

[157]Harley, "Group Organizations Among Lawyers," p. 40.

[158]John Wigmore, 30 ABA Rep 18 (1906); Johnson, Schooled Lawyers, pp. 145-48; George Martin, Causes and Conflicts (Boston: Houghton Mifflin, 1970), pp. 134-38; "Admissions to the Bar," 11 Alb. Law J. 360-61 (1875).

[159]Reed, Training for the Public Profession of the Law, p. 264.

[160]I. Maurice Wormser, "The Results of a Comparative Study of the Examination Questions Framed by State Boards of Examiners," 39 ABA Rep 864 @ 873 (1914).

[161]"Admission to the Bar," New York Times, February 25, 1922, p. 12; cf. Orlando Potter, 15 ABA Rep 14 (1892); Edward T. Lee 46 ABA Rep 670 (1921).

[162]Annual Reports of the President and Treasurer of Harvard College, 1876-77, quoted in Reed, Training for the Public Profession of the Law, p. 269.

[163]William Keysor, 30 ABA Rep 24 (1906); Reed, Training for the Public Profession of the Law, p. 255; cf. Radin, "The Achievements of the ABA," 26 ABAJ 19 (1940).

[164]Elihu Root, 47 ABA Rep 492 (1922); cf. Walter George Smith, "Address of the Chairman [of the Section of Legal Education]," 38 ABA Rep 761 (1913); Walter George Smith, 40 ABA Rep 719 (1915); Andrew A. Bruce, 40 ABA Rep 714 (1915).

[165]E. F. Trabue, 39 ABA Rep 810 (1914).

[166]Auerbach, Unequal Justice, pp. 121-29. Of course, Auerbach should not be held responsible for my conclusions. Cf. Clarence A. Lightner, "A More Complete Inquiry into the Moral Character of Applicants for Admission to the Bar," 38 ABA Rep 779 (1913); Charles A. Boston, 38 ABA Rep 748-49 (1913); Walter George Smith, 40 ABA Rep 719 (1915). Smith used the euphemism, "representatives of the most ancient race of which we have knowledge."

That some young men were unjustly excluded cannot be denied. George Wickersham related the case of a Jewish applicant who had appeared before him in New York. Investigation had revealed that no one of his name had been employed at a business to which he gave reference. Under examination the applicant admitted having worked under an assumed name and country of origin because the company in question would not hire Jews. "That applicant, gentlemen," said Wickersham, "could not understand why he should be rejected by us." Today we would probably file suit against the employer and reconstitute the bar examination board. 39 ABA Rep 818 (1913).

[167]Newark (NJ) News, quoted in 8 ABAJ 156 (1922).

[168]Samuel Hand, "Bar Association and the Profession," 3 New York State Bar Association Proceedings 67 @ 80 (1880).

[169]Burrow, Organized Medicine in the Progressive Era, pp. 64-65.

[170]Burton J. Hendrick, "How Should a Lawyer Behave?" World's Work, 33 (January, 1917), 330.

[171]Jethro K. Lieberman, Crisis at the Bar: Lawyers' Unethical Ethics and What to Do About It (New York: W. W. Norton & Co., Inc., 1978), pp. 54-56; Walter B. Jones,

"Canons of Professional Ethics: Their Genesis and History," 7 Notre Dame Lawyer 483 (1932).

[172]The states were Georgia (1889), Virginia (1889), Michigan (1897), Colorado (1898), North Carolina (1900), Wisconsin (1901), West Virginia (1902), Maryland (1902), Kentucky (1903), Missouri (1906). 31 ABA Rep 676 (1907).

[173]Hobson, "The American Legal Profession and the Organizational Society," pp. 298-99.

[174]Maxwell Bloomfield, "Law and Lawyers in American Popular Culture," in Carl Smith, et al., Law and American Literature (New York: Alfred A. Knopf, 1983), p. 164. Previously "pettifogger" had been the preferred pejorative term, but this had "Anglo-Saxon connotations."

In Arthur Train's story, "The Shyster," a popular (though Train argues, an inaccurate) description of such a lawyer is given as "a down-at-the-heels, unshaved and generally disreputable-looking police-court lawyer--preferably with a red nose--who murders the English language--and who makes his living by preying upon the ignorant and helpless." Arthur Train, "The Shyster," in By Advice of Counsel (New York: Scribner's, 1925), pp. 9-10, quoted in Bloomfield, pp. 164-65.

[175]Lucius H. Perkins, "The State Board--A Landmark in Lawyer Making," 27 ABA Rep 789 @ 790 (1904).

[176]Martin W. Cooke, "Bar Associations--What They May Undertake," 11 Proceedings of the New York State Bar Association 38 @ 45 (1888).

[177]Richard Hofstadter, The Age of Reform (New York: Alfred A. Knopf, 1955), p. 157.

[178]Auerbach, Unequal Justice, p. 42.

[179]Richard Rovere, Howe & Hummel (New York: Farrar, Straus, 1947); David M. Oshinsky, A Conspiracy So Immense: The World of Joe McCarthy (New York: Free Press, 1983), p. 16.

[180]Burton J. Hendrick, "How Should a Lawyer Behave?" p. 333.

[181]Richard Hofstadter, The Age of Reform, p. 158; cf. the sources which Hofstadter cites on p. 160, and those

cited by his student Joseph Katz, "The Legal Profession, 1890-1915," M.A. thesis, Columbia University, 1954, pp. 29-39.

[182]Frank Gaylord Cook, "Lawyers and the Trust," North American, 183 (1906), 114; cf. Alfred Russell, "Avoidable Causes of Delay and Uncertainty in Our Courts," 14 ABA Rep 197 @ 198, 202 (1891); Clarence H. Miller, 30 ABA Rep 12 (1906).

[183]George W. Bristol, "The Passing of the Legal Profession," 22 Yale Law Journal 590 (1913).

[184]William B. Hornblower, "Has the Profession of the Law Been Commercialized?" Forum, 18 (February, 1895), 684; cf. Alfred Russell, "Avoidable Causes," pp. 197-98.

[185]Walter George Smith, "Address of the Chairman of the Section of Legal Education," 38 ABA Rep 761 (1913).

[186]"Why I Gave Up My Practice," Independent, 60 (June 28, 1906), 1536; cf. William F. Bundy, 32 Illinois State Bar Association Report 84 (1908); Hobson, "The American Legal Profession," pp. 300-01; for a slightly different comparison see Thomas Walsh, 33 ABA Rep 70 (1908).

[187]Andrew A. Bruce, 40 ABA Rep 737 (1915).

[188]Theodore Roosevelt, "Address at Harvard University, June 28, 1905," in Presidential Addresses and State Papers (New York: The Review of Reviews Company, 1910), "Homeward Bound Edition," IV, 419-20.

[189]Lieberman, Crisis at the Bar, p. 58.

[190]Alfred Hemenway, "The American Lawyer," 28 ABA Rep 390 @ 398-99 (1905); cf. Elihu Root, Addresses on Government and Citizenship (Cambridge: Harvard University Press, 1916), pp. 66-68.

[191]Henry St. George Tucker, "Address of the President," 28 ABA Rep 299 @ 384 (1905).

[192]"Report of the Committee on the Code of Professional Ethics," 29 ABA Rep 600-02 (1906); Sunderland, A History of the ABA, pp. 110-111.

[193]33 ABA Rep 56-57, 573 (1908); Sunderland, A History of the ABA, p. 110.

[194]Oliver Wendell Holmes to Lucien Hugh Alexander, December 12, 1907, Alexander Papers, University of Michigan.

[195]32 ABA Rep 5 (1907).

[196]Max Radin, "The Achievements of the ABA," 26 ABAJ 135 (1940).

[197]Elmer B. Rogers, 33 ABA Rep 58 (1908).

[198]33 ABA Rep 59, 85-86, 575-85 (1908).

[199]Max Radin, "The Achievement of the ABA," 26 ABAJ 135 @ 138 (1940); Sunderland more euphemistically calls it "a very spirited debate." Sunderland, p. 111.

[200]Calvin C. Child, "Shifting Uses from the Standpoint of the Nineteenth Century," 2 ABA Rep 71 @ 90 (1879); Gustave Koerner, "The Doctrine of Punitive Damages, and its Effect on the Ethics of the Profession," 5 ABA Rep 211 @ 220 (1882); Alfred Russell, "Annual Address: Avoidable Causes of Delay and Uncertainty in Our Courts," 14 ABA Rep 197 @ 202 (1891); cf. 26 Alb. Law J. 141 (1882); "Report of the Committee on Legal Education," 20 ABA Rep 378 (1897).

[201]William H. Staake to Lucien H. Alexander, March 29, 1908, Alexander Papers; cf. Charles Biddle to Alexander, May 24, 1907, Alexander Papers.

[202]Simeon Baldwin, 9 ABA Rep 498 (1886); "Report of the Committee on Delay and Uncertainty in the Law," 9 ABA Rep 355 (1886); cf. Friedman, A History of American Law, pp. 422-23; Radin, "The Achievements of the ABA," 26 ABAJ 135 @ 138 (1940).

[203]"Report of the Sub-Committee on Code of Ethics of the Massachusetts Bar Association," (1910) in Alexander Papers; cf. Roscoe Pound to Edward A. Harriman, September 14, 1927, Box 1, Pound Papers.

[204]33 ABA Rep 61 (1908).

[205]Thomas Walsh, 33 ABA Rep 61-75 (1908), quote at p. 69. Rome Brown, the immediate past president of the Minnesota State Bar Association, grumbled that "the poor plaintiff in a personal injury case needs today...more protection against her lawyer than against the defendant." 33 ABA Rep 76 (1908).

[206]33 ABA Rep 80 (1908).

[207]George Sharswood, An Essay on Professional Ethics (Philadelphia: T. & J. W. Johnson & Co., 1854), reprinted as 32 ABA Rep (1907); Liebermann, Crisis at the Bar, p. 55.

[208]Hendrick, "How Should a Lawyer Behave?" p. 333.

[209]"Report of the Committee on Jurisprudence and Law Reform," 11 ABA Rep 308-09 (1888); cf. Richard Rovere, Howe & Hummel, pp. 119-120.

[210]20 ABA Rep 379 (1897).

[211]Auerbach, Unequal Justice, pp. 40-52; Lieberman, Crisis at the Bar, pp. 59-61.

[212]Of course, policing elite advertising was difficult because it was usually done with more finesse than the adverising of the lower bar. Speaking to the Association in 1925, U. S. Attorney General John G. Sargent criticized the self-advertisement of large firms:

> "How often we read, under glaring headlines, that the prominent law firm of Blank, Blank and Blank has been retained to bring suit against Rich and Prosperous in behalf of Much Wronged and Abused on account of a nefarious scheme carried out by the defendant, then detailing the plaintiff's grievances with a particularity showing the story could have been obtained only from Blank, Blank and Blank....Blank, Blank and Blank think it will bring them more good business to have the public informed they have this important employment...."

"The Lawyer and His Practice," 50 ABA Rep 304 @ 311 (1925); cf. Quinton Johnstone and Dan Hopson, Jr., Lawyers and Their Work (Indianapolis: Bobbs-Merrill Company, Inc., 1967), pp. 121-130.

[213]Harley, "Group Organizations Among Lawyers," p. 39.

[214]Starr, pp. 127-134; Daniel J. Boorstin, The Americans: The Democratic Experience (New York: Random House, 1973), p. 71.

[215]Henry F. Pringle, "A Grand-Stand Judge," in Big Frogs (New York: Macy-Masius, 1928), pp. 73-91; "Kenesaw Mountain Landis," Current Biography, 1943 (New York: H. W. Wilson Co., 1944), pp. 372-76; "Kenesaw Mountain Landis," Dictionary of American Biography, Supplement Three, pp. 437-439.

[216]Ibid.; "The Landis Case," 7 ABAJ 87-89 (1921).

[217]Hampton Carson, 46 ABA Rep 61-62 (1921).

[218]46 ABA Rep 62-67 (1921); some of the debate was omitted; New York Times, September 2, 1921, p. 1.

[219]46 ABA Rep 67 (1921).

[220]Cf. 7 ABAJ 440 (1921) for some examples; "The Double Judge," (ed.), New York Times, September 3, 1921, p. 8. The Chicago papers were especially strong in Landis' defense.

[221]E. A. Harriman, "The Need for Standards of Ethics for Judges," Annals of the American Academy of political and Social Science, 101 (May, 1922), 30-32.

[222]8 ABAJ 136 (1922). Landis held the position of baseball commissioner until his death in 1944. On his last day of court, he told reporters, "I know you fellows made me. You printed stuff about me and that's the reason I've got a fifty-thousand-dollar job now. I don't kid myself." Pringle, Big Frogs, pp. 89-90.

[223]Charles A. Boston, 49 ABA Rep 70 (1924).

[224]49 ABA Rep 67-71, 761-69 (1924).

[225]Cf. C. E. Moore to the ABAJ, September 17, 1921, 7 ABAJ 560 (1921).

[226]"Report of the Committee on Code of Ethics of the Massachusetts Bar Association, 1910," in Lucien Alexander Papers.

[227]Germaine Madier, L'association du Barreau Américain (Paris: M. Giard, 1922), pp. 44-45.

[228]Harley, "Group Organization Among Lawyers," p. 35.

[229]Thomas Francis Howe, "The Proposed Amendment to the Bylaws," 8 ABAJ 436 (1922); James Willard Hurst, The Growth of American Law, pp. 330-333.

[230]Max Radin, "The Achievements of the ABA," 26 ABAJ 135 @ 136 (1940); Howe, "The Proposed Amendment," p. 436.

[231]Julius Henry Cohen, 52 ABA Rep 107 (1927); Cohen, The Law: Business or Profession? (New York: G. A. Jennings, 1924), p. 336; cf. Hurst, The Growth of American Law, pp. 323-25; William D. Thompson to John W. Davis, May 29, 1923, Series III, Box 15, Davis Papers, Yale.

[232]Thomas Francis Howe, "The Proposed Amendment," p. 436; Francis J. Swayze, 42 ABA Rep 56 (1917).

[233]Henry W. Jessup to Thomas McClellan, April, 1918, Thomas C. McClellan Papers, Alabama Department of Archives and History; cf. Thomas McClellan to George Weber, February 23, 1918, McClellan Papers.

[234]Thomas Francis Howe, 53 ABA Rep 118, 477 (1928); H. Claude Horack, "The Standards and Ideals of the American Bar Association," National Education Association Addresses and Proceedings, 66 (1928), 152-53.

[235]"Reno Lawyers in Quandry," New York Times, January 22, 1928, p. 28.

[236]Quoted in Joseph Katz, "The Legal Profession," p. 37.

[237]James D. Shearer, 42 ABA Rep 80 (1917).

[238]Harley, "Group Organizations Among Lawyers," p. 36.

[239]Stevens, Law School, p. 176.

[240]First, "Competition in the Legal Education Industry," p. 370; Stevens, Law School, pp. 193-94.

[241]Friedman, Capitalism and Freedom, p. 150; cf. Richard B. Freeman, The Overeducated American (New York: Harcourt Brace Jovanovitch, 1976), pp. 118-120.

Chapter 8

[1]Henry F. May, The End of American Innocence: A Study of the First Years of Our Own Time, 1912-1917 (New York: Alfred A. Knopf, 1959), pp. ix-xi.

[2]The phrase is borrowed from a chapter title in Arnold Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (Ithaca: Cornell University Press, 1960). However, Paul is discussing a different period and a different conservatism. Wayne Earl Hobson,

"The American Legal Profession and the Organizational Society, 1890-1930," Ph.D. dissertation, Stanford, 1977, pp. 70-71; Morton Keller, In Defense of Yesterday: James M. Beck and the Politics of Conservatism, 1861-1963 (New York: Coward-McCann, Inc., 1958), pp. 80-85.

[3]Frank B. Kellogg, "New Nationalism," 37 ABA Rep 341 (1912); quotation at page 347.

[4]S. S. Gregory, "Address of the President," 37 ABA Rep 255 @ 287 (1912).

[5]Henry D. Estabrook, "The American Judicial System: The Judges," 37 ABA Rep 393 @ 397 (1912). Estabrook provides an excellent example of the ambivalence with which the ABA leadership approached progressivism. Later in the same speech, Estabrook bestows high praise upon Roscoe Pound, who he says has left his fellow ABA members as "grateful and admiring debtors." (p. 399) Of course, Pound was no "muckraker" but a colleague.

[6]William Howard Taft, "The Social Importance of Proper Standards for Admission to the Bar," 38 ABA Rep 924 @ 935 (1913).

[7]Charles Thaddeus Terry, "President's Address," (NCCUSL) 38 ABA Rep 993 @ 1015 (1913).

[8]Joseph W. Bailey, 1 ABAJ 552-54 (1915); George E. Mowry, The Era of Theodore Roosevelt (New York: Harper & Row, 1958), pp. 204, 263.

[9]T. J. O'Donnell, 41 ABA Rep 617 (1916).

[10]George Sutherland, "Private Rights and Government Control," 42 ABA Rep 197 @ 200 (1917).

[11]Peter Meldrim, "Address of the President," 40 ABA Rep 313 @ 327 (1915).

[12]Elihu Root, "Public Service by the Bar," 41 ABA Rep 355 @ 369, 372 (1916); the phrase "ardent spirits" may be a tongue-in-cheek reference to the prohibitionists. Cf. Frank J. Goodnow, "Private Rights and Administrative Discretion," 41 ABA Rep 408 @ 422 (1916).

[13]Walter George Smith, "Civil Liberty in America," 43 ABA Rep 209 @ 217-218 (1918).

[14]"Lindley Miller Garrison," Dictionary of American Biography, Supplement I, pp. 335-37. Wilson had been impressed with Garrison's performance as vice-chancellor of New Jersey from 1904 to 1913. Arthur S. Link, Wilson: Confusions and Crisis, 1915-1916 (Princeton: Princeton University Press, 1964), pp. 15-18, 37-39, 50-54.

[15]Lindley M. Garrison, "Democracy and Law," 41 ABA Rep 375 @ 388-392 (1916).

[16]G. Edward White, The American Judicial Tradition (New York: Oxford University Press, 1976) p. 184. White terms Sutherland's address to the ABA in 1917 "revealing." (p. 428). James Grafton Rogers, American Bar Leaders: Biographies of the Presidents of the American Bar Association, 1878-1928 (Chicago: ABA, 1932), pp. 188-193.

[17]George Sutherland, "Private Rights and Governmental Control," 42 ABA Rep 197 (1917), quotations from pages 198, 201, 213.

[18]Sutherland, "The Courts and the Constitution," 37 ABA Rep 371 (1912); Rogers, American Bar Leaders, p. 191.

[19]Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origin and Development (New York: W. W. Norton & Company, 1976), Fifth Edition, pp. 593-95; Barbara C. Steidle, "Conservative Progressives: A Study of the Attitudes and Role of Bar and Bench, 1905-1912," Ph.D. dissertation, Rutgers University, 1969, pp. 314-15. Chapter VIII of this dissertation, "The People vs. the Courts: The Campaign for the Recall of Judges and Judicial Decisions," is an excellent bibliographical source.

Perhaps the most notable socialist assault on the Constitution and courts was Algie M. Simons, Social Forces in American History (New York: Macmillan and Co., 1911), first published as a pamphlet in 1903 and best known for Carl Becker's quip that it was written "without fear and without research."

[20]J. Allen Smith, The Spirit of American Government (New York: Macmillan and Co., 1907), pp. 288-89; cf. Eric F. Goldman, Rendezvous with Destiny (New York: Alfred A. Knopf, 1952), pp. 143-49.

[21]Quoted in Eric F. Goldman, "J. Allen Smith: The Reformer and His Dilemma," Pacific Northwest Quarterly, 35 (July, 1944), 205.

[22]Steidle, "Conservative Progressives," pp. 315-16; cf. Charles Warren, The Supreme Court in United States History (Boston: Little, Brown, and Co., 1922), III, 435, for a partial bibliography of early twentieth century attacks upon the federal judiciary.

[23]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 ABA Rep 395 (1906); Pound, "The Need of a Sociological Jurisprudence," 31 ABA Rep 911 (1907), reprinted @ 19 Green Bag 609 (1907); Pound, "Liberty of Contract," 18 Yale Law Journal 454 (1909); Andrew A. Bruce, "The Judge as a Political Factor," 19 Green Bag 663 (1907).

[24]Privately Roosevelt suggested that Humphrey had "lost some of the powers of his mind." Publicly, he recommended that Congress pass a declaratory act concerning immunity under the Bureau of Corporations Act of 1903. Such a measure was approved by Congress in June of 1906. Roosevelt to Charles B. Morrison, March 22, 1906, in Elting E. Morison, ed., The Letters of Theodore Roosevelt (Cambridge, Mass.: Harvard University Press, 1951), V, 189-190; cf. Roosevelt to Robert Lincoln O'Brien, April 16, 1906, Letters, V, 212; Congressional Record, 59 Congress; 1st sess., pp. 5500, 9531; U.S. v. Armour & Co., 142 Fed. 808 (1906).

[25]Edward J. White, "The Judiciary and Public Sentiment," 24 Missouri Bar Association Proceedings 157 (1906); Theodore Roosevelt, "Sixth Annual Message," (December, 1906), in Hermann Hagedorn, ed., The Works of Theodore Roosevelt (New York: Charles Scribner's Sons, 1926), "National Edition," XVII, 408-11.

[26]31 ABA Rep 84-85, 98-99, 105 (1907); "Lawyers Won't Censure Roosevelt," New York Times, August 29, 1907, p. 6.

[27]Roosevelt to Robert Lincoln O'Brien, April 16, 1906, Letters, V, 212; cf. Roosevelt to Charles Bonaparte, January 2, 1908, Letters, VI, 888; Roosevelt to Justice William Day, January 11, 1908, Letters, IV, 903-904.

[28]"Message Communicated to the Two Houses of Congress, December 8, 1908," in Presidential Addresses and State Papers, (New York: Review of Reviews Co., 1910), VIII, 1924-26.

[29]Theodore Roosevelt, "Criticism of the Courts," Outlook, 96 (September 24, 1910), 149-53; Roosevelt to

Henry Cabot Lodge, September 12, 1910, Letters, VII, 123; Steidle, "Conservative Progressives," pp. 326-27.

[30]Ibid., pp. 331, 315 fn.; Roosevelt to Charles Dwight Willard, April 28, 1911, Letters, VII, 254; cf. earlier more negative appraisals of judicial recall, Roosevelt to Edmund H. Madison, February 17, 1911, Letters, VII, 232-33; Roosevelt, "Arizona and the Recall of the Judiciary," Outlook 98 (June 24, 1911), 378-79; Kelly and Harbison, The American Constitution, p. 598. Ives v. South Buffalo Railway Co., 201 NY 271, 94 N.E. 431 (1911).

[31]See above p. 206.

[32]C. C. Flansburg, "The Stability of the Bench," 9 Nebraska State Bar Association Proceedings 89-90 (1908).

[33]Elihu Root to William Howard Taft, October 14, 1910, quoted in Philip C. Jessup, Elihu Root (New York: Dodd, Mead & Company, 1937), II, 163; Root repeated some of these ideas publicly a few days later (p. 169).

[34]Quoted in ibid., pp. 163-64.

[35]"Mr. Roosevelt's Attack Upon the Supreme Court," 22 Bench and Bar 85-89 (1910); cf. Steidle, pp. 327-29.

[36]"Unseemly Criticism of the Courts," 16 Virginia Law Register 465-66 (1910).

[37]"Is Mr. Roosevelt Right?" 17 Case and Comment 230-31 (1910).

[38]Oregon was the first state to adopt judicial recall in 1908, and California followed suit after Root's speech in 1911. Jessup, Elihu Root, p. 243.

[39]Elihu Root, "The Arizona Constitution and the Recall of Judges: Address in the Senate of the United States, August 7, 1911," in Addresses on Government and Citizenship (Cambridge: Harvard University Press, 1916), pp. 387-404.

[40]James Richardson, ed., A Compilation of the Messages and Papers of the Presidents (Washington: Government Printing Office, 1922), XI, 7636-44. Congress then decided to require the removal of members of the judiciary from the recall provision of Arizona's proposed constitution. Arizona agreed to the change and was promptly admitted as the forty-eighth state. After admission its voters restored judicial recall through the amendment process, an

eventuality foreseen by Taft in his veto message. In the election of 1912, Taft ran dead last--even behind Debs--in Arizona.

[41]For a bibliography of these articles and speeches, see Steidle, "Conservative Progressives," pp. 332-339.

[42]72 Central Law Journal 453-54 (1911).

[43]Edgar H. Farrar, "Address of the President," 36 ABA Rep 229 @ 231-32 (1911); reprinted @ 73 Central Law Journal 221 (1911); cf. Hampton Carson, "The Relation of the Judiciary to Unconstitutional Legislation," 30 Missouri Bar Association Proceedings 75 (1912). Carson attacked judicial recall as "Demos run mad,...the insane fury of a mob wrecking the Temple of Freedom."

[44]Rogers, American Bar Leaders, p. 163.

[45]Henry B. Brown, "The Distribution of Property," 16 ABA Rep 213 (1893); cf. Arnold M. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench (Ithaca: Cornell University Press, 1960), pp. 84-88.

[46]Henry B. Brown, "The New Federal Judicial Code," 36 ABA Rep 339 @ 357-58 (1911).

[47]George Whitelock, 36 ABA Rep 8 (1911). The six ex-presidents were Francis Rawle, Henry St. George Tucker, Alton Parker, J. M. Dickinson, Frederick Lehmann and Charles F. Libby. Rogers, American Bar Leaders, p. 124.

[48]36 ABA Rep 51 (1911).

[49]Charles M. Woodruff, 36 ABA Rep 52 (1911).

[50]J. Aspinwall Hodge, 36 ABA Rep 59-60 (1911).

[51]Alton Parker, "Annual Address," 19 South Carolina Bar Association Transactions 102 (1912), quoted in Steidle, "Conservative Progressives," p. 342.

[52]Ibid., pp. 352-53.

[53]36 ABA Rep 48 (1911); Kelly and Harbison, The American Constitution, pp. 597-99; Everett P. Wheeler to the New York Times, September 1, 1912, p. 10; Root to Taft, June 4, 1914, Root Papers, Box 166, Library of Congress; cf. Charles Warren, "The Progressiveness of the U. S. Supreme Court," 13 Columbia Law Review 294 (1913).

[54]Roosevelt to Charles Dwight Willard, October 28, 1911, Letters, VII, 427; cf. Roosevelt to Charles McCarthy, October 27, 1911, VII, 424. "I read twice over your letter about judges," Roosevelt wrote to Henry Stimson, "I am very keenly aware that there are not a few among the men who claim to be leaders in the progressive movement who bear unpleasant resemblances to the lamented Robespierre and his fellow progressives of 1791 and '92." February 5, 1912, VII, 494.

[55]"Judges and Progress," The Outlook 100 (January 6, 1912), 40-48; William Henry Harbaugh, Power and Responsibility: The Life and Times of Theodore Roosevelt (New York: Farrar, Straus and Cudahy, 1961), pp. 420-21.

[56]Harbaugh, p. 422; J. Leonard Bates, The United States, 1898-1928 (New York: McGraw Hill, 1976), p. 118; Roosevelt to Lodge, March 1, 1912, Letters, VII, 515n.; Jessup, Elihu Root, p. 243.

[57]William Allen White, The Autobiography of William Allen White (New York: The Macmillan Co., 1946), p. 456. White, who had more political sense but less character than either Roosevelt or Taft, had difficulty understanding decisions made on principle by either man. While writing his Autobiography thirty years later, White was still trying to convince himself that Roosevelt had not really advocated the recall of judicial decisions, "only...the statutes upon which the decisions were made. Probably he meant something of that sort."

[58]Roosevelt to Kohlstatt, March 16, 1912, Letters, VII, 526-27.

[59]Harbaugh, Power and Responsibility, p. 424.

[60]Theodore Roosevelt, "The Judges, the Lawyers and the People," The Outlook 101 (August 31, 1912), 1003-07.

[61]Harbaugh, Power and Responsibility, p. 423. Stephen Stagner, in "The Recall of Judicial Decisions and the Due Process Debate," 24 American Journal of Legal History 257 (1980), argues that the American Bar Association "took an extreme position in opposition to Roosevelt [and] did not speak for all attorneys." (p. 259) Stagner, however, has difficulty finding many true supporters of Roosevelt's position. He quotes seven individuals who were to some degree sympathetic to the recall of judicial decisions. Only four of these men could be termed influential lawyers

in 1912: William Draper Lewis, Peter S. Grosscup, Harold Remmington, and Albert M. Kales. U.S. Circuit Judge Peter Grosscup is the most ironic inclusion among this group because it was his action during the Pullman strike which instigated the phrase "government by injunction." (National Cyclopaedia of American Biography, XV, 253.) Both Remmington, a wealthy authority on bankruptcy law, and Lewis were members of the ABA. Stagner is apparently unaware of the research of Barbara Steidle whose hard figures demonstrate the near unanimity of elite opinion on judicial recall. Stagner also misunderstands the basis of conservative opposition to the recall, believing it to be founded upon "an archaic constitutional theory that saw property rights as absolute." (p. 272)

[62]Ibid., pp. 423, 544; Roosevelt to Learned Hand, November 22, 1911, Letters, VII, 441; cf. Stagner, pp. 270-71.

[63]Steidle, "Conservative Progressives," pp. 351-52; Roosevelt wrote an introduction for Ransom's book, Majority Rule and the Judiciary (New York: Scribner's, 1912) and praised it highly; cf. Roosevelt to Ransom, April 28, 1912, Letters, VII, 536-37. Ironically, Ransom served as president of the ABA in 1935-36 when the organization was all but formally engaged in a struggle with the New Deal.

Elihu Root called Lewis a "crank professor" who should be collected by "a sheriff with a writ de lunatico." (Root to Taft, March 18, 1912, Taft Papers.) Later, however, after working with Lewis to raise educational requirements for admission to the bar (see above, Chapter 7), this antagonism broke down and the two men became friends. Lewis eventually persuaded Root to serve as the titular head of the American Law Institute, of which Lewis became Secretary and de facto director in 1923. As one biographer has said, "It was always something of a mystery how Lewis, whose politics often clashed sharply with those of the practicing lawyers and judges in the institute, was able to maintain authority and harmony." (Stephen Botein, "William Draper Lewis," DAB, Supplement 4, p. 492.)

[64]37 ABA Rep 575 (1912).

[65]Steidle, pp. 354-68. "Of the remaining states in the Union, the sentiments of the New York bar had already been voiced and that organization held an additional meeting in April, 1912, expressly to condemn the recall of judges and decisions [being currently considered by a state constitutional convention]. The president of the Utah bar simply requested an expression of opinion from his

association....Of the sixteen states having no discussion, six had either no state organizations or records; the Montana bar was temporarily disorganized and held no meeting; Georgia, Maine, and New Mexico took up the issue at later dates. Oregon and Arizona had recall amendments and Oklahoma had limited...some of the most controversial judicial powers....Massachusetts provided for removal of judges by 'address' (legislative petition to the governor); Vermont and New Hampshire were not much affected by controversial judicial issues, and the former provided a periodic vote on the retention of judges appointed for life." (pp. 354-55n.)

[66]Ibid., 367-68; Kellogg, "The Judicial Recall," 17 Maryland State Bar Association Report 204 (1912); the local progressive was W. Cabell Bruce, former president of the Maryland State Senate (pp. 77-98).

[67]Francis McGovern, 37 ABA Rep 3-8 (1912).

[68]S. S. Gregory, "Address of the President," 37 ABA Rep 255 (1912).

[69]Frank B. Kellogg, "New Nationalism," 37 ABA Rep 341 @ 350 (1912).

[70]George Sutherland, "The Courts and the Constitution," 37 ABA Rep 371 @ 373, 379 (1912). Sutherland even defended Ives, though he disagreed with the rationale for the decision given by the New York Court of Appeals (p. 388).

[71]Henry D. Estabrook, "The American Judicial System: The Judges," 37 ABA Rep 393 @ 395 (1912).

[72]"Report of the Committee to Oppose the Judicial Recall," 37 ABA Rep 574-589 (1912); 38 ABA Rep 579 @ 587 (1913).

Ellinwood, a prominent corporation lawyer, had been a member of the Arizona Constitutional Convention in 1910 but had refused to sign the completed constitution because of its judicial recall provisions. "Everett E. Ellinwood," National Cyclopaedia of American Biography, XXXIV, 170-71.

[73]"A Select Jury," Independent 73 (September 5, 1912), 576-77; cf. New York Times, September 2, 1912, p. 8.

[74]Cf. Steidle, "Conservative Progressives," pp. 373-74, especially the list of legal periodical articles given in

footnote 99; Duane A. Smith, "Colorado and Judicial Recall," 7 American Journal of Legal History 198 @ 202 (1963).

[75]"Report of the Committee to Oppose the Judicial Recall," 38 ABA Rep 579 @ 581-83 (1913).

[76]The objective biographical information may be found in Who Was Who and in Brown's obituary in the Minneapolis Tribune, May 23, 1926, p. 1. My subjective opinion was formed after reading Brown's fairly extensive collection of letters in the Taft Papers. For religious overtones to Brown's political position, cf., "The Dilemma of the Judicial Recall Advocate," a speech given to the Missouri State Bar Association on October 23, 1914, and included in the Taft Papers, Reel 143.

[77]"The Endless Battle for Constitutional Principle," 12 ABAJ 464 (1926).

[78]Ibid.; "Report of the Committee to Oppose the Judicial Recall," 38 ABA Rep 579 @ 580 (1913).

[79]Ibid., pp. 580-81; Brown to Frederick Wadhams, July 23, 1914, Taft Papers.

[80]Rome Brown, 39 ABA Rep 38-39 (1914); Brown to Taft, December 17, 1913, October 12, 1914, Taft Papers; cf. H. S. Hoshour, "An Argument Against the Judicial Recall," 26 Green Bag 517 (1914).

[81]Rome Brown to Taft, February 26, 1914; Brown to Members of the American Bar Association Committee to Oppose the Judicial Recall, January 27, 1915; Brown to Taft, July 18, 1914.

Brown did not accept honoraria for his speaking engagements but did require the bar associations to pay his expenses. Brown to Harry Skinner, February 19, 1914, Taft Papers.

[82]Aubrey Lee Brooks, Walter Clark, Fighting Judge (Chapel Hill: University of North Carolina Press, 1944), pp. 192-93; William A. Guthrie to Clark, July 2, 1914; R. C. Lawrence to Clark, July 3, 1914; Clark to Frank S. Spruill, July 4, 1914; Clark to A. W. Graham, July 4, 1914, July 8, 1914; in Aubrey Lee Brooks and Hugh Talmage Lefler, eds., The Papers of Walter Clark (Chapel Hill: University of North Carolina Press, 1948); Tyrrell Williams to the Editor, Nation 99 (October 22, 1914), 497 and (November 19, 1914), 605. Rome Brown to Tyrrell Williams, November 23,

1914, Taft Papers; cf. Brown to Taft, July 3, 1914, Taft Papers.

Clark opposed life tenure for federal judges and the power of federal courts to declare acts of Congress unconstitutional. He suspected that his local enemies had inspired Brown's attack and had even provided him with some of his more extravagant language. A friend hinted darkly that "Duke Water Power Company...had Brown carried down to North Carolina for the purpose of assailing you." C. C. Davis to Clark, July 9, 1914, in The Papers of Walter Clark, p. 251.

[83]Taft to Brown, February 17, 1914; cf. Brown to Taft, March 8, 1915, Taft to Horace Taft, March 21, 1915, Taft Papers. A few years later Taft addressed Brown as "Old Howitzer," "Old Krupp Gun," and "Old Boanerges." Taft to Brown, April 1, 1921, Taft Papers.

By delightful coincidence, a few months after Taft called Clark an "anarchistic crank," an ABA "process letter" in the former President's name was sent to the Chief Justice inviting him to become a member of the "Judicial Section" of the American Bar Association. Clark thanked Taft for his invitation and joined. Clark to Taft, April 3, 1914, The Papers of Walter Clark, p. 242.

[84]Taft to Brown, July 21, 1914; Taft to Wadhams, July 27, 1914, Taft Papers; cf. Francis Rawle to Brown, June 15, 1921, Taft Papers; Rawle to W. Thomas Kemp, September 21, 1922, John W. Davis Papers, III, 14, Yale University.

[85]Brown to Taft, July 18, 1914; June 7, 1921, Taft Papers; cf. Taft, "Address of the President," 39 ABA Rep 359 @ 380 (1914).

[86]"Report of the Committee to Oppose Judicial Recall," 40 ABA Rep 518 @ 519 (1915); Rome Brown, 39 ABA Rep 40 (1914).

[87]Roosevelt to Hiram Johnson, July 30, 1914, Letters, VII, 787.

[88]Steidle, "Conservative Progressives," p. 377.

[89]John Morton Blum, The Republican Roosevelt (Cambridge: Harvard University Press, 1954), p. 114; Roosevelt to Felix Frankfurter, December 19, 1917, Letters, VIII, 1262-63.

[90]Oakland Tribune, April 30, 1916, quoted in "Report of the Committee to Oppose Judicial Recall," 2 ABAJ 441 @ 445 (1916).

[91]"Report of the Committee to Oppose Judicial Recall," 40 ABA Rep 518 @ 522 (1915). There are numerous incomplete descriptions of recall attempts in the reports of Brown's committee. To my knowledge, no scholarly investigation of these proceedings has ever been made.

[92]Ibid.

[93]Hamilton Lewis, 1 ABAJ 556 (1915); cf. Chief Justice Edward White, 39 ABA Rep 120 (1914).

[94]James Grafton Rogers, "Fifty Years of the American Bar Association," 53 ABA Rep 518 @ 525 (1928).

[95]Sidney T. Miller to Taft, January 28, 1914, Taft Papers.

[96]Max Radin, "The Achievements of the American Bar Association," 26 ABAJ 19 @ 24 (1940).

[97]Herbert Harley, "Organization of the Bar," Annals of the American Academy 52 (March, 1914), 71, 81.

[98]Rome Brown to Frank Cove, January 28, 1914; Brown to Winfield S. Hammond, September 25, 1914, Taft Papers; Brown, "The Dilemma of the Judicial Recall Advocate," (October 23, 1914), galley proofs in Taft Papers, Reel 143; Brown, "The Lawlessness of the Judicial Recall," [Annual Address delivered before the State Bar Association of South Dakota at Pierre, January 14, 1915], in Taft Papers, Reel 148.

[99]Rome Brown, "The Socialist Menace to Constitutional Government," 4 ABAJ 54 @ 71 (1918).

[100]"Minority Report," 42 ABA Rep 444 (1917); "Report of the Committee to Oppose Judicial Recall," 40 ABA Rep 518 @ 523 (1915); Rome Brown to Frederick Wadhams, May 5, 1919, Taft Papers.

It is well to remember that the National Nonpartisan League had taken control of the government of North Dakota by 1919 and that its basic grievance was the alleged monopoly over the grain trade exercised by the Minneapolis Chamber of Commerce. Brown, of course, was a prominent corporation lawyer from Minneapolis.

[101]Hampton Carson to W. Thomas Kemp, June 28, 1921, Carson Papers; Brown to Frederick Wadhams, May 5, 1919; Brown to William A. Blount, July 17, 1919, Taft Papers; cf. "Light from the Lawyers," New Republic 20 (September 17, 1919), 190, for an example of how the Association could be blamed for Brown's rhetoric.

[102]Brown to Wadhams, May 5, 1919; Brown to Blount, July 17, 1919; Brown to George B. Young, August 1, 1919; Brown to Hampton Carson, December 5, 1919; Brown to Members of the Recall Committee, June 10, 1919, Taft Papers.

[103]Rome Brown, 44 ABA Rep 65-68 (1919).

[104]Brown to Carson, December 5, 1919, Taft Papers; William Draper Lewis, 44 ABA Rep 68-69 (1919).

[105]44 ABA Rep 70, 89 (1919); Brown to Carson, December 5, 1919, Taft Papers. Although the Recall Committee had been specifically continued by the convention, it was dropped without explanation from the list of special committees.

[106]Ibid.; Brown to George T. Page, September 4, 1919, Taft Papers. There is another copy of this resignation letter in the Roscoe Pound Papers, Box 215. Both George Page and Hampton Carson, the outgoing and incoming presidents of the Association, urged Brown to withdraw his resignation, but he refused. Carson to W. Thomas Kemp, June 28, 1921, Carson Papers.

A few other members left the Association with Brown, including Henry S. Forester who had held a similar chairmanship in the New York State Bar Association. It was Forester's theory that recall was "really a Pan-German agitation carried on through pseudo-Swiss propagandists, the inevitable result of which would have been the disintegration of the United States so as to be over ripe for conquest by Pan Germany." Forester to Taft, June 11, 1921, Taft Papers.

[107]Brown to Carson, December 5, 1919; Brown to Taft, November 19, 1920, September 24, 1921, October 3, 1921. While at the Tribune Brown confided to Vice President Coolidge that Woodrow Wilson "was tainted with Socialism." Brown to Coolidge, May 21, 1921, Taft Papers.

[108]Brown to Taft, October 3, 1921, Taft Papers; "Rome G. Brown, Riparian Rights Authority Dies," Minneapolis Tribune, May 23, 1926, p. 1.

The evidence for Brown's attempt to regain a committee chairmanship is circumstantial but strong. In September, 1922, his supporter and older contemporary, Francis Rawle, wrote a letter to the Association Secretary which referred to Brown as "the great dynamic force in the American Bar Association....He ought to be utilized. But do not put him on a minor committee--put him somewhere where he has dragons to fight." The Secretary passed the letter on to President John W. Davis, who apparently filed it. Francis Rawle to W. Thomas Kemp, September, 1922, Davis Papers, III, 14.

At his death the ABA Journal praised Brown as "a man following what Mr. Alfred Z. Reed has styled 'the public profession of the law,'" a man working "for something far more important than any class or professional interest--the interest of the country as a whole." "The Endless Battle for Constitutional Principle", 12 ABAJ 464-65 (1926).

[109]Melvin I. Urofsky, Louis D. Brandeis and the Progressive Tradition (Boston: Little, Brown and Company, 1981), pp. 104-105; Arthur S. Link, Wilson: Confusions and Crisis (Princeton: Princeton University Press, 1964), pp. 323-35.

[110]"Autobiographical Portraits," Box 16, Alton B. Parker Papers, Library of Congress.

[111]Taft to Gus Karger, January 31, 1916, Taft Papers.

[112]Ibid.; Brandeis to Alice Goldmark Brandeis, December 4, 1918, in Melvin I. Urofsky and David W. Levy, eds., Letters of Louis D. Brandeis, (Albany, New York: State University of New York Press, 1971-75), IV, 370.

[113]Urofsky, Brandeis, pp. 111; Alpheus T. Mason, Brandeis: A Free Man's Life (New York: Viking Press, 1946), pp. 489-90.

[114]Taft to George Wickersham, March 14, 1914, Taft Papers; cf. Taft to Wickersham, March 20 and March 27, 1914; Wichersham to Taft, Feb. 1, 1916.

[115]Quoted in Mason, Brandeis, p. 489.

[116]A. L. Todd, Justice on Trial: The Case of Louis D. Brandeis (New York: McGraw-Hill Book Company, 1964), p. 159; Mason, Brandeis, p. 489.

[117]Quoted in Todd, p. 160.

[118]Ibid.

[119]Ibid., pp. 162-63.

[120]Louis Brandeis to Norman Hapgood, March 14, 1916, in Urofsky and Levy, eds., Letters, IV, 118-119.

[121]New Republic, 6 (March 18, 1916), 165; Burton J. Hendrick, "How Should a Lawyer Behave?" World's Work 33 (January, 1917), 328-335; Mason, Brandeis, p. 490; cf. New Republic, 6 (March 25, 1916), 202-04.

[122]"Before the hearings closed so triumphantly the American Bar Association launched an all-out attack." Mason, Brandeis, p. 489.

"The American Bar Association, including seven former presidents of that organization...alleged that Brandeis was not fit to take a seat on the Supreme Court." J. Leonard Bates, The United States, 1898-1928: Progressivism and a Society in Transition (New York: McGraw-Hill Book Company, 1976), p. 147.

"That the opposition of the ABA to Brandeis did not come through 'channels', but was articulated as the personal views of seven former presidents, should not be interpreted as something less than the accurate views of the then small membership of the ABA." Joel B. Grossman, Lawyers and Judges: The ABA And the Politics of Judicial Selection (New York: John Wiley and Sons, Inc., 1965), p. 55.

[123]Cf. Brandeis to John Hinkley, July 20, 1905, in Urofsky and Levy, eds., Letters, I, 338-39. To my knowledge, no biography of Brandeis or history of the Brandeis nomination has mentioned Brandeis' long membership in the ABA, from 1893 to 1917.

[124]The living ex-presidents who did not sign the protest against the Brandeis nomination were Edmund Wetmore, Henry St. George Tucker, George R. Peck, Alton B. Parker, J. M. Dickinson, Frederick Lehmann, Charles Libby, Edgar H. Farrar, Stephen S. Gregory and Frank Kellogg; cf. Todd, Justice on Trial, p. 161. (Todd says that there were sixteen men who had served as ABA presidents still living when actually there were seventeen.)

[125]At least one Jewish member of the Association resigned, and Julius Henry Cohen, the noted writer on legal ethics, declared that it was "unfortunate" that the ex-presidents "gave the impression that what they were doing was official." New York Times, June 1, 1916, p. 9; June 2, 1916, p. 10.

[126]Todd, p. 161; Grossman, Lawyers and Judges, p. 55; Urofsky, Brandeis, p. 115.

[127]Taft to George Whitelock, October 6, 1914, Taft Papers; cf. Arthur P. Young, Books for Sammies: The American Library Association and World War I (Pittsburgh: Beta Phi Mu, 1981).

The Executive Committee did endorse the raising of a fund for "European lawyers in distress," and though Taft was unenthusiastic, a group headed by Joseph Choate sent about $13,000 to London for distribution to Belgian refugees. Rogers, American Bar Leaders, p. 201; Whitelock to Taft, January 28, 1915, Taft Papers.

[128]41 ABA Rep 34-35 (1916).

[129]Rogers, American Bar Leaders, p. 202.

[130]New York Times, September 5, 1917, p. 5; cf. 42 ABA Rep 98 (1917).

[131]42 ABA Rep 25-26 (1917).

[132]Charles Evans Hughes, "War Powers Under the Constitution," 42 ABA Rep 232 (1917); "War Power Ample, Hughes Declares," New York Times, September 6, 1917, p. 1; cf. William A. Hayes, 42 ABA Rep 84-85 (1917). Hughes' speech was carried by the Times almost verbatim.

[133]Gaston de Leval, "Prussian Law as Applied in Belgium," 42 ABA Rep 301 (1917); Whitelock to Taft, June 4 and June 13, 1917, Taft Papers; quotation from speech at pages 316-17; New York Times, September 7, 1917, p. 5.

[134]George T. Blakey, Historians on the Homefront: American Propagandists for the Great War (Lexington: University Press of Kentucky, 1970), pp. 30, 58-59; Robert D. Ward, "The Origin and Activities of the National Security League, 1914-1919," Mississippi Valley Historical Review, 47 (June, 1960), 51-65; John Carver Edwards, Patriots in Pinstripe: Men of the National Security League (Washington, D.C.: University Press of America, 1982), pp. 93-94, 100-02.

The National Security League was founded in 1915 by S. Stanwood Menken, a New York corporation lawyer and former advocate of Henry George's single tax. Joseph Choate, Elihu Root and Alton Parker served as honorary officers of the organization, but there was no direct connection between the NSL and the ABA.

[135]Robert McNutt McElroy, "The Representative Idea and the War," 42 ABA Rep 249 @ 253 (1917).

[136]Thomas W. Hardwick, "The Regulation of Commerce Between the State Under the Commerce Clause of the Constitution of the United States," 42 ABA Rep 215 (1917); New York Times, September 5, 1917, p. 5.

[137]Ibid.; cf. Henry R. Rathbone, 42 ABA Rep 32 (1917). The version printed in the Report eliminates the reference to lawyers as "money grabbers."

[138]Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (New York: Oxford University Press, 1976), pp. 102-03.

[139]C. C. Bonney, 7 ABA Rep 55 (1884); Henry C. Semple, 7 ABA Rep 63 (1884); Lord Russell of Killowen, Lord Chief Justice of England, "International Law and Arbitration," 19 ABA Rep 253 (1896); John Hinkley, "Reminiscences of the American Bar Association," 21 ABAJ 452 @ 458; New York Times, August 21, 1896, p. 1; Francis Rawle, "Address of the President," 26 ABA Rep 261 @ 263 (1903); cf. Sir William R. Kennedy, "The State Punishment of Crime," 22 ABA Rep 359 @ 377 (1899); Richard Burton Haldane, "Higher Nationality," 38 ABA Rep 393 @ 413-15 (1913); Hampton Carson, 38 ABA Rep 16-17 (1913); Taft to Mabel Boardman, October 27, 1914, Taft Papers.

[140]James Bryce, "The Influence of National Character and Historical Environment on the Development of the Common Law," 31 ABA Rep 444 @ 461 (1907).

[141]Taft to Root, November 8, 1913, Root Papers, Library of Congress; Taft to James M. Beck, November 11, 1913, Taft Papers; Joseph Choate to Taft, November 19, 1913, Choate Papers, Library of Congress; Frank Kellogg to Taft, November 17, 1913, Taft Papers.

Neither Kellogg nor Choate were enthusiastic about the proposal. Choate believed that "there was insufficient ground for our obtruding upon [the British] in this way." Kellogg feared that such a trip would emphasize the power wielded by the governing clique and "would be considered a jaunt for the benefit of the few who can spend the time and money to go." Of course, a trip to London was made in 1924 after an official business meeting in Philadelphia.

[142]The words are John Dewey's; cf. John Dewey, "The Social Possibilities of War," in Joseph Ratner, ed.,

Characters and Events: Popular Essays in Social and Political Philosophy by John Dewey (New York: Henry Holt, 1929), II, 551-560; cf. Allen F. Davis, "Welfare, Reform and World War I," American Quarterly, 19 (Fall, 1967), 516-533.

[143]Andrew Squire, 43 ABA Rep 24-25 (1918).

[144]Henry R. Rathbone, 42 ABA Rep 32 (1917).

[145]Morton Keller, In Defense of Yesterday, pp. 12-13; cf. Walter George Smith, "Civil Liberty in America," 43 ABA Rep 209 @ 210-11 (1918).

[146]New York Times, September 7, 1917, p. 5: "Speeches at the Annual Dinner," 3 ABAJ 655-66 (1917).

[147]Ibid., p. 641; New York Times, September 7, 1917, p. 5.

[148]42 ABA Rep 23 (1917); however, contrast Stephen S. Gregory, 42 ABA Rep 60 (1917).

[149]Rogers, American Bar Leaders, p. 202; 42 ABA Rep 29-31, 53-55 (1917).

[150]Lawrence G. Brooks to the Editor of the ABAJ, January 4, 1923, 9 ABAJ 62 (1923); Lucien H. Alexander, "The Legal Profession and the War," 5 ABAJ 681 @ 686 (1919); John Lowell, "Report of the Special Committee for War Service of the American Bar Association," 5 ABAJ 178 (1919).

Lawrence Brooks, Lowell's secretary, reported that Lowell "worked for many weeks in a hubbub of noise which would have driven to distraction a man less engrossed in public service. I well remember the day that Mr. Whitelock walked in unexpectedly and chaffed Mr. Lowell on his surroundings. Indeed, Mr. Lowell had a haunting fear that some day Mr. Root might look him up and think the Committee located not as perhaps comported with the dignity of the American Bar Association." (9 ABAJ 62 [1923])

[151]George Whitelock to Taft, October 6, 1917, Taft Papers.

[152]"Extracts from Selective Service Regulations," in Taft Papers, Reel 186.

[153]Cf. Auerbach, Unequal Justice, pp. 102-06.

[154]"Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice, at Richmond, Va., April 16, 1918," in Congressional Record, 65 Cong., 2 sess., vol. 56, p. 6233.

[155]A. E. Bolton, "Individuality of Bench and Bar," California Bar Association Proceedings, 19 (1917), quoted in Auerbach, Unequal Justice, pp. 105-06.

[156]"Suggestions of Attorney General Gregory," pp. 6234-35.

[157]William A. Hayes, "The Purpose, History, and Present Program of the American Bar Association," Reports of the State Bar Association of Wisconsin 566 @ 581 (1918).

[158]Quoted in David M. Kennedy, Over Here: The First World War and American Society (New York: Oxford University Press, 1980), p. 52.

[159]Walter George Smith, "Civil Liberty in America," 43 ABA Rep 209 @ 216 (1918); cf. Thomas I. Parkinson, 43 ABA Rep 62 (1918).

[160]Rogers, American Bar Leaders, p. 202; Lucien Hugh Alexander, "The Legal Profession and the War," 5 ABAJ 681 @ 682. Alexander's "proof" was that such national leaders as President Wilson, Secretary of War Baker, Secretary of the Navy Daniels, and General Pershing were lawyers. With similar logic he might have argued that Protestants had won the war.

Chapter 9

[1]Jerold Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (New York: Oxford University Press, 1976), p. 130.

[2]Arthur S. Link, "What Happened to the Progressive Movement in the 1920's?" American Historical Review, 64 (1959), 850; cf. Clarke A. Chambers, Seedtime of Reform: American Social Service and Social Action, 1918-1933 (Minneapolis: University of Minnesota Press, 1963); Paul W. Glad, "Progressives and the Business Culture of the 1920s," Journal of American History, 53 (1966), 75-89; James Weinstein, "Radicalism in the Midst of Normalcy," Journal of American History, 52 (1966), 773-790; Burl Noggle, "The Twenties: A New Historiographical Frontier,"

Journal of American History, 53 (1966), 311-312; Otis L. Graham, Jr., The Great Campaigns: Reform and War in America, 1900-1928 (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1971), especially Part Three, "Reform: 1917-1928," pp. 97-169.

[3]Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), p. 101.

[4]Roscoe Pound to Everett P. Wheeler, January 27, 1919; Minutes of the Committee to Suggest Remedies and Propose Laws Relating to Procedure, April 29, 1919, Wheeler Papers, New York Public Library.

[5]New York Times, August 28, 1919, p. 15.

[6]"Criticizes Army Courts," New York Times, January 4, 1919, p. 11; "Is Court Martial Law Up to Date?" ibid., February 14, 1919, p. 1.

[7]44 ABA Rep 44-61, 70-84 (1919); Hinkley's remark at page 60.

[8]John Lowell, 44 ABA Rep 84 (1919); "Samuel Tilden Ansell," National Cyclopaedia of American Biography, XLVII, 128-29; Norbert Brockman, "The Politics of the American Bar Association," Ph.D. dissertation, Catholic University of America, 1963, p. 78.

[9]Hampton Carson, "Heralds of a World Democracy: The English and American Revolutions," 43 ABA Rep 241 @ 261 (1918).

[10]John H. Clarke, "A Call to Service: The Duty of the Bench and Bar to Aid in Securing a League of Nations to Enforce the Peace of the World," 43 ABA Rep 225 @ 233 (1918); cf. Federico Cammero, "The Present Value of Comparative Jurisprudence," 43 ABA Rep 303 (1918).

[11]George T. Page, "Address of the President," 44 ABA Rep 151 (1919); David Jayne Hill, "The Nations and the Law," 44 ABA Rep 171 (1919); Robert Lansing, "Some Legal Questions of the Peace Conference," 44 ABA Rep 238 (1919); Dexter Perkins, "David Jayne Hill," DAB, Supplement 1, pp. 401-02.

[12]6 ABAJ 190-99 (1920); New York Times, August 17, 1920, p. 3 and August 28, 1920, p. 6; cf. Edgar A. Bancroft to the American Bar Association Journal, June 12, 1920, Taft Papers, Reel 219.

[13]Walter S. Logan, 22 ABA Rep 7 (1899); cf. Morton Keller, In Defense of Yesterday: James M. Beck and the Politics of Conservatism, 1861-1936 (New York: Coward-McCann, Inc., 1958), pp. 53, 104.

[14]David J. Brewer, "A Better Education the Great Need of the Profession," 18 ABA Rep 441 @ 454, 456 (1895).

[15]"The Lawyer and the World Court," 12 ABAJ 100 (1926).

[16]Rokuichiro Masujima, "Address," 46 ABA Rep 245 @ 251 (1921).

[17]John D. Hicks, Republican Ascendancy, 1921-1933 (New York: Harper & Row, 1960), pp. 145-46; "Lawyers for the World Court," New York Times, September 3, 1923, p. 12; 48 ABA Rep 105 (1923); "The President's Proposal," 9 ABAJ 160 (1923).

[18]Norbert Brockman, "The Politics of the American Bar Association," p. 76.

[19]Ibid.; "The Lawyer and the World Court," 12 ABAJ 100 (1926).

[20]"Thrift and the Law," 6 ABAJ 200 (1920).

[21]"Delinquent Children," 6 ABAJ 157 (1920); cf. George W. Wickersham, "The Work of the National Crime Commission," 51 ABA Rep 233 @ 236 (1926).

[22]James M. Beck, "The Spirit of Lawlessness," 46 ABA Rep 167 @ 171 (1921); cf. Beck, "The Future of Democratic Institutions," 51 ABA Rep 248 @ 260 (1926).

[23]Keller, In Defense of Yesterday, p. 197; cf. pp. 152, 158.

[24]F. Dumont Smith, "The Kansas Industrial Court," 47 ABA Rep 208 @ 218 (1922); cf. George T. Page, "Civilization and Liberty," 6 ABAJ 47 @ 48 (1920).

[25]Luther Z. Rosser, "The Illegal Enforcement of Criminal Law," 46 ABA Rep 266 (1921).

[26]James M. Beck, "The Spirit of Lawlessness," 46 ABA Rep 167 @ 176 (1921).

[27]Ibid., p. 173.

[28]"Justice and Civilization," 7 ABAJ 234 (1921); cf. David Jayne Hill, "The Nations and the Law," 44 ABA Rep 171 @ 174 (1919); Frank O. Lowden, "Fundamentals of Government," 8 ABAJ 475 @ 478 (1922); Viscount Cave, Lord Justice of Appeal, "The Future of International Law," 45 ABA Rep 181 @ 186 (1920); "Report of the Special Committee on American Citizenship," 49 ABA Rep 255 @ 257 (1924).

[29]Sir Auckland Geddes, "The Ancient Problem," 45 ABA Rep 171 @ 179 (1920).

[30]James M. Beck, "The Spirit of Lawlessness," 46 ABA Rep 167 @ 173 (1921); however, cf. "Report of the Committee on American Citizenship," 49 ABA Rep 255 @ 259 (1924).

[31]"American Lawyers See Mussolini," New York Times, August 14, 1924, p. 2. Curiously the Association was at this time investigating designs for an official seal. Someone, perhaps Frederick Wadhams, suggested the adoption of a device with fasces. Hampton Carson was frank in his disapproval, however, arguing that the fasces had "no proper association with the administration of justice in America." Carson to Wadhams, May 15, 1925, Carson Papers, Pennsylvania Historical Society.

[32]William E. Leuchtenburg, The Perils of Prosperity, 1914-32 (Chicago: University of Chicago Press, 1958), p. 67; cf. Cordenio A. Severance, "The Constitution and Individualism," 47 ABA Rep 163 @ 184-85 (1922).

[33]Boston Globe, September 3, 1919, p. 4. These statements of Langtry, who was an editor by profession, were not published in the Reports.

[34]See above p. 416 ; cf. Albert J. Beveridge, "The Assault upon American Fundamentals," 45 ABA Rep 188 @ 211-216 (1920).

[35]John Higham, Strangers in the Land: Patterns of American Nativism, 1860-1925 (New York: Atheneum, 1973), 2nd ed., especially pp. 254-77, 300-24.

[36]George T. Page, "Address of the President," 44 ABA Rep 151 @ 157-58, 161 (1919); cf. Page, "Civilization and Liberty," 6 ABAJ 47 (1920); James Grafton Rogers, American Bar Leaders (Chicago: American Bar Association, 1932), p. 199.

[37]Cordenio A. Severance, "The Constitution and Individualism," 47 ABA Rep 163 @ 187 (1922).

[38]Kimbrough Stone, "Need to Enforce Respect for Law," 8 ABAJ 162 @ 163 (1922); Charles F. Libby, both an ultraconservative and a Francophile, had warned the Association of the dangers from the new immigration as early as 1910 after he had perused the works of Gustav LeBon. Charles F. Libby, "Address of the President," 35 ABA Rep 331 @ 349 (1910).

Atlanta lawyer Luther Z. Rosser warned that being "a very Cave of Adullam" for the world's distressed meant "terrible burdens" to come. "The social reaction in so great a melting pot will surely manifest itself in social storms and earthquakes." Luther Z. Rosser, "The Illegal Enforcement of Criminal Law," 46 ABA Rep 266 @ 270-71 (1921).

[39]Jacob M. Dickinson, "National Standards," 9 ABAJ 642-43 (1923). Dickinson was no cranky xenophobe. In his youth he had studied law in Leipzig, and he spoke fluent German.

[40]Pierce Butler, "Some Opportunities and Duties of Lawyers," 48 ABA Rep 209 @ 216 (1923); cf. Cordenio A. Severance, "The Constitution and Individualism," 47 ABA Rep 163 @ 187 (1922); "The Endless Battle for Constitutional Principle," 12 ABAJ 464-65 (1926).

[41]R. E. L. Saner, "Address at Washington Memorial Chapel, Valley Forge, July 4, 1924," 49 ABA Rep 123 @ 125.

[42]Edwin S. Puller, 8 ABAJ 713 (1922); cf. speech of Cordenio A. Severance quoted at 8 ABAJ 585 (1922).

[43]"Program for Promoting American Ideals," 8 ABAJ 585 (1922); Rogers, American Bar Leaders, pp. 222-225; 49 ABA Rep 243 (1924).

[44]47 ABA Rep 416 (1922).

[45]Robert E. L. Saner, "The Schools Must Save America," National Education Association Journal, 12 (December, 1923), 395; Cordenio A. Severance, "The Constitution and Individualism," 47 ABA Rep 163 @ 188 (1922).

[46]49 ABA Rep 271 (1924). It is difficult to know what function the "Creed" was intended to serve. It is more than five times longer than the Apostles Creed, too long to recite at any public gathering, much less memorize.

[47]48 ABA Rep 442 (1923).

[48]Hampton Carson, "Heralds of a World Democracy: The English and American Revolutions," 43 ABA Rep 241 @ 260 (1918); cf. Andrew A. Bruce, 47 ABA Rep 68 (1922); John F. Dillon, "Address of the President," 15 ABA Rep 167 @ 198 (1892); D. H. Chamberlain, 8 ABA Rep 14 (1885); Cortlandt Parker, "Alexander Hamilton and William Paterson," 3 ABA Rep 149 @ 150 (1880).

[49]Thomas James Norton, "National Encroachments and State Aggressions," 51 ABA Rep 309 @ 327 (1926); Thomas J. Norton, The Constitution of the United States: Its Sources and Its Application (Boston: Little, Brown & Company, 1922); cf. Herman Belz, "The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship," 13 American Journal of Legal History 110 (1969).

[50]Ben W. Hooper, "Labor, Railroads and the Public," 9 ABAJ 15 @ 18 (1923).

[51]S. E. N. Moore to the Editor, 6 ABAJ 124 (1920).

[52]Norton, "National Encroachments," p. 327.

[53]"Report of the Special Committee on American Citizenship," 49 ABA Rep 260, 263-64 (1924); 53 ABA Rep 327 (1928); New York Times, January 15, 1924, p. 30; 49 ABA Rep 264 (1924): "Teachers should have not only sufficient knowledge, but they should, above all, ground their teaching on bed-rock Americanism and be imbued with a desire to communicate such spirit to their pupils."

[54]"Teaching the Constitution in the Schools," 14 ABAJ 108 @ 109 (1928); cf. George W. Ritter to John W. Davis, March 28, 1923, Davis Papers, III, 14, Yale.

[55]49 ABA Rep 261 (1924); 52 ABA Rep 237-38 (1927).

[56]Saner to Davis, May 4, 1922 and December 14, 1922; ? to Saner, February 13, 1923, Davis Papers, III, 14; 49 ABA Rep 266 (1924).

[57]New York Times, June 7, 1924, p. 5; May 9, 1925, p. 1; R. E. L. Saner, 49 ABA Rep 88 (1924); "Report of the Special Committee on American Citizenship," 49 ABA Rep 255 @ 266 (1924). In 1924 the first three prizes were $3500, $1000, and $500.

[58]New York Times, May 9, 1925, p. 1.

[59]Quoted in "The Oratorical Contests", 11 ABAJ 309 (1925). The contest, the hostile Chicago editorial continued, "put a premium on mere talk, of which may we be permitted to remark, this republic has an overproduction."

[60]Josiah Marvel to Members of the American Bar Association, May 18, 1925, Carey Papers, Oregon Historical Society; 11 ABAJ 441 (1925).

[61]"Report of the Standing Committee on American Citizenship," 50 ABA Rep 335 @ 336 (1925); 52 ABA Rep 235 @ 238 (1927); 53 ABA Rep 325 @ 326 (1928).

[62]R. E. L. Saner to C. H. Carey, March 31, 1923, Carey Papers; "Report of the Special Committee on American Citizenship," 49 ABA Rep 255 @ 263, 265 (1924).

[63]"Suggested Outline for Address on Patriots Day, April 19," in Carey Papers.

[64]"Revitalizing Our National Heroes," 12 ABAJ 33 (1926); "Report of the Committee on American Citizenship," 51 ABA Rep 361 (1926).

[65]Edson R. Sunderland, History of the American Bar Association and its Work (Chicago: American Bar Association, 1953), p. 109.

[66]"The 'New Federalist' Series," 9 ABAJ 161 (1923); 9 ABAJ 142 (1923); "American Citizenship Movement" (printed announcement) in Carey Papers; "Report of the Special Committee on American Citizenship," 49 ABA Rep 255 @ 267 (1924).

[67]F[rederick] Dumont Smith, The Constitution: Its Story and Battles (Los Angeles: Kerr-Jefferson Company, 1923), pp. 24-26, 387, 389, 308, 394, 20. Even the conservative Thomas J. Norton called Smith's writing "poetry not history." Cf. F. Dumont Smith, "The Story of the Constitution," (Dallas: Citizenship Committee, 1923).

[68]"Report of the Committee on Reference Books on the Constitution," 13 ABAJ 166 (1927). The two other committee members were Edgar B. Tolman, editor of the Journal, and the great legal draftsman Ernst Freund.

Other "indispensable" books included John Fiske, The Critical Period in American History; Thomas J. Norton, The

Constitution of the United States; and James M. Beck, The Constitution of the United States. Charles Warren, Congress, the Constitution and the Supreme Court made the list as well; but of course, Charles Beard is nowhere to be found.

[69]Robert L. Hale, "Some Challenges to Conventional Legal Views," 9 ABAJ 329 (1923).

[70]Roscoe Pound, "Some Parallels from Legal History," 49 ABA Rep 204 @ 223 (1924).

[71]Rogers, American Bar Leaders, p. 224; cf. Norbert Brockman, "The Politics of the American Bar Association," Ph.D. dissertation, Catholic University of American, 1963, p. 79.

[72]Davis to Wadhams, April 17, 1923, Davis Papers, III, 14.

[73]Baldwin to Saner, May 23, 1923 on letter of Saner to Baldwin of the same date, Baldwin Papers, Yale.

[74]Auerbach, Unequal Justice, pp. 53-59; "Report of the Committee on Legal Aid Work," 47 ABA Rep 404 (1922).

[75]Auerbach, Unequal Justice, pp. 53-57; Reginald Heber Smith, "The Bar Adopts Legal Aid," Survey, 47 (October 15, 1921), 81.

[76]"Legal Aid for the Poor," Annals, 17 (January, 1901), 165-66, quoted in Auerbach, p. 55.

[77]The speakers were Reginald Heber Smith, Charles Evans Hughes, Ernest L. Tustin, and advocate of juvenile courts, Ben B. Lindsey. The greatest difference of opinion appeared in the speeches of Tustin, a strong advocate of municipally supported legal aid bureaus, and Charles Evans Hughes, who argued that government involvement might lead to political manipulation.

[78]Reginald Heber Smith, "The Relation between Legal Aid Work and the Administration of Justice," 45 ABA Rep 217 @ 220 (1920). Smith had recently published Justice and the Poor (1919), a study of legal aid work subsidized by the Carnegie Foundation.

[79]Ernest L. Tustin, "The Relationship of Legal Aid to the Municipality," 45 ABA Rep 236 @ 242 (1920).

[80]Charles E. Hughes, "Legal Aid Societies, Their Function and Necessity," 45 ABA Rep 227 @ 235 (1920).

[81]46 ABA Rep 159, 493 (1921); "Report of the Committee on Legal Aid Work," 47 ABA Rep 404 (1922); Reginald Heber Smith, "The Bar Adopts Legal Aid," Survey, 47 (October 15, 1921), 81; Smith, "The Interest of the American Bar Association in Legal Aid Work," Annals 205 (September, 1939), 108-113.

[82]John Higham, Strangers in the Land, p. 326.

[83]Quoted in ibid.

[84]Quoted in Morton Keller, In Defense of Yesterday, p. 166.

[85]"Report of the Committee on American Citizenship," 51 ABA Rep 361 @ 364 (1926). In 1924 La Follette's Conference for Progressive Political Action adopted a platform plank calling for the "[a]bolition of the tyranny and usurpation of the courts including the practice of nullifying legislation in conflict with the political, social, or economic theories of the judges." (Kirk H. Porter and Donald Bruce Johnson, comp., National Party Platforms, 1840-1964 [Urbana: University of Illinois, 1966], p. 256) La Follette was most exercised over the 5-4 decision in Hammer v. Dagenhart (1918) which struck down Congressional attempts to regulate child labor by means of the Commerce Clause.

[86]Cordenio A. Severance, "The Constitution and the Individual," 47 ABA Rep 163 @ 174, 176 (1922).

[87]Floyd E. Thompson, "Paternalism and Lawlessness," 48 ABA Rep 591 @ 593 (1923).

[88]Cf. for instance, Frank O. Lowden, "Fundamentals of Government," 8 ABAJ 475 @ 476 (1922); R. E. L. Saner, "Governmental Review," 49 ABA Rep 127 @ 136 (1924); Chester I. Long, "The Advance of the American Bar," 51 ABA Rep 158 @ 174 (1926); Thomas James Norton, "National Encroachments and State Aggressions," 51 ABA Rep 309 (1926).

[89]Dwight G. McCarty, "Protecting the Public: Encroachment of Social Legislation on Private Rights," 11 ABAJ 36 (1925); cf. William Draper Lewis, "Adaptation of the Law to Changing Economic Conditions," 11 ABAJ 11 (1925).

[90]Chester I. Long, "The Advance of the American Bar," 51 ABA Rep 158 @ 174 (1926); Nicholas Murray Butler, "The New American Revolution," 10 ABAJ 845 (1924).

[91]Alfred H. Kelly & Winfred A. Harbison, The American Constitution (New York: W. W. Norton & Co., Inc., 1976), 5th ed., p. 671; Long, "The Advance of the American Bar," p. 173; Norton, "National Encroachments and State Aggressions," pp. 310-312; Nicholas Murray Butler, "The New American Revolution," p. 849; cf. Thomas W. Hardwick, "The Regulation of Commerce Between the States under the Commerce Clause of the Constitution of the United States," 42 ABA Rep 215 @ 224-25, 230-31 (1917).

[92]"The LaFollette Amendments," 8 ABAJ 418 (1922); 21 ABAJ 11 (1935).

[93]Cortlandt Parker, "Address of the President," 7 ABA Rep 147 @ 182 (1884); Alexander R. Lawton, "Address of the President," 6 ABA Rep 137 @ 170 (1883); George G. Wright, "Address of the President," 11 ABA Rep 169 @ 215 (1888).

[94]George Sutherland, "Private Rights and Government Control," 42 ABA Rep 197 @ 201-04 (1917); Elihu Root, "Address of the President: Public Service by the Bar," 41 ABA Rep 355 @ 370-71 (1916); F. Dumont Smith, The Constitution, pp. 393-94.

[95]Philip C. Jessup, Elihu Root (New York: Dodd, Mead & Company, 1938), II, 477-79. Root argued the brewers' case before the Supreme Court in an unsuccessful attempt to have the Eighteenth Amendment ruled unconstitutional. A popular witticism was that "Hires' Root Beer" had been changed to "Beer Hires Root."

[96]43 ABA Rep 45-47, 65-67 (1918).

[97]Ibid., pp. 97-113.

[98]H. K. T., "Supporting the Constitution," 10 ABAJ 790-91 (1924); Kimbrough Stone; "Need to Enforce Respect for Law," 8 ABAJ 162-65 (1922); cf. Pierce Butler, "Some Opportunities and Duties of Lawyers," 48 ABA Rep 209 @ 222 (1923); Nicholas Murray Butler, "The New American Revolution," 10 ABAJ 845 @ 848 (1924).

[99]Frederick Wadhams to Hampton Carson, July 11, 1921, Hampton Carson Papers, Pennsylvania Historical Society. Shelton had already received the wine and whiskey before he

received Wadhams' letter, but he managed to "release" the alcohol before attracting any unwanted attention.

[100]William E. Dever, "The Problem of Law Enforcement in the Large Cities of the United States," 51 ABA Rep 221 (1926). Dever was followed on the program by George W. Wickersham, who mildly defended prohibition from Dever's assault.

Ironically, Dever had reversed the lax prohibition enforcement policy of his predecessor, "Big Bill" Thompson, and had ordered his police chief to crack down on the bootleggers. Unfortunately, the resulting destabilization of the "industry" resulted in a scramble for increased market shares by the surviving entrepreneurs, thus occasioning about four hundred violent deaths and giving Chicago a world-wide reputation for its gangsters. Samuel Walker, Popular Justice: A History of American Criminal Justice (New York: Oxford University Press, 1980), p. 181.

[101]David E. Kyvig, Repealing National Prohibition (Chicago: University of Chicago Press, 1979), p. 128.

[102]Frederic R. Coudert, "The Repeal of the Eighteenth Amendment and the Restoration of our Constitution," (March, 1931), Raskob Papers, quoted in ibid., p. 129.

[103]Kyvig, Repealing National Prohibition, p. 129; "A Referendum on Prohibition," 16 ABAJ 343 (1930); "Announcement of President Boston on Referendum," 16 ABAJ 756 (1930).

[104]New York Times, December 12, 1923, p. 12; December 21, p. 15; December 22, p. 6; December 23, p. 9; December 30, p. 4; January 17, 1924, p. 14; John W. Davis to R. E. L. Saner, December 24, 1923, Davis Papers, III, 15.

[105]Carl Sandburg, Smoke and Steel (New York: Harcourt, Brace & Howe, 1920), pp. 85-86; reprinted at 7 ABAJ 23 (1921).

ABA speakers and publications had a little to say about either the Scopes or the Sacco-Vanzetti cases. In 1922 the Journal printed a casual account of the Boston trial (Howard L. Stebbins, "The Sacco-Vanzetti Case," 8 ABAJ 677 [1922]), and in December 1927--after the anarchists' execution--it published a long article by a Canadian appellate judge who concluded that Sacco and Vanzetti had received a fair trial (William Renwick Riddell, "The Sacco-Vanzetti Case from a Canadian Viewpoint," 13 ABAJ 683 [1927]).

New York attorney Blewett Lee attacked the Tennessee legislature in "Anti-Evolution Laws Unconstitutional," 11 ABAJ 417 (1925), and ABA President Chester Long gave his support to Scopes a year after the Dayton trial ("The Advance of the American Bar," 51 ABA Rep 158 @ 168 [1926]).

[106]Alfred Hemenway, "The American Lawyers," 28 ABA Rep 309 @ 400 (1905). Hemenway quickly added that the judges in the Salem witch trials were "none of them members of the Bar."

[107]T. J. O'Donnell, "Has the Lawyer Lost Caste?" January 20, 1917 speech to the El Paso County Bar Association, in Everett P. Wheeler Papers, New York Public Library.

[108]Guy A. Thompson, "What the Lawyer Wishes from the Newspapers," 10 ABAJ 387 (1924). Thompson was elected president of the American Bar Association in 1931.

[109]Henry W. Taft to the Editor, New York Times, July 16, 1924, p. 16. Taft frankly admitted that the bar had "ceased to be the most powerful group in the community," no longer wielding "the influence in public affairs attributed to it by Bryce...and...de Tocqueville."

[110]10 ABAJ 819-20 (1924).

[111]"Proper Defense of Court and Bar," 11 ABAJ 100 @ 101 (1925).

[112]"The Technique of Misquotation," 13 ABAJ 574 (1927).

[113]"The Endless Battle for Constitutional Principle," 12 ABAJ 464 (1926).

[114]Walter George Smith, "Civil Liberty in America," 43 ABA Rep 209 @ 224 (1918).

[115]Elbert H. Gary, "Reconstruction and Readjustment," 44 ABA Rep 188 @ 196 (1919).

[116]Cf., for instance, George T. Page, "Address of the President," 44 ABA Rep 151 @ 167 (1919); Page, "Civilization and Liberty," 6 ABAJ 50 (1920); F. Dumont Smith, "The Kansas Industrial Court," 47 ABA Rep 208 @ 217 (1922); Morton Keller, In Defense of Yesterday, pp. 161-62.

[117]Charles Thaddeus Terry, "Law and Order in Industrial Disputes," 9 ABAJ 115 (1923).

[118]New York Times, August 28, 1919, p. 2.

[119]Luther Z. Rosser, "The Illegal Enforcement of Criminal Law," 46 ABA Rep 266 @ 282-83 (1921).

[120]Ben W. Hooper, "Labor, Railroads and the Public," 9 ABAJ 15 (1923); John B. Winslow, 6 ABAJ 37 (1920).

[121]"Industrial Warfare," 8 ABAJ 488 @ 489 (1922); cf. "II. Industrial Warfare," 8 ABAJ 560 (1922); Hooper, "Labor, Railroads and the Public," p. 18; "Fundamental Trouble in Wage Dispute," 8 ABAJ 648 @ 649 (1922).

[122]"Justice or War," 7 ABAJ 168 (1921); "The President's Message," 7 ABAJ 660 (1921).

[123]49 ABA Rep 52-53, 279-280, 285-88 (1924); cf. M. Louise Rutherford, The Influence of the American Bar Association on Public Opinion and Legislation (Philadelphia: privately printed, 1937), pp. 306-07; cf. W. E. Stanley, "The Kansas Industrial Court Act," 6 ABAJ 39 (1920); William L. Huggins, "A Few of the Fundamentals of the Kansas Industrial Court Act," 7 ABAJ 265 (1921); but also see, John S. Dean, "The Fundamental Unsoundness of the Kansas Industrial Court Law," 7 ABAJ 33 (1921).

[124]Charles Thaddeus Terry, "Law and Order in Industrial Disputes," 9 ABAJ 115 @ 116 (1923).

[125]Wolff Packing Co. v. Court of Industrial Relations 262 U. S. 522 (1923); New York Times, June 12, 1923, p. 1.

[126]Cf. 50 ABA Rep 86-87 (1925) and 51 ABA Rep 391-94 (1926).

[127]Jacob M. Dickinson, "National Standards," 9 ABAJ 642 @ 645 (1923); cf. Henry D. Clayton, "Usurpation of Governmental Functions by Secret Societies," 8 ABAJ 626 (1922).

[128]"Ignorance of History is No Excuse," 9 ABAJ 33 (1923).

[129]Pierce Butler, "Some Opportunities and Duties of Lawyers," 48 ABA Rep 209 (1923).

[130]Samuel Walker, Popular Justice: A History of American Criminal Justice (New York: Oxford University Press, 1980), pp. 161, 169-70.

[131]45 ABA Rep 124 (1920); Rutherford, The Influence of the ABA, pp. 181-82. From 1909 to 1920, the Association relied upon the American Institute of Criminal Law as a substitute for a Section of its own. The Institute, while legally independent, was associated with the ABA in much the same manner as the National Conference of Commissioners on Uniform State Laws (Sunderland, p. 121).

[132]Charles S. Whitman, "Unenforceable Law," 46 ABA Rep 260 @ 264 (1921); George E. Alter, "Securing a Model of Criminal Procedure," 49 ABA Rep 181 (1924); Chester I. Long, "The Advance of the American Bar," 51 ABA Rep 158 @ 160 (1926); Guy A. Thompson, "The Missouri Crime Survey," 51 ABA Rep 200 @ 219 (1926).

[133]"Law Enforcement III: A Workable Program for Improvement," 9 ABAJ 784 @ 785 (1923); cf. "Law Enforcement," 9 ABAJ 640 (1923); "Protecting the Public," 12 ABAJ 700 (1926); "The 'Threefold Necessity' in Effective Law Administration," 13 ABAJ 140 @ 141 (1927).

[134]"Justice and Civilization," 7 ABAJ 234 (1921).

[135]"The Endless Battle for Constitutional Principle," 12 ABAJ 464 @ 465 (1926).

[136]Belle Case LaFollette and Fola LaFollette, Robert M. LaFollette (New York: The Macmillan Company, 1953), II, 1055-57, 1128. La Follette first suggested a constitutional amendment on June 14, 1922, in a speech before the annual convention of the American Federation of Labor. He later repeated the proposal during his Presidential campaign of 1924.

[137]LeRoy Ashby, The Spearless Leader: Senator Borah and the Progressive Movement in the 1920's (Urbana: University of Illinois Press, 1972), pp. 32-33. Since even Chief Justice Taft regarded three of his brethren as "pretty radical," Borah was confident his plan would achieve the desired result without undermining the traditional separation of powers.

[138]John W. Davis, "Present Day Problems," 8 ABA Rep 193 @ 206 (1923); cf. "Four to Five Decisions," 9 ABAJ 232 (1923); "Four to Five Decisions II.," 9 ABAJ 305 (1923); "Letters of Interest to the Profession," 9 ABAJ 334-35 (1923); Thomas J. Norton, "The Supreme Court's Five to Four Decisions," 9 ABAJ 417 (1923); Norton, "What Damage Have Five to Four Decisions Done?" 9 ABAJ 721 (1923); Cordenio

A. Severance, "The Proposal to Make Congress Supreme," 8 ABAJ 459 (1922); Robert L. Hale, "Judicial Review Versus Doctrinaire Democracy," 10 ABAJ 882 (1924); William Draper Lewis, "Adaptation of the Law to Changing Economic Conditions," 11 ABAJ 11 (1925); "Preparing for the Supreme Court," 11 ABAJ 35 (1925); Chester I. Long, "The Advance of the American Bar," 51 ABA Rep 158 @ 167 (1926).

[139]"The Bar and the U. S. Supreme Court," 9 ABAJ 431 (1923).

[140]William Draper Lewis, "Adaptation of the Law to Changing Economic Conditions," 11 ABAJ 11 @ 13 (1925). Lewis shrewdly realized that the best hope for liberals lay not in changing the constitutional system but in "creat[ing] conditions" that would insure the selection of "a judiciary capable of moulding our Common Law to the needs of life."

[141]Sunderland, pp. 134-35; 43 ABA Rep 150-51 (1918); cf. Levi Cooke, 45 ABA Rep 88 (1920); R. E. L. Saner, "Governmental Review," 49 ABA Rep 127 @ 146; Charles E. Hughes, "Liberty and Law," 50 ABA Rep 183 @ 197 (1925); "Counting the Cost," 11 ABAJ 652 (1925).

[142]New York Times, December 7, 1926, p. 2; 48 ABA Rep 467-72 (1923); 49 ABA Rep 318-24 (1924); 53 ABA Rep 492-94 (1928). The perception of judicial underpayment has not changed much in the last sixty years. A recent member of the ABA Committee on Federal Judicial Compensation argued that Americans "ask judges to be purer than Caesar's wife, but...don't pay them what they are worth. They are the guardians of our Constitution." (Harold Tyler quoted in Time 116 [November 24, 1980], 63.)

[143]Moorfield Storey, 43 ABA Rep 38 (1918).

[144]43 ABA Rep 29-42; 79-82 (1918). Donald Fraser of Indiana declared himself to be perfectly satisfied with the way juries had treated the "fellow servant rule" (pp. 38-40).

[145]"Effort to Limit Power of Federal Judges," 10 ABAJ 303 (1924); 49 ABA Rep 344-48 (1924); 50 ABA Rep 410-14 (1925).

[146]Charles Evans Hughes, "Liberty and Law," 50 ABA Rep 183 @ 185 (1925).

[147]George T. Page, "Address of the President," 44 ABA Rep 151 @ 155 (1919); Calvin Coolidge, "The Limitations of Law," 47 ABA Rep 270 @ 276 (1922); Pierce Butler, "Some Opportunities and Duties of Lawyers," 48 ABA Rep 209 @ 219 (1923); Edson R. Sunderland, "The Exercise of the Rule-Making Power," 51 ABA Rep 276 @ 279 (1926).

[148]Chester I. Long, "The Advance of the American Bar," 51 ABA Rep 158 @ 164 (1926).

[149]Cardozo, The Nature of the Judicial Process, p. 166.

[150]Elihu Root, "Address of the President: Public Service by the Bar," 41 ABA Rep 355 @ 364-66 (1916).

[151]William Draper Lewis to Philip Jessup, August 30, 1937, in Jessup, Elihu Root, II, 470-71.

[152]47 ABA Rep 82-94 (1922). Andrews was one of the two ABA members who publicly attacked Roscoe Pound's noted St. Paul address in 1906. At the time Andrews declared American judicial procedure to be "the most refined and scientific system...ever devised by the wit of man." James D. Andrews, 29 ABA Rep 56 (1906).

[153]William Draper Lewis, "Plan to Establish American Law Institute," 9 ABAJ 77 (1923); Lewis, 48 ABA Rep 88-95 (1923); "The Improvement of the Law," 9 ABAJ 96 (1923); "The American Law Institute," 9 ABAJ 160 (1923); Lewis, "Adaptation of the Law to Changing Economic Conditions," 11 ABAJ 11 (1925); cf. Herbert F. Goodrich, "The Story of the American Law Institute," 1951 Washington University Law Quarterly 203 (1951).

[154]Lewis, "Adaptation of the Law to Changing Economic Circumstance," 11 ABAJ 11 (1925); Grant Gilmore, The Ages of American Law (New Haven: Yale University Press, 1977), 72-73.

[155]Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), p. 582.

[156]"Report of the Committee on Uniformity of Judicial Decision in Cases Arising Under Uniform Laws," 1 ABAJ 24 (1915); Jacob Sicherman, "Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation," 2 ABAJ 60 (1916).

[157]E. J. Phelps, "Chief Justice Marshall," 2 ABA Rep 173 @ 192 (1879); "Echoes of Fifty Years," 13 ABAJ 638-39 (1927).

Chapter 10

[1]In 1923 Moorfield Storey informed the Association that Baldwin, who had always been faithful in attending the annual meetings, was no longer able to do so. Storey then proposed the following resolution which was adopted unanimously by a rising vote: "The American Bar Association in convention assembled at Minneapolis, mindful of the debt which it owes the Honorable Simeon E. Baldwin for his great service in founding the Association and his unfailing devotion to its interests, sends him its hearty congratulation that he has in abundant measure all that should accompany old age, and it is hoped that his years may be prolonged while life has for him more of pleasure than of pain." 48 ABA Rep 23 (1923).

[2]52 ABA Rep 32, 40 (1927).

[3]R. E. L. Saner, "Our Fiftieth Anniversary," 11 ABAJ 585 (1925); James Grafton Rogers, American Bar Leaders: Biographies of the Presidents of the American Bar Association (Chicago: American Bar Association, 1932), p. v.

[4]See Appendix D for the methodology used to construct this collective biography. Recent interest in quantitative history has occasioned a call for "wide ranging prosopographical studies to clarify the shape, dimensions, and characteristics of the legal profession." Olavi Maru, Research on the Legal Profession: A Review of Work Done (Chicago: American Bar Foundation, 1972), pp. 5-6; cf. Stephen Botein, "Professional History Reconsidered," 21 American Journal of Legal History 69 (1977).

The best of the few studies presently available include Daniel H. Calhoun, Professional Lives in America: Structure and Aspiration, 1750-1850 (Cambridge: Harvard University Press, 1965); Gerald W. Gawalt, The Promise of Power: The Legal Profession in Massachusetts, 1760-1840 (Westport, Conn.: Greenwood Press, 1979); Gawalt, "The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900," in The New High Priests: Lawyers in Post-Civil War America (Westport, Conn.: Greenwood Press, 1984), pp. 97-123; and Gary B. Nash, "The

Philadelphia Bench and Bar, 1800-1861," Comparative Studies in Society and History 7 (1965), 203-220.

[5]Jerold Auerbach to the contrary, the membership of the ABA was never "predominantly Southern" (Auerbach, Unequal Justice p. 63). In 1878, seventy of 289 (24%) original members were from the former Confederacy, a figure exaggerated by the thirty-three lawyers from Louisiana present in Saratoga. The latter were prudently avoiding a return to the yellow fever epidemic in their home state. Only thirty-nine of the 233 committeemen treated in this study were from the South.

[6]Colorado, Delaware, Florida, Idaho, Maine, Montana, New Mexico, South Carolina, Wyoming, and Utah.

[7]For instance, Robert D. Benedict listed his home as Burlington, Vermont, though he spent a professional career of fifty-nine years in Brooklyn. Future Justice Willis Van Devanter, an Assistant U. S. Attorney-General in 1898, maintained his legal residence in Cheyenne, Wyoming.

[8]Wayne K. Hobson has suggested that "a shared cosmopolitanism and urbanism helped to unite ABA members," and that "small town and rural lawyers were not attracted to the national association." This observation may be factually true while false in implication. Thousands of urban lawyers in the lower strata of the profession had neither the time nor the inclination to become active members of bar associations even if they had been allowed to join them. Large cities were simply a magnet for the elite of the bar; that is, the bar elite was urban because it was elite, not vice versa. (cf. Wayne K. Hobson, "The American Legal Profession and the Organizational Society, 1890-1930," Ph.D. dissertation, Stanford, 1977, pp. 233-34).

[9]Cf. Hobson, pp. 175-184; according to statistics compiled by Hobson from obituaries in the ABA Reports, 1900-1911, only twenty-four percent of Chicago lawyers had been born in Illinois, while eighty-four percent of Philadelphia lawyers had been born in Pennsylvania, sixty-three percent of Boston lawyers had been born in Massachusetts, and forty-two percent of New York City lawyers lawyers had been born in New York State. (Hobson, p. 177).

Obviously one would be much less likely to be born in Chicago than in Philadelphia during the first half of the nineteenth century. The point is that the possibility of becoming a member of the legal elite for those of middle-

class birth was much greater in Chicago than in Philadelphia during the period of this study.

[10]Peck began his legal career in Janesville, Wisconsin, then moved to Independence, Kansas, and Topeka. He ended his career in Chicago.

[11]Average age of ABA committeemen:

1878	51
1888	54
1898	55
1908	55
1918	53
1928	56

[12]Even when no personal information could be obtained about an individual, it was possible to locate his forebears in the state of his residence, thus virtually assuring that he was a native-born citizen of the United States.

[13]One could also make a case for such committeemen as Luke P. Poland (1815-1887), James O. Crosby (1828-1921), Charles F. Amidon (1856-1937), and Andrew A. Bruce (1866-1934). Much depends on one's definition of a "Horatio Alger figure." For instance, Andrew Bruce landed in New York as a penniless orphan in 1881, but prior to the death of his father, a British general, he had received an excellent education in the private schools of his homeland. It is perhaps significant that all but one of these "self-made men" went west to begin their legal careers.

[14]Sunderland, pp. 145-147; in comparing the educational training of Philadelphia lawyers admitted to the bar 1800-05 with those admitted 1860-61 Gary B. Nash discovered a similar drop in the number of college graduates in this earlier period. By coincidence even the percentages (sixty-eight and forty-eight respectively) are roughly similar. Cf. Gawalt, The Promise of Power, pp. 140-49 for the even higher numbers of Massachusetts lawyers with college degrees in an earlier period.

[15]See Frederick H. Jackson, Simeon Eben Baldwin (New York: King's Crown Press, 1955).

[16]William H. Harbaugh, Lawyer's Lawyer: The Life of John W. Davis (New York: Oxford University Press, 1973), p. 385; Hobson, p. 230.

[17]Richard Jensen, "Quantitative Collective Biography," in Robert Swierenga, ed., Quantification in American History (New York: Atheneum, 1970), pp. 403-04.

[18]Robert H. Wiebe, The Search for Order, 1877-1920 (New York: Hill and Wang, 1967), p. 107.

[19]Ironically all of these men were influential in the Association. Trumbull signed the call issued for the organizational meeting of the ABA, Hagerman was president in 1903-04, and Lewis was the long-time director of the American Law Institute.

[20]James Grafton Rogers commented that the "early vitality" of the Association was found "not in assemblies or committee rooms but in strolling groups, coteries around a table and cigars....Many public careers were affected by the exchanges at these annual sessions. More than one man has been carried far in national politics by his friends who foregathered at the Bar meetings." Rogers, "The American Bar Association in Retrospect," in Law, A Century of Progress (New York: New York University, 1937), I, 180.

[21]Cf. Hobson, p. 225fn.

[22]E. Digby Baltzell, The Protestant Establishment: Aristocracy & Caste in America (New York: Random House, 1964), p. 161.

[23]Sydney E. Ahlstrom, A Religious History of the American People (New Haven: Yale University Press, 1972), p. 777.

[24]Richard Jensen has discovered a similar denominational pattern among the "Chicago elite" of 1910. "The largest Protestant denominations--Methodist, Lutheran and Baptist--were represented by only 69 men, in contrast to 164 members of the much smaller Congregational, Episcopalian, and Presbyterian bodies." Jensen, p. 394.

[25]John W. Davis to Rush Sloan, Dec. 5, 1944, quoted in Harbaugh, p. 391. George Wharton Pepper, the noted Philadelphia lawyer, summed up this approach to religion in another way by writing An Analytical Index to the Book of Common Prayer.

[26]Gamaliel Bradford, The Quick and the Dead (New York: Houghton Mifflin, 1931), p. 30. It is interesting to speculate about the possible "liberalization" of the ABA

elite had they taken their religion either more seriously or less seriously.

[27]Occasionally the size of a decedent's estate was mentioned by an obituary writer, as in the case of Alfred Hemenway (1839-1927). Hemenway, a law partner of John D. Long, amassed well over a million dollars, which he divided between the law libraries of Harvard and Yale, his two alma maters.

[28]Cf. Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), pp. 527-28. Part-time law teachers were another matter, often able to donate large amounts of time for little or no remuneration.

[29]Rogers, American Bar Leaders, p. 214.

[30]Richard E. Beringer, "Profile of the Members of the Confederate Congress," Journal of Southern History ,33 (1967), p. 539.

[31]Francis Rawle, first treasurer of the ABA, wrote in retrospect "that the leading lawyers in the various states were not then as well known to the profession throughout the country as they are in these latter days." (Francis Rawle, "How the Association was Organized," 14 ABAJ 375 [1928].) It seems involvement in the Tilden-Hays controversy assured one of "leading lawyer" status.

[32]James Grafton Rogers, "Fifty Years of the American Bar Association," 53 ABA Rep 518 @ 527 (1928).

SELECTIVE BIBLIOGRAPHY

According to Olavi Maru, librarian of the American Bar Foundation's Cromwell Library, the American Bar Association has retained virtually none of its records for the period prior to 1928. Therefore this dissertation has been based upon the annual Reports of the American Bar Association and, to a lesser extent, upon the American Bar Association Journal, published since 1915. Although this study would not have been attempted without the Reports, potential readers should be aware that the editors tidied up speeches and toned down or eliminated embarrassing arguments. As a source of non-official commentary on Association affairs, I have examined contemporary newspapers and periodicals as well.

I have found something of value in all the manuscript collections listed below, but by far the most important sources of information were the Baldwin Family Papers and the William Howard Taft Papers. The massive Taft Papers, most valuable for the years 1912-1919, have been microfilmed and indexed and are available at various academic libraries throughout the country.

No true history of the American Bar Association has ever been published. Edson Sunderland's authorized History of the American Bar Association (1953) is an institutional

chronicle of the driest and most unimaginative type. Slightly more critical is the earlier survey by Max Radin published serially in numbers of the ABA Journal for 1939 and 1940. A published dissertation, mistitled The Influence of the American Bar Association on Public Opinion and Legislation (1937), by Mary Louise Rutherford is modestly useful as a reference tool. More perceptive is James Grafton Rogers, American Bar Leaders: Biographies of the Presidents of the American Bar Association (1932) and the same author's short essay "The American Bar Association in Retrospect" (1937). My own research was profitably begun by perusing Norbert Brockman, "The History of the American Bar Association: A Bibliographic Essay" (1962).

Though I assume that most of the secondary sources listed below will either be familiar or readily available to the readers of this work, the same cannot be said of the theses cited. For my study, the most significant of these was Karl Wayne Hobson, "The American Legal Profession and the Organizational Society" (1977), a dissertation well researched, logically organized, and clearly written. Norbert Brockman, "The Politics of the American Bar Association" (1963), was composed in a style unusually free of the jargon that frequently encumbers monographs in the field of political science, and it proved to be a profitable introduction to the study of the earliest years of the

Association. Barbara C. Steidle, "Conservative Progressives: A Study of the Attitudes and Roles of Bar and Bench, 1905-1912" (1969), demonstrates impressive research and is perhaps the best source on the judicial recall controversy. The studies of Audra Prewitt, Margaret F. Sommer, and Lawrence Sommers were marginally useful. Of the three, Sommer's study of the Ohio Bar Association is the weakest, being little more than an uncritical rehash of the state bar association reports. Prewitt's work is quite short and burdened with a questionable thesis. The frequently cited Joseph Katz, "The Legal Profession, 1890-1915" (1954), is a remarkable master's thesis though now dated and useful primarily for its footnotes. The best that can be said for James Carl Foster, "Lawyers, Professionalization and Politics: Ideology and Organization in the American Bar, 1870-1920" (1976) is that it has an interesting title.

Since I believe that most users of this dissertation will follow my research through the notes, I have deliberately expanded them to the brink--some would say beyond the brink--of pedantry. The books, articles and theses listed below were selected either for their relationship to the history of the early years of the American Bar Association or for their influence upon my treatment of the primary sources.

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Baldwin Family Papers, Yale University

Charles Henry Carey Papers, Oregon Historical Society, Portland

Margaret J. Carns Papers, Nebraska State Historical Society, Lincoln

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Frederick William Lehmann Papers, Washington University Library, St. Louis

John Bassett Moore Papers, Library of Congress

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