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## The New York Bar and Reform of the Elected Judiciary After the Civil War

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## The New York Bar and Reform of the Elected Judiciary After the Civil War

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### Abstract

This paper deals with the history of America's other peculiar institution: the elected judiciary. Elected judges are found virtually nowhere else in the world, but in America they are a fact of life in the considerable majority of states. The history of the elected judiciary is surprisingly little explored. This paper examines the post-Civil War trend away from Jacksonian populism and toward a more aristocratic view of the judiciary as a body set apart from the people. After the Civil War, many states, including New York, lengthened terms of office for their elected judges; some states even switched back to an appointive system. In New York, this reform was sparked by a perception of rampant corruption among New York City judges. The paper delves into the little-understood areas of how elected judges were nominated and how they campaigned in the late nineteenth century. The judicial elections process is set against the social backdrop of massive immigration into New York City and the resulting rise of the Tweed Ring. The paper describes the Ring's corruption of key members of the judiciary, together with the ethnic rancor ignited by allegations of judicial corruption. Leading the judicial reform efforts were members of the elite bar. The paper discusses the backgrounds of elite lawyers and their role in lengthening judicial terms and in founding the Association of the Bar of the City of New York. The Association proved active in working to impeach the most notorious judges of the Tammany Hall Ring. For some time, many worried that the lack of a sound judiciary would cause New York's newly burgeoning economy to collapse, much like the difficulties a corrupt judiciary poses in developing countries today. In the end, New York was able to reform the judiciary sufficiently that persons and property were reasonably secure, and New York's rise to commercial prominence could continue.

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# The New York Bar and Reform of the Elected Judiciary After the Civil War

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## I. Introduction

This Article sheds light on America's other peculiar institution: the elected judiciary. While slavery has existed in many times and places, electing judges is almost unique in modern history.<sup>1</sup> This distinctive American practice has recently attracted a great deal of attention, both in legal circles and in the popular press: the U.S. Supreme Court launched into an already fierce debate with an opinion on speech rights of judicial candidates;<sup>2</sup> newspapers routinely run articles about contributions to judicial campaigns and allegations of judicial bias;<sup>3</sup> and legions of law review articles propose reforms.<sup>4</sup>

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<sup>1</sup>One exception is the election of judges in France beginning in 1790 during the French Revolution. MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES 55-69 (1988). The French government discontinued the practice when Napoléon Bonaparte took power in 1799, and never again held judicial elections. *Id.* at 99-100. I have not found any other examples of popularly elected judges in modern times. It therefore appears that, apart from one European country for a short time undergoing unprecedented upheaval, no other society has embarked on such an experiment.

<sup>2</sup>Republican Party of Minnesota v. White, 122 S.Ct. 2528 (2002).

<sup>3</sup>Leslie Eaton, *After Scandals, State Panel Offers Plan to Revamp Judges' Elections*, N.Y. TIMES, Dec. 4, 2003; Editorial, *Judicial Elections: Reform is Needed, But Proposals Are Just a Start*, BUFFALO NEWS, Dec. 14, 2003; Mark Scolforo, *Election of Judges in Pennsylvania Criticized: Some Candidates Question a System That Forces Them to Raise Money from Those Who May Appear Before Them*, PHILADELPHIA INQUIRER, October 13, 2003; Robert Duncan, *Legislators Renew Effort to Appoint Texas Judges: Group Says Elections Bad for Reputation*, HOUSTON CHRONICLE, Mar. 4, 2003; Editorial, *It's Time to Reform Selection of Judges: Texas' Judicial Elections Are Dysfunctional Because of the Influence of Big Money and Partisan Tides*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 2003; Thomas Moyer, Editorial, *Cash v. Quality: Ohio's Judicial Elections Smell More of Money Than Merit*, THE PLAIN DEALER (Cleveland, Ohio), Mar. 5, 2003; Jonathan Groner, *Mississippi: Battleground for Tort Reform: Business Lobby and Trial Lawyers Gear Up for Judicial Elections*, LEGAL TIMES, Jan. 26, 2004.

<sup>4</sup>Following is a small sample of what has become a vast outpouring: Jared Lyles, *The Buying of Justice: Perversion of the Legal System Through Interest Groups' Involvement with the Partisan Election of Judges*, 27 LAW & PSYCHOL. REV. 121 (2003); Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 S.M.U. L. REV. 263

What this new attention to judicial elections recognizes is that a reasonably competent and unbiased judiciary (or judge-like civil service) is important, if not essential, in ensuring the rule of law and economic prosperity.<sup>5</sup> The lack of an adequate judiciary has plagued many countries in their efforts to modernize and develop: the list of afflicted countries includes Russia, China, Indonesia, and many others.<sup>6</sup> As it happens, the United States itself has plenty of experience with judicial corruption and judicial reform. New York City, now long the nation's undisputed commercial capital, faced after the Civil War an elected judiciary so corrupt and incompetent that leading citizens feared economic and social collapse. This Article tells the story of how New York pulled back from the brink.

There is no question that the voters of New York played an important role in ratifying reforms of the judiciary. But the reforms were initiated in the first place by elites, especially elites in the bar. Many scholars take a dim view of the elite bar during this period, and hold fast

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(2000); Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301 (2003); Richard R.W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609 (2002).

<sup>5</sup>The "rule of law" can be an elastic concept, as Robert Gordon has recently pointed out. Robert W. Gordon, *Can Lawyers Produce the Rule of Law?*, paper presented at the George Washington University Law School workshop, Sept. 24, 2004, at 1 & n.3. Here, I am referring to the basic ability to protect property rights, enforce contracts, and ensure the physical safety and liberty of citizens. *See also* William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723.

<sup>6</sup>The United States has already made and is continuing serious efforts to aid many of these countries in shaping up their legal systems, including their judiciaries. *See* Richard Van Duizend, *Strengthening the Administration of Justice Overseas*, 42 JUDGES' J. 39 (2003) (describing extensive U.S. efforts to improve justice systems in Eastern Europe, Asia, Africa, and Latin America, including involvement of and funding from the U.S. Agency for International Development, the National Center for State Courts, and the American Bar Association). The election of judges in many states may cause international observers to question whether the United States is up to the job of advising others on matters such as judicial selection.

to the idea that the new bar organizations following the Civil War, despite lip service they may have paid to public aims, were basically exclusionary and anti-competitive devices designed to keep out social and economic undesirables.<sup>7</sup> One need not reject that critique entirely to recognize that more public-regarding motives may also have existed.<sup>8</sup> Whatever the faults of elites, they can have their uses. The elites I am referring to here were well-educated, with at least some modest means, sometimes from families with traditions of local leadership, and generally honest reputations. Tocqueville pointed out the crucial role such individuals could play as members of the bar: “the prestige accorded to lawyers and their permitted influence in the government are now the strongest barriers against the faults of democracy.”<sup>9</sup> Elite lawyers aspired to serve as a sort of mediating force correcting the excesses of both the grasping

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<sup>7</sup>The most prominent exponents of this view include JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); MAXWELL H. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976); RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

<sup>8</sup>It is worth paying attention to what the reformers themselves believed they were doing, and taking a close look at their accomplishments. See Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL WAR AMERICA* 53-57 (Gerard W. Gawalt ed. 1984); Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA, 1730-1940* (Gerald L. Geison, ed. 1983). The Association of the Bar of the City of New York found a sympathetic, but not uncritical, historian for its centennial. GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970* (1970). Lewis Grossman has skillfully traced the reforming career of one of its most prominent members. See Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW AND HIST. REV. 577 (2002) (discussing Carter’s anti-codification efforts).

<sup>9</sup>1 TOCQUEVILLE, *supra*, at 263.

nouveaux riches and the penniless immigrant hordes bent on redistribution.<sup>10</sup> With their “penchant for order” and “natural love of forms,” elite lawyers hoped to form a Tocquevillian aristocracy keeping the polity on an even keel. In the case of the New York bar, at least, one can be grateful that “hidden at the bottom of a lawyer’s soul one finds some of the tastes and habits of an aristocracy.”<sup>11</sup>

While scholars have paid attention to the populist origins of judicial elections,<sup>12</sup> virtually no one has traced their later history, influenced by elites.<sup>13</sup> Following a well-documented wave of populism before the Civil War, a backlash began.<sup>14</sup> Many of the state constitutions written and ratified before the Civil War embodied the populist Jacksonian principle of giving power

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<sup>10</sup>This is, as Robert Gordon has pointed out, the role of “the few” in classical republican theory. Gordon, *“The Ideal and the Actual,” supra*, at 56. See ARISTOTLE, THE POLITICS, bk. VII, ch. 9-10 (Carnes Lord, trans. 1984).

<sup>11</sup>1 TOCQUEVILLE, *supra*, at 264.

<sup>12</sup>Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337 (1983).

<sup>13</sup>Even James Willard Hurst, normally so attuned to issues of judicial structure and selection, hardly mentions the reforms discussed here. JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 122-123 (1950).

<sup>14</sup>In some ways this cycle of populism and elite reaction paralleled an earlier cycle. During the populist Revolutionary era, the judiciary was under grave suspicion, and the powers of legislatures and juries exalted in state constitutions. This period was quickly followed by the federalist era, including the framing of the federal Constitution and the first decade or more of the nineteenth century. During the Federalist era, the structural importance of an independent and powerful judiciary was recognized, and judges, copying their English counterparts, adopted various means to assert control over jury verdicts. I have written about this first attempt to roll back populism through a strengthened judiciary in Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505 (1996).

directly to the people. These constitutions provided for frequent election of all government officials—including judges—and rotation in office.<sup>15</sup> But a reaction to Jacksonianism set in immediately after the Civil War, when the effects of these changes began to be felt in earnest. Lawyers and judges of both parties, the intellectual (and sometimes physical) heirs of the Federalists and Whigs,<sup>16</sup> began to denounce the populist constitutions as “novel experiments” that with time had proved to be failures.

These elite lawyers argued in favor of a type of reform that I call re-anglicizing the bench. They wanted to make the state judiciaries more English in structure and urged that new constitutional conventions return to appointments for life for the judiciary or at least provide longer elective terms, using the English and federal judiciaries as models.<sup>17</sup> The independence of the judiciary was their rallying cry. In several states, including New York, these reformers

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<sup>15</sup>The Jacksonian movement prompted other changes affecting the processes of law-making, the bench, and the bar. Referenda came into vogue. Powers of judges over juries, including the ability to comment on evidence at trial, were limited. Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000). State constitutions and legislatures swept away most qualifications for the bar, essentially opening the bar to all comers.

<sup>16</sup>This link between Whig ideology and the Gilded Age reformers is beginning to be better appreciated. Robert Gordon noted it some time ago, and Lewis Grossman has lately discussed it. See Gordon, “*The Ideal and the Actual*,” *supra*, at 56; Grossman, *supra*, at 581.

<sup>17</sup>These efforts on behalf of the judiciary were part of a broad reform movement which also aimed at ending corruption in state legislatures and in municipal government, partly by introducing civil service reform. See, e.g., ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883* (1961). Re-anglicizing the bench might also have a double meaning, hinting at filling the bench with men of sturdy English stock rather than more recent immigrants. Some reformers may have had this in mind as well, but it appears the reformers would have been happier with honest Irishmen than corrupt Yankees on the bench. See *infra* Part IV.A.

actually succeeded.<sup>18</sup>

New York provides an especially important example of these attempts to reform and re-anglicize the bench. New York's events were important in their own right and highly influential throughout the country because of the state's commercial prominence and because it was one of the first to adopt an elective judiciary and one of the first to try to reform it. New York's Constitution of 1846 was one of the earliest to exhibit full-blown Jacksonian populism and to provide for an elective judiciary, encouraging other states to follow suit. Around the same time, New York was definitively emerging as the most important commercial center in America. As a result of New York City's importance in banking, shipping, and other industries, its bar produced some of the best legal talent in the nation and attracted it from other regions of the country, especially New England.

However, as Part II of this Article discusses, New York City after the Civil War also had a deeply corrupt judiciary; contemporary observers believed it to be one of the most, if not the

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<sup>18</sup>Before the Civil War, 24 of the 34 states elected at least some judges. But, as one speaker in 1887 put it, “[t]he changes since 1860 indicate an opposite tendency—either in the lengthening of judicial terms in States still retaining the election, or in the abandonment of that system by some States.” HENRY HITCHCOCK, ADDRESS BEFORE THE NEW YORK STATE BAR ASSOCIATION, Jan. 18, 1887. *See also* 2 J. HAMPDEN DOUGHERTY, LEGAL AND JUDICIAL HISTORY OF NEW YORK 176-177 (1911). Five states—Virginia, Louisiana, Florida, Maine, and Connecticut—eventually decided to abandon judicial elections altogether and go back to an appointive system. *Id.* Other states were not willing to go as far as that, but did lengthen judicial terms considerably. In 1873, Pennsylvania's new constitution lengthened the terms of supreme court judges from fifteen to twenty-one years, and of other judges from five to ten years. In 1875, Missouri lengthened the terms of supreme court judges from six to ten years, and the judges of two recently-created intermediate appellate courts was made twelve years. In 1883, Ohio's legislature was authorized to fix a term for judges not less than five years. (Since 1851, the constitutional term for judges in Ohio was five years.) California changed the term of supreme court judges from ten to twelve years. Maryland changed the terms of all judges from ten to fifteen years. *Id.*

most, corrupt in the country. The effects of the Constitution of 1846, combined with massive immigration and the rise of the Tweed Ring, encouraged this corruption. Reformers warned ominously that New York City could lose its commercial preeminence and indeed sink into “barbarism” if steps were not taken to reform the judiciary. Part III describes the world of elite members of the New York bar, lawyers who hailed from both New York and New England. These individuals represented New York’s best chance of cleaning up the bench.

As Part IV shows, the elite New York bar eventually rose to the challenge. The elite bar’s success was due in part to its ability to get its members elected to the constitutional convention of 1867-68, and, once there, to their focus on lengthening judicial terms rather than abolishing the elective system for judges. At the convention of 1867-68, reformers—especially elite lawyers—attacked the problem of judicial corruption in one of the earliest efforts to reverse the tide of Jacksonianism and to re-anglicize the bench. The convention proposed, and the people ratified, an amendment to the New York constitution lengthening judicial terms. After further judicial scandals attracting attention in the local and national press, the elite bar formed the Association of the Bar of the City of New York. The Association was small but deliberately bipartisan, and at least occasionally could successfully focus on getting honest judges on the bench and removing corrupt ones. Although a state-wide referendum on returning to an appointive judiciary failed in 1873, enough had been accomplished that the New York judiciary was once again functioning at a respectable level. New York’s rise to national and international commercial success could continue, and its citizens could be reasonably assured of respect for their persons and property.

## II. The Threat of “Hopeless Barbarism”: The Elite Bar’s Perception of Problems in the New York Judiciary and Legal System After the Civil War

In July 1867 an article appeared in the *North American Review*, perhaps the leading general review in the country,<sup>19</sup> entitled “The Judiciary of New York City.”<sup>20</sup> No author was attributed.<sup>21</sup> The article sent shock-waves through the New York bench and bar, and tremors throughout the country. Although it did not name names, it described specific instances of corruption in ways that allowed easy identification of participants and alleged that such corruption was widespread. No court or branch of law in the city was immune, the article suggested. Furthermore, lawyers were forced to go along with this system or risk losing their practices, and so the bar was corrupted as well as the bench. The article opens a window into the way the elite bar perceived the legal system at the time. It discussed four main sources or examples of judicial corruption: judicial elections, abuse of injunctive powers, patronage problems with referees and receivers, and abuse of criminal justice. Other elite lawyers commented on each of these problems in private diaries and other sources, and I will discuss

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<sup>19</sup>The editor of the *North American Review* was the reformer Charles Eliot Norton, the distinguished Harvard classicist and the first president of the Archeological Institute of America. See GERALD W. MCFARLAND, *MUGWUMPS, MORALS, AND POLITICS, 1884-1920*, at 47 (1975).

<sup>20</sup>[Thomas G. Shearman], *The Judiciary of New York City*, 58 NORTH AMERICAN REVIEW 149 (July 1867).

<sup>21</sup>The article was reputed to have been written by Thomas G. Shearman (ultimately founder of the firm known today as Shearman and Sterling). Charles Francis Adams, Jr., in a footnote to another article in the *North American Review* on the Erie railroad scandal in July 1869, attributed the earlier article to Shearman. Shearman seems never to have denied that he wrote the July 1867 piece. One of David Dudley Field’s partners and his right-hand man, Shearman was viewed by others in the bar as one of the contributors to the very corruption of which he wrote. DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* 226-227 (1986).

each of these four areas in turn. The *North American Review* article convinced many that deep-seated reform in the judiciary was needed if New York was to retain its status as a premier commercial city and state under the rule of law.

A brief description of court organization in New York is necessary here to understand the article's allegations. The court of last resort in New York was the Court of Appeals, half of whose members held fixed terms on the court and half of whom were trial judges (from the Supreme Court) who rotated on and off the Court of Appeals each year. The trial court of general jurisdiction was the Supreme Court.<sup>22</sup> In addition, there were local judges composing the County Courts and the Surrogates' Court (these latter handling mainly probate matters). Within the City of New York, there were two additional civil courts whose jurisdiction essentially overlapped: the Superior Court and the Court of Common Pleas.<sup>23</sup> The criminal courts in the city included those held by the justices of the Supreme Court and judges known as the Recorder and the City Judge; these heard more serious cases requiring jury trial. Other courts, composed of police justices, heard petty offenses and held prisoners to bail.

#### **A. Judicial Elections**

Shearman's article described the control corrupt party bosses wielded over the judiciary as a result of elections and short terms. But the populist Constitution of 1846, he said, did not immediately give rise to this control. For "some years" after election of judges began, candidates for the more important courts were generally "men of high character and respectable

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<sup>22</sup>Members of the Supreme Court sometimes formed an appellate body known as the general term. 2 DOUGHERTY, *supra*, at 168-169.

<sup>23</sup>There was also in the city a Marine Court, with jurisdiction over claims of less than \$500, and eight civil justices, who heard claims of less importance. *Id.*

abilities.”<sup>24</sup> Some of the first judges elected had already served for a considerable period on the bench.<sup>25</sup> But this happy situation did not continue. One of the reasons for the change for the worse, Shearman wrote, was the huge number of immigrants flooding the city.<sup>26</sup>

The impact of immigration on New York City in a very short time is difficult to imagine today. Shearman noted that the census of 1860 had counted 77,475 foreign-born voters in New York City, and only 51,500 native ones.<sup>27</sup> Naturalizations had been so great since then that, he estimated, current figures would show about 100,000 foreign-born voters to 60,000 native ones. Between 1840 and 1870, New York’s overall population more than tripled, reaching an official count of 942,292.<sup>28</sup> Even that number may be low: the Office of the Census arrived at that figure only after revising its original count of 726,386 amid charges of a politically-inspired undercounting.<sup>29</sup> Whatever the precise figure, New York’s population was exploding due to immigration: by 1870, a large proportion of New Yorkers had been born overseas, with Ireland and the German states being the most common nations of origin.<sup>30</sup> These immigrants fled to America because of the dire hardships surrounding the potato famines and political tumult that

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<sup>24</sup>Shearman, *supra*, at 150.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*See* ALEXANDER B. CALLOW, JR., *THE TWEED RING* 61 (1966).

<sup>29</sup>*See* SEYMOUR J. MANDELBAUM, JR., *BOSS TWEED’S NEW YORK* 7 (1965).

<sup>30</sup>*See id.* at 8; *see also* EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898* 1111-12 (1999).

afflicted both nations in the 1840's and beyond.<sup>31</sup> Although Shearman did not explicitly say so, the Irish were the chief concern of many natives. Natives were alarmed at their perceived penchant for whiskey, their tolerance of dirt,<sup>32</sup> their growing control of city government, and their use of it to funnel money to local bosses and to give sinecures to their retainers. Old New Yorker George Templeton Strong, in his famous diaries, wryly noted New York City's submission to the "rod and scepter of Maguires and O'Tooles and O'Shanes."<sup>33</sup>

Shearman said the problem was not so much that the immigrants almost unanimously supported the Democratic party, since many Democrats preferred honest officials to dishonest ones. The problem was that as between two Democrats, the immigrants always preferred the worst.<sup>34</sup> "Such voters," he wrote, three times elected the notorious Fernando Wood as mayor, and twice sent him to Congress. The tenement slums in which these immigrants lived proved a fertile breeding ground for Tweed's Ring.<sup>35</sup> Although the Ring was generally associated with the

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<sup>31</sup>See CALLOW, *supra*, at 61.

<sup>32</sup>Shearman wrote that an immense majority of the foreign-born in New York were "of an ignorant and demoralized class; and their mode of living by no means tends to their improvement. John Wesley wisely said that cleanliness was next to godliness; and judged by that standard, thousands of tenement-houses in New York are to the last degree ungodly." Shearman, *supra*, at 151. See also MATTHEW PATRICK BREEN, THIRTY YEARS OF NEW YORK POLITICS UP-TO-DATE 212 (1899) (describing tale told by newly-arrived Irish immigrant about his squalid lodgings at a judicial nominating convention). Shearman declared it was impossible that such places should be the homes of "intelligent and truly patriotic electors." The people who lived there were not degraded by poverty, for those in rural districts were often poorer, but "hopelessly degraded by dirt, foul air, and drink." Shearman, *supra*, at 151.

<sup>33</sup>4 THE DIARY OF GEORGE TEMPLETON STRONG 273 (Allan Nevins & Milton H. Thomas ed., 1974) [hereinafter STRONG DIARIES].

<sup>34</sup>*Id.*

<sup>35</sup>City services began to collapse under the weight of immigration, and crime increased. See EDWARD CRAPSEY, THE NETHER SIDE OF NEW YORK 45-46 (1872). The black-Irish riots

Democratic party, in that Tweed and the other ringleaders were elected as Democrats, the Ring also bought plenty of Republicans.<sup>36</sup> Tammany Hall, in existence long before Tweed's rise, was already attempting to enlist the support of new immigrants by 1828.<sup>37</sup> Tweed skillfully garnered to himself immense support in the city. By 1850, Tweed had begun his rise to power. In that year, Tammany Hall ran Tweed for alderman in a successful campaign. At first sight, Tweed's dominance of the machine is surprising. Although not a recent immigrant himself—Tweed's ancestry was Scottish, and his forebears had come to New York in the mid-eighteenth century—Tweed cleverly appealed to the newcomers.<sup>38</sup>

The immigrants' influence was of course felt in judicial elections as well, and the elite bar was not happy with the results. Shearman blamed these voters for the ejection of Judge

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raised levels of disorder, and the policing system, such as it was, failed. Even postal service within the city began to break down. *See* MANDELBAUM, *supra*, at 19.

<sup>36</sup>As a leading opponent of Tweed, the Democrat Samuel J. Tilden, pointed out, "The very definition of a Ring is that it encircles enough influential men in the organization of each party to control the action of both party machines,—men who in public push to extremes the abstract ideas of their respective parties, while they secretly join their hands in schemes for personal power and profit." 1 SAMUEL J. TILDEN, TILDEN'S PUBLIC WRITINGS AND SPEECHES 561 (John Bigelow, ed., New York, Harper and Brothers, 1885) (2 vols.). According to a contemporary observer, Tweed had a special side door cut into his office wall so that members of the opposing party who did not wish to be seen making deals with him could slip in and out. Breen, *supra*, at 43-44.

<sup>37</sup>Other political factions were not so quick to do so, and indeed tried to play the nativist card. *See* DENIS T. LYNCH, "BOSS" TWEED: THE STORY OF A GRIM GENERATION 115-21 (1927); CALLOW, *supra*, at 20-22. In 1857, the Republican party, which controlled the state legislature at Albany, attempted to neutralize the effect of immigration on New York politics by passing a new Municipal Charter. That charter gave Albany direct control over many city functions, including the police force, and was much resented by immigrants. *See* Tyler G. Anbinder, *Fernando Wood and New York City's Succession from the Union: A Political Reappraisal*, 68 N.Y. HIST. 67, 68-77 (1987).

<sup>38</sup>OLIVER E. ALLEN, THE TIGER: THE RISE AND FALL OF TAMMANY HALL 83 (1993). *See also* LYNCH, *supra*, at 37-38.

Bosworth, a life-long Democrat, from the Superior Court in 1863, although his replacement “did not, in all probability, receive the votes of a thousand respectable men.”<sup>39</sup> The worthy Judge Bosworth’s failure to gain his party’s renomination was to become a *cause célèbre* among reformers, repeatedly referred to in the debates at the 1867-68 Constitutional Convention.<sup>40</sup> Bosworth had attracted Tweed’s ire because of the interference of the bench with the frauds of the Common Council.<sup>41</sup> This interference “opened the eyes of the plunderers of the public to the necessity of controlling the civil courts, which they had previously overlooked.” Tweed, not mentioned by name but described as a “notorious corruptionist,” arranged for Bosworth and another “worthy and capable” Democratic judge to lose the renomination because Tweed “declared he must and would have one friend on whom he could rely in each of the city courts of record.”<sup>42</sup> Bosworth was replaced by the Irish-born John H. McCunn,<sup>43</sup> later removed from office by the state senate for corruption. While in office, Judge McCunn did not disappoint his political master. He was most noted for conducting fraudulent naturalization proceedings, which

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<sup>39</sup>Shearman, *supra*, at 152.

<sup>40</sup>See *infra* text accompanying notes \_\_\_\_.

<sup>41</sup>Shearman, *supra*, at 154.

<sup>42</sup>*Id.* Shearman describes another incident in which Tweed, in 1861, made a great show of his virtue in nominating two honest candidates to the Superior Court, Hoffman and Woodruff, at the Democratic Convention. He then collected a large sum from them for “election expenses.” But at the eleventh hour he sold them out for \$10,000 cash, paid for by friends of “the regular Democratic candidates,” whose names Tweed then substituted. “One of the judges thus elected has procured a seat in the New York Constitutional Convention, and can doubtless give valuable suggestions to his associates upon the advantages of an elected judiciary.” *Id.* See Judge Daly’s comments on Woodruff *infra* text accompanying notes \_\_\_\_.

<sup>43</sup>McCunn was a sailor from County Derry who, after arriving in New York, got initial help from the eminent and well-respected lawyer Charles O’Conor. MARTIN, *supra*, at 76.

not surprisingly took place just before elections. Machine bosses would round up dozens of immigrants at a time and bring them before Judge McCunn to be hastily naturalized.<sup>44</sup> The press lampooned these proceedings. The *Tribune* commented, “It is rumored that Judge McCunn has issued an order naturalizing all the lower counties of Ireland, beginning at Tipperary and running down to Cork. Judge Barnard [another Tweed judge] will arrange for the northern counties at the next sitting of Chambers.”<sup>45</sup>

Matthew Patrick Breen, a contemporary observer of New York City politics, described judicial elections under the dominance of the Tweed ring from a close vantage point. As his name suggests, he was of Irish origin, and he served for some time in municipal government.<sup>46</sup> He therefore knew whereof he spoke. His account highlights the importance to the Ring of controlling the judiciary and judicial patronage. Breen changed the names of the candidates, but claimed to be describing an actual election.

First Breen described the Democratic judicial nominating convention, most likely for a judge of the Superior Court, noting that the Democratic nomination was equivalent to a certificate of election.<sup>47</sup> The convention swarmed with sycophants.<sup>48</sup> “Nor was this degradation confined to the ignorant. Men of education, men who were members of the learned professions,

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<sup>44</sup>This at a time when many colored men, born in New York, who had served in the Union Army, could not vote. *See* DEBATES AT THE CONSTITUTIONAL CONVENTION OF 1867-68.

<sup>45</sup>*Irish Citizenship*, N.Y. TRIBUNE (May 23, 1869). *See also* W.A. SWANBERG, JIM FISK: THE CAREER OF AN IMPROBABLE RASCAL (1959) 86.

<sup>46</sup>BREEN, *supra*, at iii.

<sup>47</sup>*Id.* at 207.

<sup>48</sup>*Id.* at 205, 206.

were in that very body, and vied with the worst in sniveling sycophancy.”<sup>49</sup> The crowd of about 400 was a mixed gathering in every sense: “persons who wore diamonds in their white shirt-fronts, or in their gaudy neckties, were cheek-by-jowl with those who wore red or blue flannel shirts smeared with grease or soiled with the smoke of the furnace.”<sup>50</sup> Half an hour after the Convention was supposed to begin, the party leaders had not appeared. Some members of the rowdy crowd became anxious. “What was the matter? Was there a hitch? Was the “slate” broken? How could it be? Every man in that hall understood that “Dan” Breezy was to have the nomination, by the order of Tweed himself, and, what is more, that Tweed had had him admitted to the bar, only a short time before, expressly in order to qualify him, according to law, for a Judgeship.”<sup>51</sup>

But tensions were soon relieved. The “tall form of Mike Hickey, the chief “bugler,” as he was called, of Alderman Sheehan, appeared at the door, calmly smoking a cigar.”<sup>52</sup> Difficulties had arisen because the judicial district covered several wards, and each alderman wanted a say in the judge’s patronage.

“Everything is all right,” said Mike, assuringly. “You see boys, it’s just like this: The five leaders is next door in Colbert’s (a liquor shop). There’s a little hitch about the places to be give’ out by the Judge. Alderman Cooney wants the earth for his deestrikt, and Alderman Bill Nix wants the sun, moon and stars for *his* deestrikt. They thinks they’ll do up Alderman Sheehan, and sneak away the places in the Court from him; they thinks he’s dead slow, they do; but you bet your life they can’t throw him down in this business. Then, what d’ye think? They takes Breezy into the private room and tries to give him the gaff; and they

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<sup>49</sup>*Id.* at 207.

<sup>50</sup>*Id.* at 208.

<sup>51</sup>*Id.* at 209.

<sup>52</sup>*Id.*

wants him to sign a paper to give Cooney the Chief Clerk of the Court, when the Alderman, quick as a flash, says, ‘Not on your life, Breezy; I know the law, and you das’nt sign no such thing without running up plumb agin it.’ This brace hit ‘em right square, and made ‘em wilt. Then the Alderman, he again, quick as chain-lightnin,’ says, lookin’ at Breezy and givin’ him the wink, ‘Youse can tell the gentlemen, by verbal words, what you’ll give ‘em.’ With that, Breezy then says, sizin’ up the posish, ‘I will do the square thing by youse all; leave it to me.’ But Cooney is a hard one, and he says, ‘No, I wants to get fer my deestrikt the Chief Clerk,’ says he, ‘and won’t give up that place, nohow.’ It’s all right, though,” said Mike; “fer the order is give out, and Breezy can’t be side-tracked fer nobody or fer nothin.”<sup>53</sup>

Breezy is then chosen the nominee by acclaim, to wild cheering. He launches into his nomination speech:

“Fellow citizens,” said Mr. Breezy, with a melting pathos in his voice, “had I twenty lives to expend, this moment is the proudest hour of my life! (Applause and cries of ‘Bully for you.’) I was brought up amongst you all, the men, women and children of this district. I know their hearts and minds, and when you come before me, as Judge, I will be able, from what I know of you, to decide who is telling the truth and who is telling false. (Applause and cries of ‘That’s so.’) This is the only way a man can give out justice on the square, and I assure you to-night that, if I didn’t know I had this quality, I never would be a candidate for the high office of Judge. (Cries of ‘Good for you, we know it.’) Has my Republican opponent, Isodore Gonsfager,<sup>54</sup> any record like this? (‘Never, on your life!’ shouted a man at the end of the hall, which sally elicited great cheering.)

“Now, fellow citizens,” continued Mr. Breezy, “I would like to discuss the National and State issues in this campaign, which I call upon you all to vote for; but the hour is too late and, without further delay, I want to come down to the local issue, which his name is Gonsfager. (A voice, ‘That’s what we want.’) Who is this Gonsfager?” asked Mr. Breezy, with stern countenance and heavy emphasis. “Who is he? I ask again. I will tell you. He is one of the dandy graduates of Columbia College Law School. (Sensation, and deep groans for Gonsfager.) Does he know the people over which he asks to preside? Do the people know him from a side of sole-leather? (Loud cheering.) How, then, can he give justice between you? (Cries of ‘You’re the man to do it.’)

“Now, fellow citizens,” he concluded, “the hour is late and your waiting

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<sup>53</sup>*Id.* at 209-210.

<sup>54</sup>Probably intended to represent a Jewish name.

was long. Colbert's doors are wide open, and I want you to drink to my health, one and all!"

This timely peroration was manifestly regarded as the most acceptable part of his speech, for, with one impulse, the entire throng suddenly sprang from their seats, and, jumping and tumbling over the benches, made a grand rush for Colbert's liquor store.<sup>55</sup>

## **B. Abuse of Injunctive Powers**

The judges thus elected were not likely to pay strict attention to the niceties of either judicial ethics or the law. Their ability to wreak havoc—and thus the political bosses' desire to control them—was magnified by the fusion of law and equity accomplished in New York's Constitution of 1846 and the Field Code of 1848. The fusion of law and equity permitted ordinary judges, at almost any level, to grant sweeping injunctions, in contrast to the separate and centralized system of equity that had earlier prevailed, presided over by the renowned Chancellor Kent. After the fusion, injunctive power was up for grabs, and party bosses exerted their full influence over elected judges to get injunctions in their favor. Lawyers, also, carried favor with certain judges through bribes or political influence, to get injunctions for their clients. Shearman stated: "It is certain that some lawyers can always get an injunction or an attachment, and keep it in force for weeks, without a respectable ground for it."<sup>56</sup>

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<sup>55</sup>BREEN, *supra*, at 217-218. Breen also includes a description of Breezy's "skilful management of his whirlwind canvass," and the hapless Gonsfager's campaign, culminating in the triumphant election of Breezy. *Id.* at 242-245. Violence was not unknown at elections in the late nineteenth century. Parties employed leaders of local street gangs to use their fists to influence balloting on election day. EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 131 (1979). Election violence was not limited to New York City; John Witt describes an upstate judicial election in 1894 in which a "gang of rowdies" battled over the ballot box with a group of policemen. JOHN F. WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 157 (2004).

<sup>56</sup>Shearman, *supra*, at 155. *See also* 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 455 (1995) (first published 1927) ("Injunctions granted by [Tweed judges] were moves in the

An example of the way in which certain powerful interests were able to get unreasonable injunctions was judicial treatment of the excise law. Liquor dealers, Shearman explained, detested this law because it made real the previous nominal prohibition of liquor sales on Sundays.<sup>57</sup> Liquor dealers managed important centers of immigrant and Ring politics, as the account of Judge Breezy's nomination shows.<sup>58</sup> The liquor-dealers' association was anxious to overturn the law, but was told by its counsel that the law was constitutional and could not be contested. Other lawyers in New York said the same. Finally, "a well-known lawyer," representing a prosperous brewer, gave his opinion that the law could not constitutionally apply to liquor dealers who held licenses under the old law, until those licenses expired. On this ground he applied for an injunction. The problem of the "nine-tenths of all the liquor-dealers in the city" who did not have licenses under the old law was never argued. Nevertheless, the judge promptly decided that the excise law was "*wholly void*," without giving any reason, and issued approximately seven hundred injunctions that completely halted the operation of the law for six months. Eventually, the Court of Appeals decided the law was valid in every respect and voided

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party game.").

<sup>57</sup>Shearman, *supra*, at 156. Enforcement was put into hands that were "faithful and resolute." Breen also describes how unpopular this law was among German-Americans in New York. BREEN, *supra*, at 110-111.

<sup>58</sup>*See also* BREEN, *supra*, at 111-112; EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 135 (1979). Morris describes Theodore Roosevelt's near-disastrous meeting with an influential saloon keeper—"a very important personage" in Roosevelt's words—in his first campaign for New York City alderman in 1881. In response to the saloon keeper's suggestion that the price of liquor licenses should be lowered, Roosevelt declared they were not high enough. His Jewish and Irish political managers hastily urged him to go back to his friends on Fifth Avenue, and they would take care of the "liquor vote" on Sixth Avenue. *Id.*

the injunctions.<sup>59</sup>

One practice that grew up among New York city judges at this time, seemingly as a natural outgrowth of the judicial culture of favoritism, was that of listening to counsel making statements about their cases out of court without their opponents being present. Shearman lamented that the practice had become so common in New York as to excite no remark, although “it is fatal to real justice.”<sup>60</sup> A few years later, in his speech at the founding of the Association of the Bar, William Evarts made the same complaint.<sup>61</sup> As a result of this practice, *ex parte* injunctions might suddenly rain down on a hapless lawyer’s client. This was most flagrant in the litigation surrounding control of the Erie Railroad and the Albany and Susquehanna, discussed below.<sup>62</sup> It also might happen that a judge in such a case pledged his decision beforehand, even if there was to be an argument in open court later. “We have known extensive stock speculations to be conducted on the faith of decisions thus promised; and it is not to be wondered at if the judge was strongly suspected of having an interest, as he certainly had a friend, in the

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<sup>59</sup>Cite to case. Shearman, *supra*, at 156. Shearman says that not only liquor dealers but “professional gamblers,” who had obtained representation in Congress and in the state legislature, had “gained a strong hold upon the courts.” “Several judges have notoriously attained their offices through the influence of this class, and their indisposition to execute the law against their best friends is not a matter for surprise.” *Id.* at 157.

<sup>60</sup>Shearman, *supra*, at 155.

<sup>61</sup>*See infra* text accompanying notes \_\_\_\_.

<sup>62</sup>The Field Code created many problems of overlapping jurisdiction and injunctions. In addition, many decisions were not reviewable by Court of Appeals, or took a long time to be appealed. The Court of Appeals was very inefficient because of the yearly rotation among its members, begun by the Constitution of 1846. *See* 2 DOUGHERTY, *supra*, at 159. There were, therefore, serious problems with inconsistency in the law. *See* THERON G. STRONG, LANDMARKS OF A LAWYERS’ LIFETIME 70-71 (1914) [hereinafter T. STRONG].

speculation.”<sup>63</sup>

### **C. Patronage Problems: Referees and Receivers**

Another power judges wielded that made machine politicians so anxious to get control of them was patronage. In accordance with their general ideology, the framers of the 1846 Constitution had done their best to strip judges of as much patronage as possible. That Constitution abolished all offices to which Court of Appeals and Supreme Court judges had formerly made appointments. But while that Constitution abolished such permanent offices, it left two very important loopholes in the form of temporary appointments: referees and receivers. Judges took full advantage of these appointments to feather their nests and to serve the interests of the Tweed Ring. Two Ring judges in particular, Supreme Court Judges George Barnard and Albert Cardozo, developed the distribution of patronage into an art form.

It is worth describing these two judges here, since for New York lawyers they, together with Judge McCunn, epitomized the “Tweed judges.” Whereas the uneducated Irish immigrant John McCunn was seemingly a natural to become a Ring judge, Cardozo and Barnard are more surprising and demonstrate the hold the Ring was able to gain among individuals from more established families by appealing to greed. Albert Cardozo was no recent uneducated immigrant, but a member of one of New York’s oldest and most distinguished sephardic Jewish families.<sup>64</sup> Many of his relatives were lawyers,<sup>65</sup> and his son Benjamin was destined to become a justice of

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<sup>63</sup>Shearman, *supra*, at 155.

<sup>64</sup>ANDREW L. KAUFMAN, *CARDOZO* 6-7 (1998).

<sup>65</sup>See Edgar J. Nathan, *Memorial of Michael H. Cardozo*, 11 ABCNY REPORTS 134-137 (1906).

the U.S. Supreme Court.<sup>66</sup> But it was not Irish and Jews alone who could be corrupted by the Ring: Judge Barnard—perhaps the most notorious of all Ring judges—came from a family of English origin prominent in Poughkeepsie. He and his seven brothers had all gone to Yale. George Barnard’s brother Joseph was on the Supreme Court at Poughkeepsie and had a reputation for honesty.<sup>67</sup> George Barnard was clearly the black sheep of the family. Tales of his cavalier, irreverent, and wildly partial behavior on the bench are legion.<sup>68</sup>

The Constitution of 1846 gave these judges ample opportunity to display their partiality. That Constitution, responding to the pressures of an overloaded court system, had set up a method of quasi-arbitration called referral.<sup>69</sup> If the parties consented, their case could be heard by a referee (essentially a special master) rather than a judge. The referee would then submit a report to the judge who would confirm or reject it. Nominally, the fees of a referee were set at three dollars a day. But in practice, fees could rise much higher, to fifty or a hundred dollars a day, when a referee or his clerk did anything in a case, even adjourn it to another day.<sup>70</sup> Fees tended to be especially high when it was understood that relations between the judge and referee were such that the judge would automatically confirm the referee’s report.<sup>71</sup> As a result, there

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<sup>66</sup>Kaufman notes that, in contrast with his father, Benjamin Cardozo was known for extreme probity on the bench. KAUFMAN, *supra*, at 20.

<sup>67</sup>MARTIN, *supra*, at 76.

<sup>68</sup>*See, e.g.*, BREEN, *supra*, at 158-159; T. STRONG, *supra*, at 72-73; Shearman, *supra*, at 153.

<sup>69</sup>These were also known as “tribunals of conciliation.” 2 ALDEN CHESTER, COURTS AND LAWYERS OF NEW YORK: A HISTORY 1609-1925, 686 (1925).

<sup>70</sup>Shearman, *supra*, at 153.

<sup>71</sup>*Id.*

were fortunes to be made in the referee business, and certain judges had their own stable of referees, presumably providing kickbacks to them.

Judges Barnard and Cardozo were past masters of this practice. Shearman did not mention Barnard by name, but was clearly describing him when said that the “reference business had begun to assume dangerous proportions before this judge took his seat; but it was reserved for him to give it the form of a science.”<sup>72</sup> No matter what the circumstances, if a case was worth enough, he sent it to one of the lawyers in his former law office. Objection was useless; even the agreement of all the parties on other names was in vain.<sup>73</sup> Matthew Breen describes an amusing example of this. He noted that Judge Cardozo gave most of his valuable references to Gratz Nathan, who was his nephew. Barnard gave his to his former law partner, James H. Coleman. Two lawyers, one representing the plaintiff and the other the defendant in an action, agreed in writing to refer the case to Gratz Nathan, and handed up an order of reference to Judge Barnard. That worthy judge, when he saw the name of Gratz Nathan as referee, exclaimed: “Gratz Nathan! No, gentlemen; “Jimmy” Coleman is my Gratz.”<sup>74</sup> Shearman said that the only limits to Judge Barnard’s sending the spoils of referral to his favorites were the jealousy of the other judges and repeated amendments of the law aimed at this practice. The other judges he sometimes defied and sometimes conciliated by giving a few references to their relatives and

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<sup>72</sup>*Id.* at 159.

<sup>73</sup>*Id.*

<sup>74</sup>BREEN, *supra*, at 390. Cardozo’s gift of business to his nephew was not limited to referrals and receiverships. The lawyer George Templeton Strong, for instance, was furious after an encounter with Judge Albert Cardozo in which Cardozo tried to force parties to a suit for partition of real estate to accept Gratz Nathan as a “real estate expert,” to be paid \$10,000 for doing no work. 4 STRONG DIARIES, *supra*, at 236. *See also* KAUFMAN, *supra*, at 295.

friends. The law he evaded in various ways, especially by letting lawyers know that it was dangerous to object to his nominations for referee.<sup>75</sup>

The Ring judges similarly corrupted the process of appointing receivers. The appointment of corrupt receivers was perhaps even more feared than the appointment of corrupt referees, since large fortunes might be placed in the receivers' hands with no one to check their disposition of property, loans without security, and so on.<sup>76</sup> George Templeton Strong noted the grave consequences this could have for New York as a commercial center: "Law does not protect property. The abused machinery of Law is a terror to property owners. . . . No city can long continue rich and prosperous that tolerates abuses like these. Capital will flee to safer quarters."<sup>77</sup> As with injunctions, the Erie Railroad litigation and the Albany & Susquehanna

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<sup>75</sup>Shearman, *supra*, at 159.

<sup>76</sup>Shearman, *supra*, at 168, 159. One of the city's most prominent lawyers, James T. Brady, caused a stir among the bar and politicians when he lost his temper in Judge Barnard's court. The episode is recounted in BREEN, *supra*, at 320, 394. While Brady was cross-examining a receiver appointed by Judge Barnard, the judge constantly intervened to aid the receiver in dodging the questions. Exasperated, Brady finally turned to Barnard with raised arm pointing directly at the judge and, "in a ringing voice, all but accused him of joint corruption with the receiver." Although Barnard was ordinarily flippant on the bench, he turned silent and pale as Brady declared that "he made his statement regardless of consequences, and that in the interest of the profession and in vindication of the court, he was not only ready to make a personal sacrifice, but that he should appeal to all honest man and all courageous lawyers to aid him in driving from power those who were degrading the administration of justice." Breen wrote that it was "the first, forward step in the fight against the corrupt Judiciary." *Id.* at 320. Brady had considerable influence within the bar, being at that time the president of the New York Law Institute, the only functioning organization of the New York City bar. The Institute had been founded in 1828 by James Kent, and although it mainly operated a library service, it counted among its members most of the leaders of the city bar and could be a rallying point for judicial reform. Unfortunately, Brady died soon after his outburst, in February 1869, and a much less zealous reformer, Charles O'Conor, took over as head of the Institute. Some other channel for judicial reform would have to be found.

<sup>77</sup>4 STRONG DIARIES, *supra*, at 264 (Dec. 18, 1869). Strong described the problems with receivers: "No banker or merchant is sure that some person, calling himself a 'receiver,'

litigation illustrated the worst abuse of the power to appoint receivers.

#### **D. Abuse of Criminal Justice**

Tweed and his associates were hardly likely to overlook the criminal justice system in their quest to dominate and bilk city government. A combination of political pressure and bribery kept the judges well under control. The politically-favored, especially if they were wealthy, had nothing to fear. Indictments against them could be prevented (by control of the district attorney<sup>78</sup> and/or grand jury) or quashed. Shearman reported that a man was indicted for “a series of enormous frauds” by which he had made himself rich. A judge quashed the indictment on a technicality, and Shearman claimed, “on the most respectable authority,” that the judge received \$10,000 for the decision. The man later openly boasted that he knew how to manage the drawing of future grand juries to prevent any renewal of the indictment, and indeed subsequent efforts to indict him failed.<sup>79</sup> Those who were not so wealthy also benefitted, so long as they were aiding the Ring. Tweed’s operatives accused of election fraud, if they were arrested at all, were quickly sprung from jail without so much as a cursory examination of the charges against them. Strong wrote in his diaries: “Law protects life no longer. Any scoundrel who is

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appointed ex parte as the first step in some frivolous suit he never heard of, may not march into his counting room at any moment, demand possession of all his assets and the ruinous suspension of his whole business, and when the order for a receiver is vacated a week afterwards, claim \$100,000 or so as ‘an allowance’ for his services, by virtue of another order, to be enforced by attachment.” *Id.*

<sup>78</sup>See the debates over the corruption and political favoritism of this officer in the 1867-68 Convention. In 1857, Tweed arranged for his good friend Peter B. Sweeny to become District Attorney. BREEN, *supra*, at 55.

<sup>79</sup>Shearman, *supra*, at 166. Shearman gave another example of a judge who quashed an indictment on a technicality, and the next day a check for \$500, drawn by the accused, was cashed on Wall Street with the judge’s indorsement on it. *Id.* at 165-166.

backed by a little political influence in the corner groceries of his ward can commit murder with almost absolute impunity.”<sup>80</sup>

Should the defendant be so unlucky as to have a case come on for trial, the judge’s power over the jury might be exerted. A good lunch and a \$100 bribe might be all that was needed for the evidence for the prosecution to become unconvincing to the judicial mind, and a verdict of acquittal directed.<sup>81</sup> Theron Strong, a distant relative of George Templeton Strong, recounts in his memoirs an example, at a slightly later period, of a judge giving a politically astute summing-up.<sup>82</sup> New York judges retained the power that English and federal judges had to sum up the evidence for the jury and to present their own views.<sup>83</sup> Although in this instance it is unclear whether the judge understood the summing-up to be politically astute or was just fortunate, the story indicates the power elected judges might wield in favor of their political allies. Judge George C. Barrett, president of the new Young Men’s Municipal Reform Organization, was elected to the Supreme Court in 1871 after being nominated by the reforming Apollo Hall Democrats and endorsed by the Committee of Seventy.<sup>84</sup> Judge Barrett was a judge in the

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<sup>80</sup>4 STRONG DIARIES, *supra*, at 264 (Dec. 18, 1869). This was so, he said, partly because “[t]he sheriff’s office is a den of Celtic thieves, roughs, and *Sicarii*.” *Id.*

<sup>81</sup>Shearman, *supra*, at 165.

<sup>82</sup>Throughout his memoirs, Theron Strong commented on various judges’ styles of summing up and clearly viewed it as an important judicial attribute in New York. *See, e.g.*, T. STRONG, *supra*, at 16-17, 44, 111, 127. He seems to have thought the practice was valuable. Interestingly, he has harsh words for what he calls the “‘settling’ judge” who tried to force the parties into compromise, a common type today in the era of managerial judging. *Id.* at 130.

<sup>83</sup>As a result of a movement favored by many lawyers in the South and West, other state judges lost this ability. *See* Lerner, *Transformation, supra*, at 225.

<sup>84</sup>His opponent was the Tammany candidate Thomas A. Ledwith, who was attacked by the Association of the Bar. T. STRONG, *supra*, at 101.

English mode favored by reformers: “His jury trials were manifestations of a high order of judicial ability to control the progress of things, and to mould the verdict of jurors.”<sup>85</sup> It was “said to have been the boast of a great English judge that he never lost but one verdict,” and Judge Barrett was similar. “He was what would be described as a verdict-getting judge.” At the end of a trial he had well-defined views as to what the verdict should be, and he exerted his influence to see that there was no miscarriage of justice.<sup>86</sup> In all Judge Barrett’s years on the bench, “[t]here were probably very few cases in which the verdict did not express his own conviction, and in cases where it did not, he was bold and fearless in setting the verdict aside.”<sup>87</sup>

Judge Barrett presided over many important criminal trials, including the second trial of Richard Croker for murder. At his first trial the jury hung, and at the second he was acquitted. Judge Barrett was up for re-election in 1885, when Croker had become the boss of Tammany Hall. It was therefore important, if not essential, for Judge Barrett to get his support. One of Barrett’s colleagues on the bench arranged a meeting between them, and introduced Barrett to Croker. The first thing Barrett said was, ““Mr. Croker, I am glad to see you, I have not met you since you were tried before me.”” His colleague was astonished at Barrett’s bluntness, until he realized that this was his way of reminding Croker of the great service done him in presenting the case to the jury in a manner that justified an acquittal. A tender scene ensued; within the next

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<sup>85</sup>*Id.* at 103.

<sup>86</sup>*Id.* Barrett was “[u]nlike most judges, who seem to drift along with a trial instead of controlling it, and deliver charges that are so colourless that they are of little aid to a jury in solving at times complicated questions of fact.” In contrast, Barrett “pointed out unmistakably, and with great clearness and force the rules of law to guide the jury, and then explained their application to the facts, which he marshalled with very great skill.” *Id.*

<sup>87</sup>*Id.* at 104.

five minutes judge and political boss were “enfolding each other in a loving embrace.”<sup>88</sup> Indeed, for a number of years after this meeting, according to Strong, few had greater influence with Croker than Judge Barrett.<sup>89</sup>

Others, less wealthy or disfavored by the Ring, were not so lucky. Like dictatorships everywhere, the Ring did not hesitate to use imprisonment as an intimidation tactic.

“Sometimes,” Shearman reported, “a highly respectable man will be kept in durance, at the instance of wealthy enemies, notwithstanding he is abundantly able and willing to give bail.”<sup>90</sup>

In the Erie litigation unjustified arrests occurred that disrupted crucial shareholders’ meetings.

In the reverse situation, a poor and unconnected victim could likewise expect no justice against a wealthy, connected guilty party.

We remember an instance in which a rich but infamous brothel-keeper had terribly beaten one of the poor wretches in her house. The “prisoner” was on bail, the accuser was detained as a witness. When the case was called, the poor creature came forward, her face all clotted with blood, and her clothes torn to rags,—a ghastly spectacle. The counsel for the accused took her aside, and, under the very eyes of the judge, bullied and coaxed her by turns, threatening her with prosecution as a vagrant, and with the revenge of her mistress, until she agreed not to prosecute the case, on condition of her doctor’s bill (say five or ten dollars) being paid. The counsel then announced to the justice that the complaint was withdrawn. The justice shortly asked the complainant if that was so, to which the poor creature sadly responded that she would not withdraw her complaint if she were not so poor; but as it was, she supposed she could not help herself. The justice harshly replied that he had nothing to do with that. The complaint was dismissed; and the miserable woman was promptly bundled out of court by the officers.<sup>91</sup>

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<sup>88</sup>*Id.* at 106.

<sup>89</sup>*Id.* at 106-107.

<sup>90</sup>Shearman, *supra*, at 167.

<sup>91</sup>*Id.* at 167.

Shearman said that the reporters who attended the police courts seemed only to present the “ludicrous side” of events happening there, “but to all who feel compassion for man as man, these scenes have much in them to excite both pity and indignation.” Morning after morning, a motley herd of human beings were driven in “like so many oxen, and as summarily knocked on the head if they are in the least refractory, and violently pushed forward if their movements are slow.”<sup>92</sup> Called up before the justice, if poor and friendless they were often sentenced scarcely understanding the charge against them. Others had counsel, but usually one of the infamous “shysters” or “Tombs lawyers” well-noted by legal writers of the time.<sup>93</sup> These operated almost as a ring of professional thieves, expertly fleecing “clients” for all they were worth and providing little if any service in return, sometimes even keeping money designated as the judge’s bribe for themselves. Judges and lawyers together conspired in the last two years of the war, Shearman alleged, to release thousands of prisoners on condition that they would enlist in the army, the judges and lawyers then splitting the recruiting fee between them.<sup>94</sup> Some judges made a great show of sentencing certain defendants severely, in order to get cover for letting off more dangerous criminals who had given bribes or employed the right lawyers.<sup>95</sup>

The scandal of criminal justice in the city was so bad that even the normally circumspect Police Commissioners, in their Annual Report for 1865, used strong language to describe the

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<sup>92</sup>*Id.* at 166.

<sup>93</sup>*See, e.g.,* 2 BRYCE, *supra*, at 1302.

<sup>94</sup>Shearman, *supra*, at 170-171.

<sup>95</sup>*Id.* at 171.

situation.<sup>96</sup> “In no other such city does the machinery of criminal justice so signally fail to restrain or punish serious and capital offences. . . . Property is fearfully menaced by fire and robberies; and persons are in startling peril from criminal violence.” This lamentable state of affairs was largely due to “a tardy and inefficient administration of justice.” Unless some remedy was found, “life in the metropolis will drift rapidly towards the condition of barbarism.”<sup>97</sup>

Shearman himself echoed these sentiments and pleaded with the bar to overcome their fear of exposing the corruptions of which they were aware. The better lawyers’ sense of honor in their own affairs, he said, was as strong as ever, but the corrupt atmosphere surrounding them had made them “almost insensible to the degradation of public men.”<sup>98</sup> He recognized the difficult situation in which practicing lawyers of good conscience found themselves. If they openly defied the judges, they could not continue to practice law. If they left the bar, it would leave the public wholly at the mercy of plunderers. The better part of the New York bar, he wrote, desired reform.<sup>99</sup> What to do? The opportunity had finally arrived, Shearman urged, at the Constitutional Convention about to meet in Albany. He implored delegates to put away all partisan concerns and to work together to secure the best men for judicial office from all parties. “Good men of all political opinions must unite upon this single issue, or the greatest city of America will soon fulfil the gloomy forebodings of the Police Commissioners, and sink into

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<sup>96</sup>The Board of the Police Commissioners that year were equally divided between the parties, and so less open to the charge of partiality than most. *Id.*

<sup>97</sup>ANNUAL REPORT OF THE POLICE COMMISSIONERS, 1865.

<sup>98</sup>Shearman, *supra*, at 175.

<sup>99</sup>*Id.* at 176.

hopeless barbarism.”<sup>100</sup>

### III. The Elite World: Old New York and Old New England

The class to which Shearman was trying to appeal was worlds apart in terms of its social life, culture, and politics from Tweed’s Ring and its henchmen, yet the two domains existed side by side in the city. Amid the corrupt judges and municipal hacks wielding power over teeming immigrant slums, the world of old New York carried on, with its revolutionary war descendants obeying fixed social customs, paying homage to a strict code of business probity, and abdicating political responsibility. What were the characteristics of this class, and what could galvanize them into action against political and judicial corruption?

It has not been easy to settle on a name for this class, and that difficulty points to regional nuances. Some historians call this group “Mugwumps,”<sup>101</sup> but that label is not satisfactory because it properly refers only to those who bolted the Republican party in the presidential election of 1884, when Republicans nominated the allegedly corrupt James Blaine against the reform-minded Democrat, Grover Cleveland. The period we are dealing with is earlier, and although most of the people we are concerned with were Republicans, some were Democrats. An alternative is the term used by G. Edward White, “Brahmin gentry.”<sup>102</sup> This is better, since it captures the almost priestly ideals and gentlemanliness of the class. But White was using it to

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<sup>100</sup>*Id.*

<sup>101</sup>MCFARLAND, *supra*, at 38; Grossman, *supra*, at 579. The name comes from an Indian word for “chief” or “head man.” On this type, see also JOHN G. SPROAT, “THE BEST MEN”: LIBERAL REFORMERS IN THE GILDED AGE (1968); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955).

<sup>102</sup>G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 55-60 (1993).

describe a largely New England elite, and hearing the term one thinks immediately of “Boston Brahmins,” rather than old New York. “Old New York” was indeed the term native New Yorkers of this class tended to use about themselves. I will use the terms “old New York” and “old New England.” The separate terms are, I believe, important because there were significant differences between the native New Yorkers and the well-educated and well-bred New Englanders who migrated to New York and made up such a large part of the elite New York bar. Both native New Yorkers and elite New Englanders had high ideals of professional conduct and wanted to restore the New York bench to its former glory by re-anglicizing it. But without the reforming zeal and willingness to get into politics of the newcomers from New England, old New Yorkers would have been considerably less effective. The infusion of New England energy into New York professional circles enabled the elite of the bar to some extent to guide and uplift democratic institutions in the city.

#### **A. Old New York**

Of the two societies, old New York has been the less studied by legal historians. This is understandable since old New York produced many fewer significant legal figures. Still, it could breed political giants—Theodore Roosevelt being the best example—and its culture and moral code helped to determine one of the main routes the elite bar would take to reform: a select, gentlemanly association. One of the most thoughtful accounts of old New York society comes to us from the best-known literary figure it produced: Edith Wharton (1862-1937). Wharton’s account is in large part confirmed by the diaries of the older New York lawyer George Templeton Strong (1820-1875), famous for their mordant wit and wide scope of interest. Wharton was hardly uncritical of the society in which she grew up; she made its stultifying

pressure the main theme of her most famous novels. But in her later years, she said she had become “better able to measure the formative value of nearly three hundred years of social observance: the concerted living up to long-established standards of honour and conduct, of education and manners” that were part of the social aristocracy she was born into.<sup>103</sup>

Her account emphasizes three features important to us here: Englishness, insistence on probity in business affairs, and political withdrawal—all of which were related. Throughout her description, she highlights the Englishness of old New York, contrasting it with the New York society that followed and also, interestingly, with that of Boston. The old New York families were of both English and Dutch origin, but according to Wharton the more aristocratic English culture predominated. During Wharton’s lifetime, theories of racial (often meaning what we would call ethnic) and innate family differences flourished, and Wharton herself makes frequent reference to blood and bloodlines. In her memoirs, however, bloodlines, inherited culture, and constant recent connections with the old country are all intertwined, and seem to blend together seamlessly into one fabric. According to Wharton, old New York families assiduously maintained links with the English root of their culture.<sup>104</sup> The mellow Anglicanism typical of old

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<sup>103</sup>EDITH WHARTON, *A BACKWARD GLANCE* 5 (1998 ed., first published 1933).

<sup>104</sup>The families hired English tutors to educate both sons and daughters; Wharton’s mother and her siblings all had English tutors, as did Wharton and her brothers, and this was commonplace. *Id.* at 49. Sons of the families were also regularly sent to Oxford and Cambridge. *Id.* Reverence for correct (as well as easy, flexible, and idiomatic) written and spoken English was high, despite the lack of literary enthusiasm in this world. *Id.* The blending of blood and culture is evident in Wharton’s thought on this subject, so dear to a writer: “My mother’s stock was English, without Dutch blood, and this may account for the greater sensitiveness of all her people to the finer shades of English speech.” *Id.* at 53. Her father’s people, on the other hand, were partly Dutch and “had disagreeable voices. I have often noticed that wherever, in old New York families, there was a strong admixture of Dutch blood, the voices were flat, the diction was careless.” *Id.* at 52-53. Travel also kept members of the society linked with their roots.

New Yorkers also contributed to the pervading English atmosphere.<sup>105</sup>

Chief among the “moral treasures”<sup>106</sup> of the society Wharton described lay in upholding two important standards: “that of education and good manners, and of scrupulous probity in business and private affairs.”<sup>107</sup> In discussing its business aspect, Wharton called her world “a mercantile middle class” and stated that “[t]he first duty of such a class was to maintain a strict standard of uprightness in affairs; and the gentlemen of my father’s day did maintain it, whether in the law, in banking, shipping or wholesale commercial enterprises.”<sup>108</sup> The punishment

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Wharton remembers old New Yorkers as continually planning, embarking on, or returning from European travel. As a result, in contrast to a typical member of Bostonian society, “[t]he old New Yorker was in continual contact with the land of his fathers.” *Id.* at 61. Wharton was surprised to discover, after her marriage to a Bostonian, how little Bostonians tended to travel compared with New Yorkers.

<sup>105</sup>Wharton observes that while some of the old Dutch families continued to follow the Dutch reformed rite, “the New York of my youth was distinctly Episcopalian,” and the “noble cadences of the Book of Common Prayer” tended to induce a “reverence for . . . ordered ritual.” *Id.* at 10. In this respect, she compares orderly old New York to factious Boston and notes that some of her English forbears settled first in Massachusetts, but were probably not “of the stripe of religious fanatic or political reformer to breathe easily in that passionate province,” and so transferred to New York. *Id.* at 9. She wonders whether “those old New Yorkers did not owe their greater suavity and tolerance to the fact that the Church of England (so little changed under its later name of Episcopal Church of America) provided from the first their prevalent form of worship.” *Id.* George Templeton Strong certainly fit this mode, with his high-church Anglicanism. Strong was an active Episcopalian, being a vestryman at Trinity Church, where his fellow worshipers included John Jacob Astor and many other prominent old New Yorkers (as well as nouveaux riches). He was perhaps unlike many old New Yorkers in being deeply interested in theological questions, and his diaries are filled with theological essays.

<sup>106</sup>*Id.* at 7.

<sup>107</sup>*Id.* at 21.

<sup>108</sup>*Id.* The reference to “*wholesale* commercial enterprises” points to an interesting exclusion. Wharton says that old New York was a society from which all dealers in retail business were excluded as a matter of course. “The man who ‘kept a shop’ was more rigorously shut out of polite society in the original Thirteen States than in post-revolutionary France . . . .” *Id.* at 11. Wharton recounts the surprise and amusement of the Parisian Moreau de St Méry,

visited on members of the class who violated this code was swift and severe: “I well remember the horror excited by any irregularity in affairs, and the relentless social ostracism inflicted on the families of those who lapsed from professional or business integrity.”<sup>109</sup> She recounted that in a case in which two or three men of her class were involved in a discreditable bank failure, “their families were made to suffer to a degree that would seem merciless to our modern judgment.”<sup>110</sup> Strong’s diaries describe an example of the ostracism inflicted on those who strayed from professional probity in the downfall of old New York lawyer Henry Nicoll for misappropriating clients’ money.<sup>111</sup> Strong differed somewhat from Wharton’s account in suggesting that while old New York certainly had a high ideal of business probity, adherence to it was perhaps not nearly so universal as Wharton describes.

While Wharton praised the “social amenity and financial incorruptibility”<sup>112</sup> of her world, she viewed both, particularly the latter, as linked to a substantial failing: the refusal to engage in politics. “Perhaps the New Yorkers of that day were unconsciously trying to atone for their culpable neglect of state and national politics, from which they had long disdainfully held aloof, by upholding the sternest principles of business probity, and inflicting the severest social

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who, after fleeing the Terror, kept a bookstore in Philadelphia that was the haunt of the most aristocratic of his fellow émigrés, and yet he could not be invited to Washington’s inaugural ball. Wharton notes that “[s]o little did the [American] Revolution revolutionize a society at once middle-class and provincial that no retail dealer, no matter how palatial his shop-front or how tempting his millions, was received in New York society until long after I was grown up.” *Id.*

<sup>109</sup>*Id.* at 22.

<sup>110</sup>*Id.*

<sup>111</sup>4 STRONG DIARIES, *supra*, at 550-551.

<sup>112</sup>WHARTON, *supra*, at 22.

penalties on whoever lapsed from them.”<sup>113</sup> Direct political involvement was viewed as out of the question. Even in the 1870's and 80's, “the idea that gentlemen could stoop to meddle with politics had hardly begun to make its way, and none of my friends rendered the public services that a more enlightened social system would have exacted of them.”<sup>114</sup> When old New Yorker Theodore Roosevelt began his political career, his family reacted “with almost uniform horror.”<sup>115</sup> Wharton took the rather European view that “[i]n every society there is the room, and the need, for a cultivated leisure class,” and laments that this class was not used appropriately in New York: “but from the first the spirit of our institutions has caused us to waste this class instead of using it.”<sup>116</sup> Wharton expresses amazement that the descendants of men who had fought for their freedom and been so heavily involved in the founding of a nation now seemed to possess “a blind dread of innovation, an instinctive shrinking from responsibility.”<sup>117</sup> Of course, the massive immigration into New York City of people who were hardly inclined to respect the birthright or virtues of Wharton’s class must have caused old New Yorkers to shrink from participating in elective politics. Wharton does note that, probably sometime in the 1870's or

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<sup>113</sup>*Id.*

<sup>114</sup>*Id.* at 95.

<sup>115</sup>MORRIS, *supra*, at 124. According to a member of the family, “The Roosevelt circle as a whole had a profound distrust of public life.” *Id.* Strong confirms the prohibition on old New Yorkers entering public office, with a twist: “No decent man can take public office without imminent danger of losing caste, unless he compel the respect of a defrauded but corrupt community by the accumulation of at least one or two millions of fraudulent profit. This state of things cannot last much longer without explosion.” 4 STRONG DIARIES, *supra*, at 246 (May 20, 1869).

<sup>116</sup>WHARTON, *supra*, at 95-96.

<sup>117</sup>*Id.* at 22.

80's, old New Yorkers had begun to shake off the apathy that had fallen on them after the Civil War, and started to be active in the affairs of the city once again. But this activity took the form of participation in privately-funded causes, such as museums, libraries, and charities.<sup>118</sup> The founding in 1870 of the private and select Association of the Bar of the city of New York, as opposed to a more public body, was symptomatic of this tendency.<sup>119</sup> Such institutions allowed New Yorkers to become involved without dealing directly with Ring bosses or the less scrupulous elements of the bar.

In old New York society, the profession of law held a unique place. Of the “liberal professions”—which Wharton did not define but which in England meant physicians, clergy, and barristers—it was the most common.<sup>120</sup> As in England, some knowledge of the law was considered appropriate for young gentlemen, and in fact, almost all the young men Wharton knew studied law for a while after leaving college, though comparatively few practiced it later.<sup>121</sup> A few old New Yorkers were indeed “distinguished lawyers,” with “busy professional careers.”<sup>122</sup> Many of these more serious practitioners were graduates of Columbia College or Columbia Law School, as was Strong.<sup>123</sup>

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<sup>118</sup>*Id.* at 95.

<sup>119</sup>George Templeton Strong was an early member of the Association, but never got involved in politics directly.

<sup>120</sup>WHARTON, *supra*, at 56.

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* at 95.

<sup>123</sup>Strong became a trustee of Columbia, and used his influence to broaden the academic curriculum, hire professors based on standing in their academic field rather than their religious affiliation, and raise the standards for admission to the law school to try to get a better class of

But while the law might be a thoroughly respectable profession, it could be problematic from a moral point of view. Even a “distinguished lawyer” was bound to represent the interests of his clients, and such a distinguished lawyer was likely to have for clients men who were immersed in “feverish money-making, in Wall Street or in railway, shipping or industrial enterprises,” or, as Wharton more succinctly puts it, “gold-fever.”<sup>124</sup> These lawyers were directly in contact with the nouveaux riches whose obsession with money-making and unscrupulous business methods were anathema to old New York. The lawyers were one of the relatively few points of contact between the world Wharton describes and that of rough-and-tumble city business and politics.<sup>125</sup> On the one hand, such lawyers were in a good position to know something about government affairs and thus to be reformers; on the other, as Shearman

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student. He is frequently accused of prejudice against various ethnic groups, and while that cannot be denied, he was more open-minded than many believe. Regarding allegations that he was anti-Irish or anti-Semitic, see his concern over the Irish potato famine, his praise for pianist Anton Rubinstein, he and his wife’s entertaining Miss Sarah Lazarus in their box at the opera, and their visit to the new 5<sup>th</sup> Avenue Reform synagogue, with favorable comments (though he could not resist a crack about “porkophagous, or porcivorous” Jews). 4 STRONG DIARIES, *supra*, at 262-262.

<sup>124</sup>WHARTON, *supra*, at 56. Contrast this gold-fever with the first rule of conversation at an old New York table, as instilled in Wharton by her mother, Lucretia Jones: “Never talk about money, and think about it as little as possible.” *Id.* at 57.

<sup>125</sup>In Wharton’s novels, the infusion of the nouveaux riches is portrayed as doing both moral and aesthetic damage to the older organic society. In *The Custom of the Country*, an old New Yorker considers the influx of new money:

[The new] society was really just like the houses it lived in: a muddle of misapplied ornament over a thin steel shell of utility. The steel shell was built up in Wall Street, the social trimmings were hastily added on Fifth Avenue; and union between them was as monstrous and factitious, as unlike the gradual homogenous growth which flowers into what other countries know as society, as that between the Blois gargoyles on Peter van Deegan’s roof [undoubtedly a reference to the Fifth Avenue house Richard Morris Hunt designed for William K. Vanderbilt] and the skeleton walls supporting them.

EDITH WHARTON, *THE CUSTOM OF THE COUNTRY* 73.

feared, their professional interests and the old New York social world discouraged getting involved.

### **B. New Englanders and the Elite New York Bar**

New England-born lawyers provided the jolt that galvanized the elite New York bar into action. As Wharton suggests in her description of the differences between Bostonians and old New Yorkers, New Englanders tended to have more reforming zeal and political ardor, whereas New Yorkers preferred to emphasize private gentlemanly social life and institutions. A native of New England, William Evarts, was one of the strongest voices at the New York Convention of 1867 in favor of reforming the judiciary. Nearly every one of the members of the Association of the Bar of the City of New York who were most in favor of taking on the Ring directly and reforming the system of judicial selection were of New England origin. These included Evarts, Dorman Eaton, and James Coolidge Carter.<sup>126</sup> Old New Yorkers, in contrast, tended to concentrate on heightening standards of admission to the bar, as well as maintaining a suitable clubhouse and library for the gentlemanly portion of the bar.

These New Englanders tended to come from families who were well-to-do, if not necessarily wealthy, and socially prominent, with a tradition of local leadership.<sup>127</sup> Many had close links with Congregationalist churches, and embraced a strict, although rather dry, moral

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<sup>126</sup>The Democrat and native of upstate New York Samuel Tilden was also strongly in favor of a reforming role for the Association, but he was not as involved with the inner workings of the Association as these others.

<sup>127</sup>Fortunately for historians of this period, Lewis Grossman has recently written an excellent study of one of the most influential New Englanders to migrate to the New York bar, James Coolidge Carter, and the world from which he sprang. *See generally* Grossman, *supra*.

code whose major tenet was avoiding “selfishness, greed, and licentious behavior.”<sup>128</sup> This code was dry in more ways than one; Carter, for example, condemned saloons, “where men are tempted to ruin themselves and their families by indulgence in drink and are led into the commission of the worst of crimes.”<sup>129</sup> These men were well-educated, most at Harvard and Yale, and they viewed themselves as a sort of natural aristocracy. They deplored both the money-grubbing nouveaux riches and “the unthinking and vicious multitudes who crowd our cities.”<sup>130</sup> They tended to be anti-slavery and Republican following the Civil War, though not deeply attached to either party. As the revolt of many of them against the Republican Blaine in 1884 demonstrates, they were ready to support any candidate who credibly promised reform.

As lawyers, however, these men were faced with special dilemmas. Many of them, such as William Evarts,<sup>131</sup> came to New York and were highly successful at the bar, some becoming millionaires in the process. Their success depended on representing clients, including Cornelius Vanderbilt, Jim Fisk, and even Tweed himself, whose business practices were less than above board. Sometimes their own tactics in representing these clients would not bear scrutiny. Even the high-minded reformer Dorman Eaton, a classic example of the type we are discussing, in

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<sup>128</sup>Richard Gerring, *Party Ideology in America: The National Republican Chapter, 1828-1924*, 11 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 87, 88 (1997). Contrast this dessicated negative commandment with the rich positive commandment to “love one another.”

<sup>129</sup>JAMES C. CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* 250 (1907). See Grossman, *supra*.

<sup>130</sup>James C. Carter, *President’s Annual Address, in Proceedings of the Second National Conference for Good City Government and of the First Annual Meeting of the National Municipal League and of the Third National Conference for Good City Government* (Philadelphia: National Municipal League, 1895) 275, cited in Grossman, *supra*.

<sup>131</sup>See CHESTER L. BARROWS, *WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN* (1941).

letters to his law partner revealed that he well understood the subtle art of bribing a judge.<sup>132</sup> A more prominent example of the reforming lawyer who used unscrupulous tactics in representing unscrupulous clients was David Dudley Field, author of the Field Code. He was constantly vilified by his fellow members of the elite New York bar for his actions in representing Jim Fisk and others, but in fact his actions may have been different in degree but not in kind from his colleagues.<sup>133</sup> Field embodied the fascinating trait, shared by this class generally, of being able to consider the needs of the law and law reform separately from the interests of their clients. It was this characteristic that allowed Field to use a procedural maneuver to advantage his client, then almost the next day propose a memorial to the legislature urging reform to close off that maneuver. This characteristic permitted these lawyers, especially once banded together into the Association of the Bar, to be an effective force for reform.

#### **IV. Post-Civil War Efforts at Reform**

##### **A. The Constitutional Convention of 1867**

As Shearman pointed out, the elite of the New York bar had a golden opportunity to secure judicial reform at the constitutional convention of 1867. Many members of the elite bar were represented, often elected at-large. These included both old New Yorkers, such as Joshua Van Cott, and native New Englanders, such as Evarts. Shearman's article had fired the proponents of reform. At the 1867 convention in New York, many delegates made clear their opinion that the reforms of the populist Constitution of 1846 had failed miserably. Populist

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<sup>132</sup>See, e.g., Dorman B. Eaton to J.C. Bancroft Davis, July 5, 1868, J.C. Bancroft Davis MSS, Library of Congress.

<sup>133</sup>VAN EE, *supra*, at 271.

Democrats were present and vocal, but outnumbered. Many delegates—both Republicans and Democrats—expressed their desire to return to a more English version of the judiciary. While compromise was necessary, in the end they succeeded in winning substantial change to present to the voters for ratification. Interestingly, delegates were not so much concerned with the method of selecting judges, but cared greatly about tenure.

Through a series of fortunate circumstances, members of the elite bar were able to participate directly in shaping reform at the convention of 1867. The Constitution of 1846, in a Jeffersonian spirit in keeping with the populist times, had provided that every twenty years the question whether to hold another constitutional convention was to be submitted to the people of the state.<sup>134</sup> This populist provision had the effect of facilitating a conservative reaction in less populist times. The question whether to hold a convention was submitted at the general election of 1866, and the electorate voted in favor, 352,854 to 256,364. The New York legislature provided for election of 128 delegates from the various senatorial districts and 32 delegates at large. (No elector could vote for more than 16 at-large delegates, so the principle of minority representation was included in the voting, which doubtless helped members of the elite bar get elected.<sup>135</sup>) The at-large delegates were divided evenly between the parties, with 16 Democrats and 16 Republicans. The Republicans won a majority of the districts, and so were able to elect

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<sup>134</sup>N.Y. CONST. OF 1846, art. 13.

<sup>135</sup>The delegates voted to include the principle of minority representation in electing the Court of Appeals; each New York voter was allowed to vote for the Chief Judge plus four other judges on the seven-member court. This system resulted in the election of several members of the elite bar. 2 DOUGHERTY, *supra*, at 189.

the president of the convention and to some extent to control its committees.<sup>136</sup> The convention began in June 1867, and finished its work in February 1868. Partisan feeling ran very high at the time the convention sat, as President Andrew Johnson and the U.S. Congress were locked in battle. The U.S. presidential election would soon be at hand, and party leaders felt it was a toss-up and were jockeying for position. Some delegates thought the close match in strength between the parties in New York made this “an auspicious moment for us to make a Constitution,” since no one party could look forward to controlling political offices in the state and therefore all had incentive to design the best system possible.<sup>137</sup> Whatever the reason, it is remarkable how thorough and serious the debates at the New York convention were, compared with modern political debate. Fortunately for historians, we have available five thick volumes of verbatim debates.

Although the debates covered a wide range of fascinating topics,<sup>138</sup> much of the convention’s effort focused on the judiciary. As in all previous New York conventions, lawyers formed a large majority of the delegates. Many of the most prominent lawyers (and judges) in the state were members, including William Evarts, Charles Daly, and Joshua Van Cott. Given the composition of the convention, it is perhaps not surprising that the judiciary article took up

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<sup>136</sup>ALDEN CHESTER, *COURTS AND LAWYERS OF NEW YORK: A HISTORY 1609-1925*, 697-698 (1925).

<sup>137</sup>REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1867-68, at 2197 (reported by E.F. Underhill, official stenographer to the Convention) (Albany, NY, Weed, Parsons & Co. 1868) (remarks of A.J. Parker) [hereinafter “1867-68 DEBATES”]. The volumes have continuous pagination from one volume to the next.

<sup>138</sup>The debates include absorbing discussions of colored suffrage, women’s suffrage, and state support of religious charitable institutions.

so much of the convention's time. But many delegates seemed genuinely to believe the people had called the convention primarily in order to rescue the judiciary from ill-advised Jacksonian reforms. Evarts declared, "I think I see unmistakable signs of the public will showing itself by insisting upon a change in the policy of conferring [judicial] office in the future."<sup>139</sup> He believed that "any one who supposes that the people of this State do not expect from this Convention a very thorough and substantial reinstatement of the judiciary, both in the tenure of the judges and in their repute with the people, is mistaken."<sup>140</sup> Matthew Hale stated that he agreed with many previous speakers that reform of the judiciary "is a question of greater practical importance than any other that will come before this Convention." In his opinion, "the evils and defects in our present judicial system were the occasion of the calling of this Convention."<sup>141</sup>

There was remarkable uniformity of opinion among the delegates, Republicans and Democrats alike, about the source of the New York judiciary's problems. Nearly all blamed the system of elected judges for short terms inaugurated by the Constitution of 1846. Supporters of that system were out-gunned numerically and intellectually by reformers. Several months into the debate, William Evarts was able justly to declare, "I believe that the debate, as hitherto conducted, shows a remarkable unanimity of opinion as to what the public interests require from

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<sup>139</sup>1867-68 DEBATES, at 2369 (remarks of William Evarts).

<sup>140</sup>*Id.* at 2370. "Nothing," he said, "will disappoint the people of this State so much as that we should adjourn, offering them a judicial arrangement which shows only circumstantial changes in the working system, without probing and correcting the real defects in the present judiciary, which cause such serious public concern." *Id.* Evarts went on to attribute a conservative (and rather English) attitude to the people: "They wish to see the judiciary as it stood before them in the past, clothed with all the majesty of justice, and endued with all the strength that it is in the power of men to place about those whom they desire to honor, and whom they are willing to intrust with final authority." *Id.*

<sup>141</sup>*Id.* at 2181 (remarks of Matthew Hale).

the judiciary, in its establishment and constitution”—a unanimity, he added, that was in accord with popular sentiment.<sup>142</sup>

The prevailing feeling was that the past glories of the New York judiciary—the days of Chancellor Kent and Ambrose Spencer—were dimmed.<sup>143</sup> The Convention of 1846 had foolishly and unthinkingly done away with the conditions for that glory.<sup>144</sup> Several delegates complained that New York decisions were no longer followed in the rest of the country, and abroad, as they once were. It was necessary to restore a more English conception of the judiciary, along the lines of the New York past and of the federal bench. As Evarts put it, “The nation from which we derive our origin, our laws, our custom, our habits, our language, has tried to put the judges, and we have [in the past], confessedly, tried to put the judges, upon a certain footing of superiority to the rest of the community.”<sup>145</sup> Rotation in office must be stopped.<sup>146</sup> Permanency and independence were the watchwords.

Certain delegates held an especially exalted view of the judiciary, which touched on

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<sup>142</sup>1867-68 DEBATES, at 2367 (remarks of William Evarts).

<sup>143</sup>*Id.* at 2182 (remarks of Hale).

<sup>144</sup>*Id.* at 2365 (remarks of Daly). *See also id.* at 2182 (remarks of Hale) (“If there ever was a system devised by human wit to get a political man on the bench, the least man, the least revered in his character, the least impartial, the most under influences which ought never to affect the mind of a judge, that system is devised and is to be found embodied in the system of 1846.”) *See also* Dorman B. Eaton, *Article on Judiciary*, 2 LALOR’S CYCLOPAEDIA 644.

<sup>145</sup>1867-68 DEBATES, at 2367-68 (remarks of Evarts). *See also* remarks of A.J. Parker: United States judges were very courteous, and “I believe you will find no judges in the world more courteous than they are in the English courts, where they hold for life, and remain as independent in every respect as it is possible to make them.” *Id.* at 2224.

<sup>146</sup>*Id.* at 2173 (Parker); *id.* at 2179, 2193 (Rathbun); *id.* at 2188 (Van Cott); *id.* at 2362 (Daly). A few populists delegates spoke in favor of rotation. *Id.* at 2200 (McDonald).

questions of jurisprudence. Two of the most prominent lawyers at the convention, the Republicans Joshua Van Cott and William Evarts, expressed similar conceptions. The judge in their view must be utterly above politics, serene in his lofty sphere almost like a heavenly body (or like God). Van Cott declared that “the function of the judge has no relation to policy whatever.”<sup>147</sup> The legislature “determines the policy of the State . . . so far as it can be regulated by statute.” It “prescribes the policy with absolute force, so far as it can be prescribed and fixed by mere legislation.” The executive’s function “is merely to see that the laws are faithfully administered.” But the judge’s function does not depend on anyone’s will, either the judge’s own or the will of the people. “But when you come to the bench, to the solemn functions of justice, what has the will of the people to do there? The will of the people withdraws at once.” The judge is on a purer, loftier plane: “The court sits there, beyond the region of will, serene, to look at the law; to see, not the parties but the question before it; to determine upon the great principles of justice; defying will, defying popular sentiment, defying influences which would disturb it in the faithful administration of a pure and impartial justice.” Van Cott suggested that part of the function of this God-like judge was to protect individual liberties from the depredations of the politicized legislature. Almost like God in heaven, the court “sits there in that serener region to interpret and proclaim the law, and to protect the citizen in his person and in his property.”<sup>148</sup>

Evarts likewise was at pains to separate the judge from the idea of will. “The judge is not to declare the will of the sovereignty, whether that sovereignty reside in a crowned king, in an

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<sup>147</sup>*Id.* at 2188 (Van Cott).

<sup>148</sup>*Id.*

aristocracy, or in the unnumbered and unnamed mass of the people.”<sup>149</sup> (He hardly made the last prospect sound attractive.) Rather, “the judiciary is the representative of the JUSTICE of the state, and not of its POWER.” Evarts made much of the word justice, without being terribly precise about its meaning.<sup>150</sup> Like Van Cott, therefore, Evarts believed in a strict separation of the functions of legislature and judiciary: “judges are to declare the law, and not impose it. . . . It is the law of the land that they are to declare, and not the will of any power in the land, and it is a declaration, and not an enactment of law, that is looked for from them.”<sup>151</sup> A judge should thus “hold his office during the pleasure of no representative of power” except “God, the Judge of all.”<sup>152</sup>

As it was, New York judges certainly did depend on the pleasure of those in power for their continuation in office and hardly occupied a serene sphere. Lurking in the background of the debates at the convention were the charges of judicial corruption made in the anonymous *North American Review* article. One of the most prominent members of the convention, Judge Charles P. Daly, reluctantly brought them out in the open. Daly was a Democrat and an elected judge of the Court of Common Pleas in New York City; he therefore had reason to know

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<sup>149</sup>*Id.* at 2367 (Evarts).

<sup>150</sup>“Justice,” Evarts said, “is of universal import, of universal necessity, under whatever form of government. Mr. Burke has wisely said justice is ‘the main policy of all human society.’” *Id.* In their admiration for Burke (and in much else), these reformers were the intellectual heirs of the Whigs. See D. HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS*, 70-75, 235-36 (1979).

<sup>151</sup>1867-68 DEBATES, at 2367 (Evarts).

<sup>152</sup>*Id.* at 2368. Breen had similar exalted views of the role of the judge: “The functions of a Judge approach more nearly our conception of Divine Justice than those of any other position on earth. To basely betray that trust is an act bordering on sacrilege.” BREEN, *supra*, at 24.

whereof he spoke. Respected and upright Judge Daly made a fitting counterpart to the corrupt Judge McCunn; both were Irish-born Catholics and had served as common sailors before immigrating to New York.<sup>153</sup> Daly compared the situation of the New York judges after 1846 to that of English judges in the seventeenth century, when they served at the pleasure of the king and were renowned for caving to royal pressure.<sup>154</sup> One of the Jacksonian populists at the Convention, Judge Ezra Graves, was clearly uncomfortable with the implied charges of judicial corruption made by Daly and other delegates, and asked Daly directly whether he knew of any judge after 1846 being bribed. Daly declared he had wanted to avoid speaking about it, but referred to the article in the *North American Review*, “containing a detailed statement of corrupt acts and of conduct upon the bench, which is quite equal to any thing found in the dark and disgraceful period of English judicial history.”<sup>155</sup> He feared the New York judiciary had become a similar byword for infamy: “Whether true or not, it is humiliating enough to know that [the article] has gone forth to be read throughout the United States and in other lands in the leading review of this country. That it has thereby become incorporated into the literature of the country

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<sup>153</sup>Daly was something of an intellectual. He served as president of both the Friendly Sons of St. Patrick and of the American Geographical Society. (His interest in geography doubtless was encouraged by his early life as a common sailor.) He was immensely respected and indeed loved by Republicans and Democrats alike. There is a wonderful portrait of him in JAMES W. BROOKS, *HISTORY OF THE COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK* 77-82 (1896). Interestingly, he wrote extensively on the history of the Jews in New York. He also appears to have been something of an Anglophile. Theron Strong makes amusing comments about Daly’s attempts to imitate English judges on the bench. See T. STRONG, *supra*, at 133-137.

<sup>154</sup>1868-67 DEBATES, at 2364 (Daly).

<sup>155</sup>*Id.* at 2365 (Daly).

...<sup>156</sup> Graves pressed him as to whether he had personal knowledge of the corruption alleged. Daly denied it, but continued to stress the ignominy of the bench: “I am humiliated when one of the popular preachers of this country, Henry Ward Beecher, rises in his pulpit and makes the corruption of the judiciary of the city of New York the subject of one of his most stinging sermons, and refers to the whole body of the judiciary of the city as corrupt and rotten.”<sup>157</sup> He tried to secure the support of those from country districts, warning ominously that if there was any foundation for the charges of corruption in city judges, that corruption “is not or it will not be confined to that city. It will spread as every contagion spreads, for it will not be limited to any one spot or place.”<sup>158</sup> Evarts took up the theme from Daly, stressing the low repute of the judiciary as illustrated by Daly’s response to Graves.<sup>159</sup> In response to Evarts, another populist, John Schumaker, defended the judiciary and attacked the *North American Review* article in hyperbolic terms, calling it a “a vile, libelous article, a lampooning, anonymous, scurrilous article,” “one of the most monstrous libels, one of the most monstrous, venomous articles that ever emanated from any press in the country.” Significantly, he said authorship of the article “is charged to an English spy” or, alternatively, “to an English chance-man, a ticket-of-leave man.”<sup>160</sup>

What precisely did the delegates think were the problems caused by election of judges for

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<sup>156</sup>*Id.*

<sup>157</sup>*Id.* at 2366.

<sup>158</sup>*Id.* See also *id.* at 2406-07.

<sup>159</sup>*Id.* at 2371 (Evarts).

<sup>160</sup>*Id.* at 2372 (remarks of John G. Schumaker). See also mention of corrupt referees, *id.* at 2413; references to Judges Cardozo and Barnard, *id.* at 2419.

short terms? Delegates were not much concerned about partisanship in the initial selection of judges. They were far more concerned about the influence party operatives wielded after a judge went on the bench.<sup>161</sup> Daly praised the determination of the constitution of 1821 to remove the judges from partisan politics, and the nationally-acknowledged superiority of the resulting judges.<sup>162</sup> But the situation had changed radically after 1846. A judge elected for a short term must give up his business and becomes dependent upon his office for support. Continuance in office was vital, since judicial salaries were so small that a judge could save nothing to provide a cushion once he left the bench.<sup>163</sup> Such a judge “soon learns that his continuance in office does not depend upon his learning, his ability or his integrity.” It depends, first, upon the continuance in power of the political party that elected him; and, secondly, upon his ability to secure a renomination at the end of his short judicial term. “He may have the learning of Mansfield and the integrity of Hale, but it will avail him little if his party is not in power, and if he is not an active, leading and influential member of it.”<sup>164</sup> Judges thus threw themselves into politics.<sup>165</sup>

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<sup>161</sup>“The real evil at present is that, after he goes upon the bench, he depends for his continuance there upon the action and upon all the influences which affect political parties.” *Id.* at 2365 (Daly).

<sup>162</sup>“From 1821 to 1846, [New York judges] were beyond even the charge of political partisanship. They neither mixed in nor took part any prominent part in the strife of parties while they sat upon the bench.” *Id.* at 2365. As a result, “during the tenure of good behavior, the judiciary of the State of New York, in the character of its judges, and in the weight attached to their decisions, held a rank among the very first, if it was not the first, in the Union.” *Id.*

<sup>163</sup>*Id.* at 2365.

<sup>164</sup>*Id.*

<sup>165</sup>Daly noted that “within the last six or seven years, the name of almost every judge in the city of New York has been heralded in the newspapers as president or vice-president of some political meeting, not from their own choice in all cases, but because the exigencies of party demanded it.” *Id.* at 2359.

Because of partisan influence and the poor organization of the courts created by the Constitution of 1846, the prestige and influence of New York's judiciary had plummeted.<sup>166</sup>

Going out on a limb, Judge Daly illustrated the truth of these principles with specific examples.<sup>167</sup> Daly preferred, for reasons of tact, to stress the loss of good men from the bench than the gain of bad ones. "My late colleague, Judge Woodruff, in learning, ability and integrity, would compare with any judge that we have had upon the bench in this State. He was a republican, and when his term was at an end, he could not be, and he was not, re-elected."<sup>168</sup>

Another example demonstrated the problem of intra-party squabbles: "Chief Justice Bosworth adorned the bench of the superior court, and gave to American jurisprudence the valuable series of reports which bear his name. He was a democrat, and his party was in power, but he did not

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<sup>166</sup>*Id.* Professor Dwight reportedly said in a meeting of the judiciary committee that students at law schools outside New York no longer bought Barbour's reports, containing the decisions of the New York Supreme Court, since judges from other states attached so little weight to them. *Id.* at 2362. *See also id.* at 2220 (remarks of Smith) ("[B]efore this new system [of the Constitution of 1846] came into vogue, there was no State in the Union whose reports stood higher in all the sister States, in England, and wherever they were cited, than the State of New York; and I am also aware that since the change was made and our present system adopted, our reports have greatly fallen in the estimation of our sister States and of foreign tribunals.")

<sup>167</sup>Delegates were willing to talk in general terms about the problems, but were often very reticent in naming names or specific instances. This is quite understandable in a convention composed mainly of practicing lawyers and sitting judges; they did not want to offend particular judges, for fear of losing clients or insulting colleagues. Almost as soon as a particular name escaped their lips, they were apologizing. *Id.* at 2373 (Daly apologizing for casting aspersions on Judge McCunn). Nevertheless, it was clear that they had specific judges and instances in mind.

<sup>168</sup>*Id.* Matthew Hale also pointed to the defeat of Judges Alexander H. Johnson and George F. Comstock as examples of good judges defeated at the polls. *Id.* at 2382 (remarks of Matthew Hale). Even one of Comstock's political opponents said he was "sorry that his judicial abilities were lost to the state." *Id.* at 2382 (remarks of M.I. Townsend).

secure the necessary nomination and was not re-elected.”<sup>169</sup> Evarts was more direct than Daly about the reasons for failing to renominate Bosworth: “When Chief Justice Bosworth made certain decisions against a great political character [Tweed], that great political character’s memory lasted till the recurring election brought round the nomination in his own party. Chief Justice Bosworth was succeeded by Judge McCunn, because such was the royal pleasure of that political character.”<sup>170</sup> As Evarts’s mention of Judge McCunn suggested, the problem was not only that good men were being driven out of the New York judiciary, but that bad ones were taking their place.

Many delegates therefore wanted a solution that would put judges beyond the power of the political parties once they went on the bench but that would also be acceptable to the people. The delegates for the most part were not concerned to return to an appointed judiciary; they showed little interest in the question of initial selection by appointment or election. They agreed with Judge Daly that “[i]t is not, in my judgment, very material how the judge is chosen, whether by election or appointment.”<sup>171</sup> A majority of the Judiciary Committee of the Convention, composed of some of the most eminent (and most Anglophilic) lawyers and judges in the state,<sup>172</sup> proposed that the judges of the Court of Appeals and of the Supreme Court be elected, with

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<sup>169</sup>*Id.* at 2365

<sup>170</sup>*Id.* at 2368 (Evarts). Twenty-one of 28 judges were re-elected, one delegate remarked.

<sup>171</sup>*Id.* at 2365 (Daly). Daly was assuming the judge was to serve until seventy, and that care would be taken in his selection.

<sup>172</sup>Charles Folger, William Evarts, Joseph Masten, George Barker, Joshua Van Cott, Charles Daly, W. Hutchins, F. Kernan, Theodore Dwight, Amasa Parker, Charles Andrews, Edwards Pierrepont, and Matthew Hale. *Id.* at 1306.

tenure during good behavior until age seventy.<sup>173</sup> Even the most outspoken advocates for an appointed judiciary conceded that a system of life tenure resolved most of the problems with the system under the Constitution of 1846. Matthew Hale stated, “I believe, . . . and I am willing to state my belief frankly, although it may be an unpopular opinion in this Convention, that the great error which lay at the bottom of the judicial system adopted in 1846, was in making judges elective.”<sup>174</sup> However, when pressed “whether he thinks that a man who is appointed by the central power, perhaps at the dictation of a clique of political wire-pullers, would be less likely to be influenced by partisan motives than a man elected by the people,”<sup>175</sup> he admitted, “I do not think there would be any difference in that respect. The life tenure provision would correct the evil which the gentleman indicates, whether judges were elected or appointed.”<sup>176</sup> Others stated they favored an appointive system but doubted whether the people would ratify it.<sup>177</sup> The combination of belief that election with life tenure or a long term was not so much worse than

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<sup>173</sup>Report of the Committee on the Judiciary, §§ 2, 16, at *id.* 1306, 1308.

<sup>174</sup>*Id.* at 2182 (Hale).

<sup>175</sup>*Id.* at 2183 (Smith).

<sup>176</sup>*Id.* at 2183 (Hale). Hale went on to explain that he favored appointment by the governor because the governor would be in a better position to know of the “capacity and fitness of the candidates” than the people, “who would simply indorse a nomination made by a political convention.” *Id.* at 2183. See also remarks of Joshua Van Cott (“My own preference is for the system of appointment, but I admit freely that the vice of the elective system, as it has existed under the Constitution of 1846, is not so much, if at all, in the method of selection as it is in the method of utterly destroying the independence of the judge after you have selected him.”), *id.* at 2188.

<sup>177</sup>*Id.* at 2196 (remarks of Beckwith) (“For one, I would like to see all the judges appointed by the Governor, with the consent of the Senate; but I doubt whether the people would be satisfied to have that plan adopted.”) *Id.* at 2395 (remarks of Chesebro) (stating that he disapproved of judicial elections, “but it has since become the settled rule, and I am satisfied the people will not now go back on it”).

appointment, and the risk that the people would reject appointment meant that few delegates wished to force the issue.

The exception to the desire to avoid the question of appointment was, interestingly, in the discussions of the office of chief justice. The debate on this topic sharpened the divisions between those who favored a more aristocratic, hierarchical, English-style judiciary and those who wanted a populist, egalitarian, homespun bench. The Constitution of 1846 provided that the office of chief judge of the Court of Appeals would rotate every two years. As with other issues at the 1867-68 convention, many delegates favored more permanency. The judiciary committee in its report had proposed that seven judges would be elected to the Court of Appeals, and that these judges would in turn select a chief justice, who would serve out his term in that capacity.<sup>178</sup> An amendment was proposed to make the chief justice appointed by the governor. The delegate who proposed the amendment argued that strong leadership was necessary in all deliberative bodies, and that by singling out the office of chief justice, “we will give dignity to that position, as has been given to the supreme court of the United States by Chief Justice Marshall, and to the highest court of our own state, by Chief Justice Kent.”<sup>179</sup> Although he believed the governor would be in the best position to choose the chief justice, since that official was acquainted with the leading members of the profession throughout the state, he thought election to the office was acceptable so long as the candidate was elected specifically to be chief justice.<sup>180</sup> In his opinion, increasing the dignity of the court’s presiding officer would reflect on the court and “will add

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<sup>178</sup>Report of the Judiciary Committee, § 2, *id.* at 1306.

<sup>179</sup>*Id.* at 2196 (remarks of Beckwith).

<sup>180</sup>*Id.*

much to the confidence people have in their decisions.”<sup>181</sup> Another delegate argued for appointing the chief justice, “and thus do here as they do in England, and have done there with splendid success, in the selection of a long line of famous chief justices.”<sup>182</sup>

These laudatory references to federalist judges and English judges were bound to raise the hackles of populists. One claimed that to appoint the chief justice when other offices were elected “renders our system inharmonious, incongruous”: “the desire seems to be to yield to that sentiment which seeks to ingraft into our republican institutions remnants and fragments of monarchical institutions.”<sup>183</sup> He scoffed at the desire to give the office dignity. He mocked the justices of the U.S. Supreme Court for their English-style silk gowns, and declared that

it would be quite a proper amendment to make to this proposition here, that our chief justice of the court of appeals should be appointed by the Governor and Senate, that he should be furnished with a silk robe, a silver-gray wig, a gold-headed cane, and a three-cornered cocked hat, with gold band and tassels! Then you would have dignity! [Laughter.] Then the whole people of this State could look up to this great figure-head of justice and admire his dignity and the exaltation of his position. Dignity! What we want is *brains* and *business capacity*, for every-day hard work.<sup>184</sup>

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<sup>181</sup>*Id.*

<sup>182</sup>*Id.* at 2188 (remarks of Van Cott). Smith, ever the pragmatist, declared he was voting for the measure as a compromise, to satisfy those members of the electorate who thought judges should be entirely appointed. *Id.* at 2192 (remarks of Smith). Interestingly, Evarts essentially agreed with him on that point. *Id.* at 2367 (remarks of Evarts).

<sup>183</sup>*Id.* at 2196 (remarks of E.A. Brown).

<sup>184</sup>*Id.* The question of judges wearing gowns was highly charged with symbolism. Those who desired to re-Anglicize the bench were strongly in favor of gowns; populists were opposed. Theron Strong (a Republican who had been elected a judge) has interesting discussions of both sentiments. He says the Court of Appeals began wearing gowns in 1844, in “a reaction from the simplicity of our forefathers,” and that the practice “gave to the judges a distinguishing mark, so far as dress is concerned, which was very much needed. There is no question that it added tone and dignity to the court.” T. STRONG, *supra*, at 39. Their precedent was the justices of the U.S. Supreme Court. The other state courts, and the federal courts in New York as well, eventually

While the traditionalists at the convention strove to clothe the bench with dignity in Burkean fashion, the populists aimed to tear away that “decent drapery.” On an initial vote, the convention voted in favor of appointment of the chief justice.<sup>185</sup> An amendment was later introduced providing for the election by the people of the chief justice as such, which carried.<sup>186</sup> The point was still made, although in a weaker form, that the chief justice was to be marked out from his colleagues for greater prestige, and the office not subject to rotation.

With no delegates willing to argue that an appointive method should be adopted by the Convention with respect to any office but that of chief justice, debate centered on tenure and eligibility for re-election. Although some of the more populist delegates argued otherwise, there was a broad consensus among delegates that a term of eight years was too short.<sup>187</sup> The terms “permanence” and “independence” occur over and over in the debates on this topic. The majority report of the Committee on the Judiciary called for judges elected for tenure during good behavior until seventy years of age.<sup>188</sup> A substitute was offered calling for terms of 14 years.<sup>189</sup> Proponents of the fourteen-year term argued that if a poor judge is elected for life,

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followed the Court of Appeals. *Id.* Some of the more populist judges, however, were uncomfortable in gowns. *Id.* at 122 (“From all indications, probably no one was ever so uncomfortable in a gown as Judge [David] McAdam.”).

<sup>185</sup>1867-68 DEBATES, at 2192.

<sup>186</sup>*Id.* at 2372, 2374.

<sup>187</sup>*Id.* at 2188 (remarks of Joshua Van Cott) (“Now, it is agreed on all hands—for it seems to have met with the common consent of the Convention—that a longer term of office than eight years should be fixed for the court of last resort.”)

<sup>188</sup>*See* Report of the Judiciary Committee, *supra*.

<sup>189</sup>*Id.* at 2165.

“there is no escaping from him unless he be found guilty of some overt act.”<sup>190</sup> They also claimed that life tenure tends “to make the incumbent lazy, to use a plain Saxon term.”<sup>191</sup> Some said life-tenured judges would become “overbearing and tyrannical,” and feared particularly that they would make their power felt over members of the bar: “the time has gone by when the people or the bar will bow down, as they have been compelled to do in former times, to men who happen to hold a seat on the bench.”<sup>192</sup> Others, less inclined to populism, noted an incongruity between elected judges and life tenure.<sup>193</sup> They also suggested that 14-year terms were equivalent to life tenure in many cases, given the likely average length of tenure on the bench.<sup>194</sup> Many delegates believed that a term of fourteen years might be acceptable, but only if the judges were ineligible for re-election.<sup>195</sup>

Despite these arguments, supporters of life tenure passionately argued their cause, repeatedly referring to the English tradition. Judge Daly gave an elaborate description of the depths to which English judges sank in the seventeenth century when they served at the pleasure

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<sup>190</sup>*Id.* at 2165 (remarks of Smith).

<sup>191</sup>*Id.* See also *id.* at 2169 (remarks of Nelson).

<sup>192</sup>*Id.* at 2169 (remarks of Nelson).

<sup>193</sup>*Id.* at 2176 (remarks of Harris) (“The public may not know when judges are to be elected, or how many there may be to elect at any one election. I very much prefer, therefore, that if we are to elect judges, that their term of office be a certain number of years.”).

<sup>194</sup>*Id.* at 2189 (remarks of Van Cott).

<sup>195</sup>“I would place the judges in a position where they cannot be biased by any partisan influence or popular favor, and, above all, where they shall not be suspected of having their opinions influenced at all by public opinion upon either side. That can only be done by depriving them of the opportunity for re-election.” *Id.* at 2173 (remarks of A.J. Parker).

of the king, followed by glowing praise of those serving with life tenure.<sup>196</sup> The latter, he said, have all “been men of character, most of whom have adorned the seat of justice by their talents, their acquirements and their virtues.”<sup>197</sup> Van Cott, Evarts, and others also made ardent pleas depicting the plight of a younger man, elected at 40, whose term would end at age 54 and who would then be compelled to resume private practice with his former clients gone and diminished capacity for getting new ones.<sup>198</sup> Besides being undignified and an affront to the profession, this prospect would deter many able lawyers from joining the bench.<sup>199</sup> In addition a man in such a position, they said, would be tempted while still on the bench to curry favor with those who could help him when he left it, as in the parable of the unjust steward.<sup>200</sup> If judicial salaries were higher, the situation would be different: “Now, I can understand, if we gave our judges the splendid salaries which are paid to judges in England, a prudent man in fourteen years would save a handsome competency and retire from the bench without any of the oppressive anxieties to which I have referred.”<sup>201</sup> However, given New York’s track record, judicial salaries were likely to remain a “pittance.”<sup>202</sup>

Evarts conceded that the proposal of a 14-year term, with ineligibility for re-election,

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<sup>196</sup>*Id.* at 2363-2364 (remarks of Daly).

<sup>197</sup>*Id.* at 2364.

<sup>198</sup>*Id.* at 2189 (remarks of Van Cott); 2369 (remarks of Evarts).

<sup>199</sup>*Id.* at 2185 (remarks of Conger).

<sup>200</sup>*Id.* at 2199 (remarks of Hale).

<sup>201</sup>*Id.* at 2189 (remarks of Van Cott).

<sup>202</sup>*Id.*

contained “a great many elements of usefulness,” still it “falls short of a practical application of the true principle of the judicial tenure.”<sup>203</sup> Evarts described what it was “to take a lawyer and make a judge of him” almost as if it were the ordination of a priest: it was to “consecrate him, sacrifice him, to some extent, for the public service.”<sup>204</sup> Judges were therefore deserving of the highest honor the state could give. It was important that the bar, in itself an honorable profession,<sup>205</sup> feel the special honor of the judge, feel the separateness of the judge.

Let us have the reflex of an independent judiciary upon an independent bar. Let us work together. Let us magnify the judicial office for the public good. Let us be servants of the court as we are servants of the law, but only in that sense. Let us have no motives for drawing comparisons between the bench and the bar, preparing for future candidacy, for our own interests. Let us see to it that in the administration of justice, private interests and by-ends are excluded. Let us all know and understand, when a vacancy on the bench occurs, that it is a great matter who shall be judge. Let the power, Governor or the people, which fills the place, understand that it is for a durable tenure, and that a whole generation is to sit under the shade of that authority which is raised over them.<sup>206</sup>

(Note the contrast between this desire for the separateness of the bench and the criticism of that separateness among the populists.) Smith tried to bring the debate down to earth by asking of delegates in different parts of the state whether they thought the people would be prepared to ratify a constitution proposing life tenure. He thought not, and argued that “[w]e should aim not

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<sup>203</sup>*Id.* at 2370 (remarks of Evarts).

<sup>204</sup>*Id.* at 2369.

<sup>205</sup>Evarts championed a high view of the bar: “For we lawyers, not less than judges, are sworn in our duty to subserve the interests of the State; and a good, and an able lawyer, I think, may claim for the exercise of his profession the honor of advancing the glory of the State, protecting the interests of the community, and serving the public good.” *Id.* at 2369.

<sup>206</sup>*Id.* at 2370.

only to make a good Constitution, but one that the people will adopt.”<sup>207</sup> Evarts was at his most high-minded in his response, proclaiming that the duty of the delegates was to frame a constitution that they thought best, not second-best, let the results of the ballot-box be what they may.<sup>208</sup> Smith countered that the problem was not one of morality but of policy, and if the people “will not adopt what we might regard as the best possible, we must give them the best they will adopt.”<sup>209</sup> In the end, sufficient delegates were convinced either of the superiority of a 14-year term in itself or of the people’s willingness to reject life tenure. The 14-year term prevailed for judges of the Court of Appeals and the Supreme Court, and judges were to be eligible for re-election.

Although they were not willing to stick their necks out by calling directly for an appointive judiciary, members of the Judiciary Committee believed strongly enough in an appointive system that their report provided for a referendum on whether to return to an appointive system at the general election of 1870.<sup>210</sup> The Convention voted to change the date to 1873, to allow voters to get some experience under the new Constitution before making this choice.<sup>211</sup> The section was regarded as a concession to those delegates who believed judges

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<sup>207</sup>*Id.* at 2375 (remarks of Smith). *See also id.* at 2192 (reminding delegates that “while we are desirous to secure the adoption of our peculiar views, upon the questions that arise, we must not forget that others may differ from us, and that our work is to be submitted to the people”).

<sup>208</sup>*Id.* at 2375 (remarks of Evarts).

<sup>209</sup>*Id.* at 2376 (remarks of Smith).

<sup>210</sup>*Id.* at 1307 (Report of the Committee on the Judiciary, § 11).

<sup>211</sup>*Id.* at 2544-45.

should be selected by appointment.<sup>212</sup> Not surprisingly, several populist Democrats objected to the provision, calling it “very unusual” and arguing that any such change should be made by the normal process of constitutional amendment.<sup>213</sup> Supporters of appointment in effect charged these objectors with hypocrisy, claiming that it was inconsistent in the self-proclaimed champions of the people to oppose a popular referendum.<sup>214</sup> A motion to strike the section was narrowly defeated.<sup>215</sup> Thus a battle was predetermined for a date four years away.

In the meantime, there was vote-getting work to be done to encourage the people to ratify the changes made by the 1867-68 convention at the election in November 1869. The bar statewide labored hard for the passage of the judiciary article. Less than two years later the Albany Law Journal praised the bar’s strenuous efforts on behalf of the proposal: “Of all the work of the late convention submitted to the people, this article, standing alone, would find the least favor with politicians or with the people. Yet the bar, as a whole, supported it, and it was carried in spite of the active efforts of politicians of both parties, and when all the rest of the proposed amendments were rejected.”<sup>216</sup> The judiciary article was submitted separately from the rest of the work of the convention. It was in fact the only article proposed by the convention of

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<sup>212</sup>*Id.* at 2545 (remarks of Rathbun).

<sup>213</sup>*Id.* at 2545 (remarks of E.A. Brown) (also Townsend, Cooke).

<sup>214</sup>One delegate said that, in submitting the question to a referendum, “[t]he very will of the people is to be reached. Yet there stands the advocate of the people, who is in favor of submitting every thing to the people and of being in all respects governed by their opinion, their will, and their wish, and yet it seems he will set up his ‘I’ against them and their wish, if they do not agree with him.” *Id.* at 2546 (remarks of Folger).

<sup>215</sup>The amendment to strike the provision was defeated 42 to 43, and on reconsideration 40 to 47. *Id.* at 2546.

<sup>216</sup>3 ALBANY LAW JOURNAL 228 (Mar. 25, 1871).

1867 that the people ratified at the election of 1869,<sup>217</sup> perhaps proving several delegates' point that the judiciary was of most concern to the people. The vote was rather close, 247,240 to 240,442.<sup>218</sup> Still, the fact this article was approved when the rest of the work of the convention was defeated by a vote of 290,456 to 223,935, and when the Democratic party gained control of every branch of the state government,<sup>219</sup> is impressive and suggests considerable popular dissatisfaction with the state of the judiciary. It was most likely wise that the convention did not directly recommend a return to the appointive system to be voted on in 1869. The stage was set for battle in 1873.

### **B. Railroad Scandals and the Times' Crusade**

Meanwhile, a storm was brewing that no doubt encouraged voters to ratify the judicial reforms proposed by the convention of 1867 and also suggested the elite bar's work was not over. The railroad scandals would bring the corruption of the New York judiciary and legislature to the attention of not only citizens of the state and the nation, but of foreigners as well. The *New York Times* moved into high gear, trying to shame the bar into organizing and finally getting its wish. Members of the elite bar were deeply involved in the scandals and made vast sums from them, but nevertheless moved to make such litigation impossible in the future through their gentlemanly Association.

New York was not alone in this era in producing scandals; they sprang up across the country in alarming numbers in the wake of the Civil War. But those in New York did tend to be

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<sup>217</sup>Const. of 1846 as amended November 1869, art. VI, §§ 2 & 18.

<sup>218</sup>2 DOUGHERTY, *supra*, at 189.

<sup>219</sup>*Id.*

on a grander scale, and to have more colorful shenanigans and personalities involved, as befit the financial capital of the nation. Old New Yorkers, who so prided themselves on financial uprightness, took it hard. On April 9, 1868, George Templeton Strong despaired in his diary that “[b]ench and bar settle deeper in the mud every year and every month. They must be near bottom now.”<sup>220</sup> But not quite at the bottom. Not long after, when the railroad scandal had worsened, Strong wrote: “To be a citizen of New York is a disgrace. A domicile on Manhattan Island is a thing to be confessed with apologies and humiliation.”<sup>221</sup> Indeed, “The New Yorker belongs to a community worse governed by lower and baser blackguard scum than any city in Western Christendom, or in the world.”<sup>222</sup>

The most outrageous scandal, and the one most directly affecting the New York bench and bar, was the struggle for control of the Erie Railroad that erupted in January 1868. We know a good deal about this scandal, largely because of the tireless efforts of Charles Francis Adams, Jr., of the famous Boston family.<sup>223</sup> A tangled web of legal manoeuvres and counter-manoeuvers grew out of Cornelius Vanderbilt’s battle to gain control of the Erie board of directors against a formidable triumvirate who dominated the Erie board and were known as the “Erie clique”: Daniel Drew, Jay Gould, and Jim Fisk. All three came from rather hardscrabble backgrounds, a

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<sup>220</sup>4 STRONG DIARIES, *supra*, at 202.

<sup>221</sup>*Id.* at 236.

<sup>222</sup>*Id.*

<sup>223</sup>Adams published a scathing description of the scandal in the *American Law Review* in October 1868, and followed it up a book-length account. Charles F. Adams, Jr., *The Erie Railroad Row*, AMERICAN LAW REVIEW (Oct. 1868); CHARLES F. ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS (1871); *see also* Charles F. Adams, Jr., *A Chapter of Erie and An Erie Raid*, in HIGH FINANCE IN THE SIXTIES: CHAPTERS FROM THE EARLY HISTORY OF THE ERIE RAILWAY (Frederick C. Hicks, ed. 1929).

far cry from old New York, and were already known for their dubious business methods. Each side retained leaders of the bar as counsel. Charles O’Conor, an Irish Catholic lawyer and one of the most prominent members of the New York bar at the time, represented Vanderbilt; David Dudley Field represented the Erie clique. By the time the struggle was over, each side had hired dozens more elite lawyers. On the Erie clique side, some of the most prominent of these were Clarence A. Seward, nephew of Lincoln’s Secretary of State, and Evarts himself.

Soon all these leaders of the bar were carrying out complicated legal strategies of the opposing sides that cast the entire New York legal system in disrepute. Each side obtained numerous injunctions under dubious conditions, many of them nullifying other judges’ injunctions. Judge Barnard, as might be expected, was in the thick of the action. Under the Code of Procedure that Field himself wrote, in equitable actions each of the eight districts of the Supreme Court had statewide jurisdiction to issue injunctions. This created the potential for clashing injunctions so amply realized in the Erie litigation; any of the judges sitting in any district could nullify the order of another colleague, or find his own order nullified. It is unclear whether Field had anticipated this problem when drafting the Code; he may have expected judges would exercise a measure of comity and decline to nullify one another’s injunctions. As it turned out, in the Erie litigation judges did not hesitate to do so and Field did not hesitate to exploit this difficulty with his own Code to benefit his clients. Besides the scandal involving contradictory injunctions, bribes of thousands of dollars were freely handed out to members of the state legislature. In the end, Vanderbilt secretly arranged a settlement with the Erie clique. Needless to say, the lawyers on both sides were paid vast sums in fees.

The spectacle prompted the belief among the public that the entire New York legal

system was hopelessly corrupt. Editorials poured out condemning the scandals, and the role of the bench and bar in particular. The *New York Times* was among the loudest in its criticism, and in June 1869 published a call for the bar to organize to fight judicial corruption. It is significant that this call lauded the English bar and its hierarchical pattern of organization, recommending them as a model for their New York City counterparts. According to the *Times* editorial, simply holding a public meeting among members of the bar would not be sufficient: “The true remedy is not in a public meeting, but in a permanent, strong and influential association of lawyers for mutual protection and benefit.”<sup>224</sup> The editorial went on to praise the English bar, particularly its hierarchical form of organization, noting that “[i]n London and Liverpool such associations have been found necessary and effective. They are known, we believe, as ‘The Benchers,’ and are composed of the most prominent, able and independent members of the profession, and wield so powerful an influence that the Judges are compelled to pay that regard to their collective power which they fain would deny to that of their individual members.”<sup>225</sup> In New York City, “[s]uch an organization is sadly needed” because of rampant judicial corruption.<sup>226</sup> In diagnosing the problem, the *Times* made a somewhat veiled attack on judicial selection by election and on the largely immigrant electorate. “Individually each lawyer is powerless to resist the influence of the Judges; there is virtually a judicial ‘ring’ in this City, and always will be, as long as the

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<sup>224</sup>Editorial, THE NEW YORK TIMES, June 20, 1869.

<sup>225</sup>*Id.* Presumably the editorial was partly referring to the organization of the English bar into the four Inns of Court in London, each of which was governed by a group of senior barristers and judges known as “benchers.” Significantly, the judges in England were part of the leadership of the organized bar; bench and bar were very closely intertwined, in contrast to the system prevailing in parts of the United States.

<sup>226</sup>*Id.*

Judges are chosen by the present constituency.”<sup>227</sup> After this first ringing call upon the bar for “united action and organization,”<sup>228</sup> the *Times* steadily prodded the bar to take action over the next few years.<sup>229</sup> Other reform-minded newspapers eventually joined in.<sup>230</sup>

Members of the bar did nothing for months. In the meantime, yet another railroad scandal erupted, further tarnishing the reputations of lawyers and the legal system. In this version, it was Fisk and Gould who attempted to gain control of the relatively small Albany & Susquehanna Railroad in upstate New York. Again injunctions rained down from all sides. An apparent murder and a pitched physical battle for control of the railroad punctuated this scandal. The legal system had broken down completely, unable to prevent physical violence over the question of control of a relatively small corporation. The *Times* begged the bar to take action. On December 16, 1869, the paper editorialized: “If it be the supineness, the guilty silence of the lawyers, as officers of the people’s courts, which have brought us to our present pass, it is their reawakened public spirit and activity which must help us back to a better state of things; we must again proclaim that the bar must lead the way.”<sup>231</sup>

### **C. Founding of the Association of the Bar of the City of New York**

It is difficult to convey the sense of desperation one gets from reading lawyers’ accounts at this time. Strong wrote in his diaries, “The stink of our state judiciary is growing too strongly

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<sup>227</sup>*Id.*

<sup>228</sup>*Id.*

<sup>229</sup>*See, e.g., A Word to the Lawyers*, N.Y. TIMES, Apr. 6, 1872, at 4.

<sup>230</sup>*See, e.g., Ruin to the Ring*, WORLD (New York), Feb. 17, 1870, at 4.

<sup>231</sup>Editorial, N.Y. TIMES, Dec. 16, 1869.

ammoniac and hippuric for endurance. . . . People begin to tire of holding their noses, and are looking about in a helpless way for some remedy.” Strong saw no remedy, however, “except by a most perilous process, justified only by the extremist necessity, and after all constitutional remedies are exhausted.”<sup>232</sup> Breen sheds some light on the remedy Strong may have been darkly hinting at. He describes a secret meeting of eight respectable leading citizens, merchants and lawyers, at which lynching the Ring leaders and the worst Tweed judges was seriously discussed, since the Tweed judges would block any judicial remedy.<sup>233</sup>

Under these circumstances, the bar did in fact begin to organize itself. George Martin, the centennial historian of the Association of the Bar of the City of New York, has ably chronicled the Association’s origins in his 1970 history.<sup>234</sup> The earliest moves to organize the Association are somewhat shadowy, probably because the lawyers feared retribution from judicial and political sources, including physical violence. From the beginning, there appear to have been two separate purposes for the organization: first, forming a sort of club for the gentlemanly portion of the bar, and second, promoting reform of bench and bar. Although these two purposes need not necessarily have been contradictory, in practice there was often tension between them.

In due course, a first meeting of subscribers was called for February 1, 1870, and was by invitation only.<sup>235</sup> At the organizational meeting, the two principal speakers—Henry Nicoll and

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<sup>232</sup>4 STRONG DIARIES, *supra*, at 264 (Dec. 18, 1869).

<sup>233</sup>BREEN, *supra*, at 353-357.

<sup>234</sup>See MARTIN, *supra*, chap. 2.

<sup>235</sup>Invitation Issued to Subscribers, Association of the Bar of the City of New York, reprinted in MARTIN, *supra*, illustration 3. The Association contained some problematic

William Evarts—had evidently prepared carefully and conveyed somewhat different emphases. It is worth taking a look at each of these speeches to see what they reveal about the aspirations of the elite bar at the time, and its potential to effect reform.

Nicoll was a New Yorker, much respected by the milieu of George Templeton Strong, who would become the first chairman of the Association’s executive committee, and serve in that capacity for four years. His speech, considerably the longer of the two, focused on the degradation of the bar and particularly the loss of its elite status in the public eye and of rank within it. The villain of his speech was the Constitution of 1846. However, he directed his ire not so much toward the advent of judicial elections as toward the provisions affecting admission to the bar. Nicoll did not mince his words as to the malign effects of the Constitution of 1846 on the profession: “That Constitution, under which we still live, gave almost a death blow to the legal profession. Disastrous effects could not but flow from the organic changes made by that instrument.”<sup>236</sup> The most serious problems, in his view, was the Constitution’s destruction of differing ranks within the legal profession, based on seniority, and the loosening of requirements to enter the profession.<sup>237</sup>

Nicoll was clear and unapologetic about the need for an aristocratic profession as a leaven for a democratic polity. In his view, the bar, under the provisions of the Constitution of 1846, “had been reduced to a mere collection of individuals without class or rank—a dull dreary level of enforced equality.” This description evokes Tocqueville’s accounts of the potential

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subscribers. That Field was invited came as a surprise to many, given his role in the Erie scandals. Many in the bar looked upon him as part of the problem, not the solution.

<sup>236</sup>1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORTS 2, at 8 (1870).

<sup>237</sup>*Id.*

disadvantages of democracy. Nicoll confronted directly the strident claims of Jacksonian democracy that had prompted the Constitution, and noted, “Perhaps it may sound strange in a democratic community to talk in this way, but I apprehend that, outside of political rights and relations, distinctions must exist everywhere—they are necessary for the very welfare of society.” This passage provides a justification for Nicoll’s—and perhaps much of old New York’s—reluctance to get involved in politics. It implies that politics is a rather artificial sphere wholly separate from the rest of life, or “society,” and that in the political sphere “a dull dreary level of enforced equality” must persist. However, in the organic, more natural society outside that confined sphere, “distinctions must exist everywhere.” The artificial values of politics must not interfere with that organic society; if so, great damage is done.

Nicoll was not simply advocating elitism and privileges for their own sake. He was convinced that the high tone of the best of the bar would percolate down the social pyramid to other members and indeed to the rest of the organic “society.” The theory that reforms initiated by the best will percolate down the social pyramid is found in other contexts in writings produced by old New Yorkers, and is of course characteristic of a society with a confident upper class that expects deference (or at least an upper class that still hopes for deference).<sup>238</sup> In the

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<sup>238</sup>For example, in the introduction to their famous book *The Decoration of Houses*, Edith Wharton and Ogden Codman write: “[I]f it be granted . . . that a reform in house-decoration, if not necessary, is at least desirable, it must be admitted that such reform can originate only with those whose means permit of any experiments with their taste may suggest. When the rich man demands good architecture his neighbors will get it too. The vulgarity of current house decoration has its source in the indifference of the wealthy to architectural fitness. Every good moulding, every carefully studied detail, exacted by those who can afford to indulge their taste, will in time find its way to the carpenter-built cottage. Once the right precedent is established, it costs less to follow than to oppose it.” *Introduction*, EDITH WHARTON & OGDEN CODMAN, JR., *THE DECORATION OF HOUSES* (republished 1978 W.W. Norton & Company, originally published 1897) (no page numbers). Wharton and Codman therefore call upon the rich, in many cases the

case of the bar, this percolating down would be achieved by gathering in an association “all that is intelligent, all that is honest, all that is honorable in this Profession” so that this elite might be able “to create a spirit of professional brotherhood, to create in the members of our profession a regard for the profession.”

The theory of the separate and artificial sphere of politics goes far to explaining why Nicoll scarcely touched on the problem of the elected judiciary. The judiciary, unlike the bar, seems to have been in his mind more fully and perhaps irredeemably subsumed into the sphere of politics. (This was in contrast to the English model, where the bench and bar were more closely knit together and the judiciary largely free from direct political influence.) Nicoll would only say of judicial elections, that other notable effect of the Constitution of 1846 on the profession, “It is unnecessary and it may be improper to speak of that now.” If he believed it was possible that the judiciary might in fact be rescued from politics and reclaimed for the more organic society, that feat lay in the future, after the elevation of the bar to its proper status.

In contrast, the New England-born Evarts’ speech was fired with zeal to reform the judiciary. While Nicoll became chairman of the executive committee of the Association, Evarts was its first president. By the time the Association was founded, he was already prominent in national political and legal circles as a Republican. In general Evarts was more of a staunch democrat with a small “d” than Nicoll, and did not emphasize an aristocratic element in the bar.

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nouveaux riches, to fit themselves for their necessary position at the top of the social pyramid by assimilating an old tradition. And in the text of the book, they clothe this old “percolating down” theory in the mantle of the new social science: “It is a fact recognized by political economists that changes in manners and customs, *no matter under what form of government*, usually originate with the wealthy or aristocratic minority, and are thence transmitted to the other classes.” *Id.* at 5 (emphasis added).

He did not hold with a theory of a separate sphere for politics, removed from the rest of society and from the bar. And so at the Association's organizational meeting in February 1870, unlike Nicoll Evarts did not hesitate to inveigh against the judiciary and to call for political reform. He unshrinkingly labeled the judiciary "that weakest portion of our political system, that portion that has, or should have, no patronage or influence and no political authority,"<sup>239</sup> but because of these had become degraded. Evarts' double use of the word "political" here suggests a somewhat ambiguous attitude to politics, or the relationship of politics to law. On one hand, the judiciary is said to be properly part of the "political system," on the other hand, it should have "no political authority." In the first use of the word, Evarts seems to suggest a fundamental constitutional role, in the second, entanglement with partisan politics. Whether these two forms of politics can ever really be separated is not a question Evarts grapples with.

Nevertheless, Evarts the politician must have been aware that in order for the bar to help disentangle the bench from corrupt partisan politics, some political involvement in the less lofty sense would be necessary. Evarts made a few pointed references to recent scandals. In a reference to the latest Erie scandal, Evarts declared, "Why, Mr. Chairman, you and I can remember perfectly well (and we are not very old men) [Evarts was fifty-two at the time], when, for a lawyer to come out from the chambers of a Judge with an ex parte writ that he could not defend before the public, before the profession and before the Court, would have occasioned the same sentiment toward him as if he came out with a stolen pocket-book."<sup>240</sup> He closed with the statement that the Association's goal should be to "restore the honor, integrity and fame of the

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<sup>239</sup>1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORTS 2, at 28 (1870).

<sup>240</sup>*Id.*

profession in its two manifestations of the Bench and of the Bar.”<sup>241</sup> Where Nicoll had discussed only the one, Evarts was eager to take on the other as well.

Evarts’ reforming approach was backed up by a speech from a prominent member of the opposite party: Samuel J. Tilden. Tilden, who was to become vice president of the Association, was a well-respected lawyer and also chairman of the Democratic party in New York who had won something of a reputation as a reformer in clashes with Tweed.<sup>242</sup> It was therefore important for the Association to have his blessing on its endeavors: the Association thus would have the leadership of two prominent members of opposite parties in Evarts and Tilden. Tilden was not scheduled to speak at the meeting, however, and had indeed risen to leave when Nicoll crossed the room to urge him to say a few words.<sup>243</sup> Tilden and Nicoll had both been delegates at the Convention of 1846, and had voted against the changes to the judiciary and bar.<sup>244</sup> Although Tilden was unprepared, his speech did not lack fire. Tilden’s memorialist later said he “made the most stirring speech of the hour . . . striking the keynote of the effective denunciation which

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<sup>241</sup>*Id.* At the twenty-fifth anniversary celebration of the founding of the Association, Evart’s speech showed undimmed enthusiasm for its reforming mission, and indeed struck almost a populist note as he rhetorically linked the founding of the Association with the founding of the Republic: “The two hundred lawyers who signed the first call for the meeting . . . should be regarded with veneration as the founders of this great society. Lawyers have ever been the men who have made the revolutions in this country. . . . At the time of the formation of this Association I had observed the course of affairs, and I felt that the alternative was either to be gloriously successful or gloriously beaten in our opposition to a great evil. We realized the importance of organization. But it was a question whether we would bow our heads to the petty tyrants on a corrupt bench, and the Association took up the gage of battle and won the victory.” N.Y. TIMES, Feb. 16, 1895. *See also* 45 MISCELLANEOUS BAR ASSOCIATION REPORTS 20, 21; BERRY, *supra*, at 15.

<sup>242</sup>*See* JOHN BIGELOW, THE LIFE OF SAMUEL J. TILDEN 56, 156 (1895).

<sup>243</sup>1 ABCNY REPORTS 2, at 19.

<sup>244</sup>*Id.* at 19-20.

aroused and quickened public sentiment to the need of instant action.”<sup>245</sup> He began by emphasizing the recent degradation of the bar:

Sir, it cannot be doubted—we can none of us shut our eyes to the fact—that there has been, in the last quarter of a century, a serious decline in the character, in the training, in the education, and in the morality of our Bar; and the first work for this Association to do is to elevate the profession to a higher and a better standard. [Applause.] If the Bar is to become merely a method of making money, making it in the most convenient way possible, but making it at all hazards, then the Bar is degraded. [Applause.] If the Bar is to be merely an institution that seeks to win causes and to win them by back-door access to the judiciary, then it is not only degraded, but it is corrupt. [Great applause.]<sup>246</sup>

Thus far, Tilden’s speech was not too far removed from Nicoll’s, although perhaps more pointed. However, Tilden soon urged bolder action, claiming that “I am as peaceable a man as my friend Nicoll, yet I confess that his words of peace sounded a little too strongly in my ears. The Bar, if it is to continue to exist—if it would restore itself to the dignity and honor which it once possessed—must be bold in defence [sic], and if need be, bold in aggression. [Great applause.]”<sup>247</sup> The bar, Tilden declared, “can have reformed constitutions, it can have a reformed judiciary, it can have the administration of justice made pure and honorable, and can restore both the judiciary and the Bar, until it shall be once more, as it formerly was, an honorable and an elevated calling. [Applause.]”<sup>248</sup> Tilden confessed that “I do not know . . . in what form this is to be done,” and noted that he had not taken part in the preliminary consultations toward forming

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<sup>245</sup>William A. Butler, Memorial of Samuel J. Tilden, 4 ABCNY REPORTS 91 (1886).

<sup>246</sup>1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORTS 2, at 20-21 (1870).

<sup>247</sup>*Id.*

<sup>248</sup>*Id.*

the Association.<sup>249</sup> However, he believed that forming such an organization was a necessary first step. He concluded his remarks with a fundamental point which the others had failed to make, about the continued prosperity of New York being dependent on the relatively pure administration of justice:

[T]he city of New York is the commercial and monetary capital of this continent. If it would remain so, it must establish an elevated character for its Bar, and a reputation throughout the whole country for its purity in the administration of justice. [Applause.] I had lately occasion to express the opinion in private which I now repeat here to-night, that it is impossible for New York to remain the centre of commerce and capital for this continent, unless it has an independent Bar and an honest Judiciary. [Great applause.]<sup>250</sup>

Tilden's speech gave backing to Evarts' approach and helped to shift a majority of the 200 or so lawyers present in favor of a more crusading organization. (Even Nicoll eventually came round to a more reform-minded view.) Some of the old New Yorkers such as George Templeton Strong who attended the meeting were so sickened by recent scandals that they even felt the speeches had not gone far enough. Strong wrote in his diary the day after the meeting: "Speeches . . . were generally rather good, though too subdued in tone to suit my taste. But Choate and others told me that they thought moderation is best at first. I have not much hope of good from this movement, but it may possibly accomplish something."<sup>251</sup> The Times, in covering the meeting, was more hopeful of progress.<sup>252</sup>

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<sup>249</sup>*Id.*

<sup>250</sup>*Id.*

<sup>251</sup>4 STRONG DIARIES, *supra*, at 273.

<sup>252</sup>*Reform at the Eleventh Hour*, N.Y. TIMES, Feb. 3, 1870, at 4. Not surprisingly, the Times gave the meeting considerable coverage, as befit one of its pet causes; interestingly, it tended to focus on the need to improve standards for admission to the bar than cleaning up the judiciary. Coverage at other papers was more brief, but not at all dismissive. *Important Meeting*

As it turned out, the Association was further spurred by a bloody incident which occurred not long after the organizational meeting. It concerned a leader of the group who formed the Association, Dorman Eaton, who was to have nominated officers at the first official meeting of the Association on February 15. On the night of February 12, as Eaton was returning home late, he was attacked, brutally beaten, and left for dead. Robbery was almost certainly not the motive, since Eaton's assailants did not take his money or watch.<sup>253</sup> There were several possible motives for the attack besides Eaton's role in the Association; Eaton had been active in other reform efforts and had made powerful enemies. The *New York Times* declared the general opinion when it editorialized that "some one of the persons whom Mr. Eaton offended by his attack on dishonesty and corruption, deliberately hired an assassin to perform this work."<sup>254</sup> Members of the Association, meeting two days later and horrified by the beating, while Eaton lay near death, as their first official act after organizing offered a reward of \$5,000 for the apprehension and conviction of Eaton's assailants.<sup>255</sup> The assailants were not found, but, by accident, at the trial of Fisk's murderer over a year later, evidence emerged suggesting that Fisk was indeed behind the attack.<sup>256</sup>

Eaton did in fact recover, and perhaps the main effect of the attack was to make him a

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*of the New York Bar*, EVENING POST (New York), Feb. 2, 1870, at 2.

<sup>253</sup>*The Attack on Mr. Eaton*, SUN (New York) Feb. 19, 1870, at 1.

<sup>254</sup>N.Y. TIMES, Feb. 17, 1870.

<sup>255</sup>ABCNY Minutes, Feb. 15, 1870, at 2.

<sup>256</sup>At the trial of Edward Stokes, accused of murdering Fisk, Fisk's mistress Josie Mansfield, while testifying about something else, mentioned that Fisk told her his men had attacked Eaton. 4 STRONG DIARIES, *supra*, at 410, 431.

more staunch reformer than ever. Indeed he gradually gave up his law practice after the attack and devoted himself full-time to municipal reform;<sup>257</sup> most significantly for our purposes, he became the mouthpiece for the Association on the question of judicial elections.

In May 1870, as the Association was buying its new house and setting up a library, it was also taking modest steps to clean up the judiciary. Governor John T. Hoffman, a Tweed protégé, was about to appoint three judges from the Supreme Court in the city to sit (on the court's General Term) as an appellate court, and members of the Association rightly feared he would appoint judges picked by Tweed.<sup>258</sup> To try to head off this result, the Association quickly formed a committee of well-respected lawyers to present a memorial to the governor asking that judges from outside the city be appointed, so as to limit Tweed's influence. (The committee included Charles O'Connor, Henry Nicoll, Wheeler H. Peckham, William E. Curtis, and Joseph H. Choate—a high-powered group indeed.)<sup>259</sup> Tweed somehow learned of the Association's nascent action and telegraphed Hoffman asking for immediate appointment of Judges Barnard, Cardozo, and Ingraham, all three known to be in Tweed's pocket. The governor responded quickly and favorably to Tweed's request, and the frustrated committee reported back to the Association that its proposed action was too late.

The Association's halting efforts at reform were moving too slowly for some in the press. In March 1871 *The Albany Law Journal*, reflecting the more populist spirit of upstate New

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<sup>257</sup>John B. Pine, Memorial of Dorman B. Eaton, 9 ABCNY Reports 114-115 (1901); Dorman Bridgman Eaton, 3 Dictionary of American Biography 607; Gerald W. McFarland, *Partisan of Non-Partisanship: Dorman B. Eaton and the Genteel Reform Tradition*, 54 J. AM. HIST. 806-822 (1968).

<sup>258</sup>For an account of this episode, see BREEN, *supra*, at 323-325.

<sup>259</sup>ABCNY Minutes, May 24, 1870, at 14-16.

Yorkers, took the new Association to task for concentrating on “social intercourse . . . for the four hundred or so gentlemen who enjoy the advantages” the Association conferred while neglecting political reform.<sup>260</sup> It urged a broad expansion of the Association’s membership and pointed to the success of the unorganized bar in achieving passage of lengthened tenure for judges in 1869 as evidence of what the whole bar acting together might accomplish,<sup>261</sup> and lamented the fact that “the influence of the organization is seen neither in court nor legislature.”

**D. The Bar’s Role in the Early Reform Movement to End the Ring: Public Meetings and the Election of 1871**

In fact, the Association was prompted to take some action for legal reform by a controversial figure, Field. On February 7, 1871, Field argued that the Association should send a memorial to the state legislature with proposed changes to the Code of Procedure concerning receivers’ appointments, referees’ fees, and allowances.<sup>262</sup> His initiative spurred the hitherto inactive committee on amendment of the law, and on February 21 the Association did in fact vote to send a memorial to the legislature with Field’s three proposed changes to the Code.<sup>263</sup> Unfortunately, the legislature sat on the memorial without acting, but at least the Association had taken the first steps toward urging reform. A few others followed: in April 1871 Evarts appointed a committee on extortions to investigate “illegal fees and perquisites” public officials extorted from lawyers. In May 1871, James Carter, one of the members most anxious for reform

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<sup>260</sup>3 ALBANY LAW JOURNAL 228 (Mar. 25, 1871).

<sup>261</sup>*See supra* text accompanying note .

<sup>262</sup>ABCNY Minutes, Feb. 7, 1871, at 34. *See also* Albert Stickney, *The Lawyer and His Clients*, 112 NORTH AMERICAN REVIEW 418 (Apr. 1871).

<sup>263</sup>ABCNY Minutes, Feb. 21, 1871, at 36.

by political means, urged at an executive committee meeting that the Association oppose amendments to the Code of Procedure which would “seriously cripple[]” the jurisdiction of certain civil courts in the city, “greatly impede[]” the right of citizens to obtain redress against corporations, and allow courts to punish by fine and imprisonment, without trial by jury, “the free and public expression of opinion upon the conduct of judicial tribunals.”<sup>264</sup> Another committee was formed and went on a successful trip to Albany to persuade the governor to veto these amendments to the Code, which had been passed by the legislature.

Suddenly in the summer of 1871 the *Times* received incontrovertible proof of the Ring’s vast frauds. Former sheriff James O’Brien, bitter at the Ring’s refusal to pay his “extras” while its leaders appropriated millions for themselves, gave George Jones of the *Times* a pile of transcripts from the books of the city comptroller, Richard Connolly.<sup>265</sup> Jones ran a series of stories that summer that created a sensation. Public calls for further action swelled.

Members of the Association were prominent in the public meetings and calls for reform which followed. On September 4, 1871, a public meeting to address city corruption was held at Cooper Union. Thousands showed up, and many had to be turned away for lack of space. Breen, who was at the meeting, described it as follows: “The foremost men of the city attended. They occupied seats on the platform, looking dark and determined. The auditorium was packed with merchants and business men, doctors and lawyers, mechanics and clerks. The public intelligence and the public conscience had awakened to the disgrace and danger of the

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<sup>264</sup>Minutes of the Executive Committee, ABCNY, May 1, 1871, at 39. The Amendments would also have increased the patronage of the Supreme Court and removed it from the control of the Court of Appeals.

<sup>265</sup>BREEN, *supra*, at 334-335.

situation.”<sup>266</sup> After several speeches, one by prominent Association member Judge James Emott, a committee on resolutions was appointed, which included several members of the Association. Of the seven committee members, three were Joseph H. Choate, James Emott, and Henry Nicoll. While the committee was in session in an adjoining room, there were several more speeches denouncing Tammany Hall, after which Choate came out and read twelve long resolutions, the gist of which was that the city had endured gross financial mismanagement because of Tweed and the Ring, that Tweed and the Ring should be defeated at the next election, the Tweed municipal charter should be repealed, as much money as possible recovered for the treasury, and a committee of seventy members be appointed to carry out these goals.<sup>267</sup> The meeting bore fruit rapidly. On October 17, Charles O’Conor was appointed special state attorney general to recover money stolen from the city. He in turn chose as his associates Evarts, Emott, and Wheeler H. Peckham. The next week Tilden, on behalf of the Committee of Seventy, swore out a warrant for Tweed’s arrest for deceit and fraud. On October 27, the warrant was served and bail set at one million dollars, most of which was posted by Jay Gould.<sup>268</sup>

Meanwhile the election of 1871 was fast approaching. The Association got involved in selection of judicial candidates in two ways: by working with politicians to encourage appropriate nominations and by opposing unworthy candidates. In September 1871 the executive committee resolved to recommend appointing a special committee to confer with “the

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<sup>266</sup>BREEN, *supra*, at 336.

<sup>267</sup>*Id.*

<sup>268</sup>MARTIN, *supra*, at 65.

political organizations” to secure nomination of suitable candidates.<sup>269</sup> After an “animated discussion” at the Association’s meeting on October 10 with several different proposals, the members voted to set up a special committee, composed of 15 members, authorized only to “report such measures as they may deem advisable” to secure election of suitable and competent judges.<sup>270</sup> This committee did work with the political parties, probably securing the nomination of George Barrett for the Supreme Court as a result, and joined the Committee of Seventy in opposing Barrett’s opponent, Tweed nominee Thomas A. Ledwith. The Association agreed to publish in the newspapers a resolution stating that it considered Ledwith’s nomination as “that of a man who was not a lawyer,” and that it “must be regarded as dictated by political or selfish motives, and in our opinion should be condemned by the people.” Ledwith was indeed defeated and Barrett elected, although it is difficult to say what effect the Association’s resolution had. But some members of the Association were convinced it had played a significant role and were emboldened to go after corrupt sitting judges.

#### **E. Ethnic Tensions Rising**

As a result of the November 1871 elections, in which Tweed lost supporters and the reformers won seats, the reform movement seemed secure, and bound to be effective. However, the campaign stirred up immense ethnic tension that was to cause the movement trouble in the long run. Ethnic invective poured from newspapers on both sides, and seemed almost to portray a war of the English against the Irish, mirroring that in the old countries.

The large German community in New York to some extent stayed out of the rancorous

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<sup>269</sup>Minutes of the Executive Committee, ABCNY, Sept. 22, 1871, at 44.

<sup>270</sup>ABCNY Minutes, Oct. 10, 1871, at 67. The vote was 45 to 23. *Id.*

ethnic debate. Several newspaper editors, leaders of the German community, were staunchly in favor of the reform movement and so disarmed criticism of that group. For example, at the celebrated September 4 reform meeting at the Cooper Union, Oswald Ottendorfer, editor of the New York paper *Staats Zeitung*, and “a leader of the German element in New York, delivered a strong, fervid and powerful denunciation of the Tammany thieves.”<sup>271</sup> And Joseph Pulitzer, another leader of the New York German community, was editor of the *World*, which crusaded tirelessly for reform. But, as noted below, the *World* did take umbrage at anti-immigration sentiment and anti-Catholicism in the *Times*.

The newspapers therefore, in their frequent invocations of ethnicity, or what was then known as “race,” primarily concerned themselves with attacking the Irish and counter-attacking those of English origin. The print battle over race raged throughout 1870 and 1871, as the fight over the Ring gained momentum. The anti-Irish forces struck hard. The *Evening Post*, which applauded the bar’s efforts at reform, was among the more circumspect members of New York’s press, stating that Tweed’s home voting district was comprised of “the least intelligent, the most bigoted, and, to a great extent, the most vicious population.”<sup>272</sup> The *Nation* denounced the “folly and wickedness of the Irish.”<sup>273</sup> The *Times* took the toughest line of all, declaring that the Irish were not “true American[s],”<sup>274</sup> and that the Catholic Church sought to supplant secular

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<sup>271</sup>BREEN, *supra*, at 336.

<sup>272</sup>*What Might Have Been Done*, EVENING POST (New York), Nov. 9, 1871, at 2.

<sup>273</sup>*The Irish and the Riots*, NATION (New York), July 20, 1871, at 36.

<sup>274</sup>*Democrats and Republicans*, N.Y. TIMES, Mar. 18, 1871, at 4.

authority.<sup>275</sup> Illustrating the connection between its view of the Irish and organized bar, the *Times* declared that the “whole Celtic race” must “take an inferior position in the progress of races” in a column that ran next to its laudatory coverage of Evarts’ attacks on the Tweed Ring.<sup>276</sup> And Thomas Nast, whose famous cartoons in *Harper’s Weekly* were among the most effective weapons against the Tweed Ring, portrayed the Catholics of Tammany Hall as reptilian creatures.<sup>277</sup>

The Irish-sympathizing press hit back, accusing the Anglophilic press of being elitist, aristocratic, and fundamentally anti-democratic. (Its fervor was no doubt increased by memories of conflict back in the old country.) Thus did the Democrat-leaning *Sun* attack the *Times*, which had instigated the bar’s reform efforts, as a group of “arrogant Englishmen” who “lived by denouncing American Judges.”<sup>278</sup> That both the *Times* and its ally in judicial reform, the *Nation*, pointed to the British bench as a model played into this accusation.<sup>279</sup> Still another Democratic publication lambasted the *Times* for its anti-Catholicism.<sup>280</sup> In an era in which recent immigrants had, at least in the eyes of the Democratic press, real reasons to fear disenfranchisement at the

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<sup>275</sup>See *The Latest Pretensions of the Romish Church*, N.Y. TIMES, July 17, 1871, at 4.

<sup>276</sup>See *New-York Rising Against Its Masters*, N.Y. TIMES, Apr. 7, 1871, at 4; *The Leading Races of the World*, N.Y. TIMES, Apr. 7, 1871, at 4.

<sup>277</sup>See STEPHEN HESS AND MILTON KAPLAN, *THE UNGENTLEMANLY ART: A HISTORY OF AMERICAN POLITICAL CARTOONS* 93-99 (1968).

<sup>278</sup>*Foolish Attacks on Judges*, SUN (New York), Feb. 7, 1870, at 2.

<sup>279</sup>See *supra* text accompanying notes ; *The Anglo-Saxon Judge*, NATION (New York), July 27, 1871, at 52-53.

<sup>280</sup>See *A War of Race and Sect*, WORLD (New York), Nov. 1, 1872, at 4.

hands of Republicans in Albany,<sup>281</sup> such appeals to ethnic solidarity must have resonated. Given the large numbers of recent immigrants who recently had become naturalized citizens, and in the city soon outnumbered native-born New Yorkers on the voting rolls, such ethnic tensions did not help the reforms espoused by New York City's bar.<sup>282</sup>

#### **F. The Bar's Role in the Trials of Ring Judges**

While ethnic tension raged in the press, the reform movement marched on. Although the Association was helping to keep bad judges such as Ledwith off the bench, the worst of the Tweed judges remained. Strong fumed in his diary about the Association's timidity in December 1871: "The Association is pusillanimous; its members are afraid to get up a cause against Barnard, Cardozo and Company, though abundant proof of corruption is within their reach." He attributed this lack of action to cowardice, since "[i]f they should fail, Barnard and the others would be hostile to them, and they would lose clients." He was so frustrated that he wrote, "I feel inclined to resign from this Bar Association."<sup>283</sup>

In fact, encouraged by the results of the election of 1871, the Association was already moving to take on the corrupt judges. In January 1871, the Association voted to present a memorial to the legislature with an attached report. The memorial stated that for some time the administration of justice in the city had "failed to command that measure of public confidence

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<sup>281</sup>See *The New Naturalization Bill - Scoundrelly Scheme Against the Rights of Foreign-Born Citizens*, WORLD (New York), Feb. 14, 1870, at 4. The *Times*, for its part, sought to nullify the effect of Irish votes even without a legislative enactment. See *A Balance to the Irish Vote*, N.Y. TIMES Apr. 13, 1871, at 4.

<sup>282</sup>By 1870, New York City's foreign-born voters outnumbered their native-born counterparts by almost 42,000. See *The Bottom of the Great City Difficulty*, NATION (New York), Sept. 7, 1871, at 157.

<sup>283</sup>4 STRONG DIARIES, *supra*, at 404 (Dec. 16, 1871).

which is essential in order that it may accomplish its beneficent ends.”<sup>284</sup> Furthermore, this was known not only in New York but throughout the country and abroad, thanks to a vigorous press: “charges directly impeaching the judicial integrity of some of the judges upon the bench in the said city, have been repeatedly made in the most explicit manner in many of the principal journals of the day, and thus circulated throughout the United States and foreign countries.”<sup>285</sup>

Echoing Tilden’s argument made at the organizational meeting of the Association, the memorial went on to point out that New York’s poor reputation for justice might well endanger its standing as a commercial capital: “in these and in other ways the administration of justice in said city, and the honor and fair fame not only of that city but also of the State have become widely involved in doubt and suspicion; and . . . capitalists have been alarmed, and important commercial and financial enterprises have been diverted from said city, and that its general prosperity is likely to be still further materially retarded.”<sup>286</sup> The memorial went on to refer to the election in November 1871 as a “popular uprising” whose fruits should not be squandered by failure to take action against the judges.<sup>287</sup>

Therefore the memorial called on the legislature to institute a “rigid inquiry” and to apply “such remedies . . . as the results of the inquiry may demand.”<sup>288</sup> As a part of the memorial, the Association included the committee’s report summarizing the various types of misconduct the

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<sup>284</sup>3 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 1872, no. 40, at 1.

<sup>285</sup>*Id.*

<sup>286</sup>*Id.*

<sup>287</sup>*Id.*

<sup>288</sup>*Id.*

corrupt judges had engaged in, although it did not mention any of the judges by name.<sup>289</sup>

Members of the Association were active in the investigations and proceedings that followed; indeed they in effect acted as counsel to the legislative committees and Senate. Three members of the Association—Joshua Van Cott, John E. Parsons, and Albert Stickney—spent all their time on the hearings and the later proceedings, about six months total. The Association provided financial support for their efforts.<sup>290</sup> The Assembly referred the memorial to its judiciary committee, which in turn held lengthy hearings in New York City to investigate the accusations. The investigation focused on three judges: Barnard and Cardozo of the Supreme Court, and John H. McCunn, of the Superior Court.<sup>291</sup> The committee recommended to the Assembly impeachment for all three judges. At that point, Judge Cardozo resigned, despite an alleged agreement between himself and Judge Barnard that neither would resign, thereby cementing his reputation as the most despicable member of the ring.<sup>292</sup> The Assembly voted to impeach Barnard but urged that McCunn’s case be dealt with more informally; it submitted

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<sup>289</sup>*Id.* at 3.

<sup>290</sup>At the end of their labors the Association voted each of the three an honorarium of \$1,000 each for their services in the trial of Judge McCunn. 1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MINUTES OF THE EXECUTIVE COMMITTEE 64 (Jan. 7, 1873). The Association’s total outlay in the proceedings was substantial; it reached \$40,000, and was raised by subscription. *Id.*; see also 3 PROCEEDINGS IN THE COURT OF IMPEACHMENT OF GEORGE G. BARNARD 1819 (Albany, NY, Weed, Parsons 1874) (3 vols.).

<sup>291</sup>A fourth judge, D.P. Ingraham of the Supreme Court, was briefly investigated but his reputation was not as bad as the others. In any case, he was elderly, his term of office had nearly expired, and according to the constitution he could not run again for office.

<sup>292</sup>Albert Cardozo’s son Benjamin, only two years old at the time of his father’s resignation, gave the Cardozo name a better reputation. In his career on the New York Supreme Court and Court of Appeals and on the United States Supreme Court, he earned a reputation of sterling judicial integrity. See KAUFMAN, *supra*, at 20.

charges to the governor and recommended that the Senate investigate them. In the end, the Senate held trials for both judges during the summer of 1872. The charges against each were carefully chosen, and included allegations concerning appointment of receivers and referees and grants of ex parte injunctions.<sup>293</sup> Despite the efforts of Barnard's counsel to suggest that the Association was attacking Barnard for political reasons,<sup>294</sup> both judges were convicted and removed from office.

### **G. 1873 Referendum on Judicial Elections: The Bar Meets Defeat**

The spectacle of judges on trial for offenses involving massive corruption encouraged the Association as it launched its most far-reaching effort to undo the damage wrought by the Constitution of 1846: the referendum on judicial elections at the election of 1873. This referendum, as described above, originated in the constitutional convention of 1867.<sup>295</sup> Many respected members of the bar believed that overturning judicial elections and returning to appointment by the governor with confirmation by the senate would provide a systemic solution to the bench's problems, so amply demonstrated by the recent corruption trials. Advocates of

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<sup>293</sup>PROCEEDINGS IN THE SENATE ON THE INVESTIGATION OF THE CHARGES PREFERRED AGAINST JOHN H. MCCUNN 584 (Albany, N.Y., Weed, Parsons 1874). Parsons, one of the Association lawyers, described a case in which both parties had agreed to refer their case to a particular referee (arbitrator) and the arbitration was proceeding, when, to the shock and dismay of both sides, Judge McCunn appointed Tweed as the referee and another Tammany Hall man as a receiver, which vastly increased the length and expense of the litigation. *Id.* Parsons argued that McCunn had done this “to purchase political support and assistance,” since “[t]his was immediately preceding his nomination to his present term of office, and indicates the extent to which he holds his seat by the will of the people.” *Id.*

<sup>294</sup>3 BARNARD TRIAL PROCEEDINGS, *supra*, at 1819, 1905. Breen wrote later that Beach was trying to portray the Association as a monster crawling “in the path of its victim from place to place, listening to his lightest word and noting his minutest movement in its anxiety for materials out of which to construct the instrument intended for his ruin.” BREEN, *supra*, at 402.

<sup>295</sup>*See supra* text accompanying notes .

reform believed themselves to be aided not just by the recent judicial corruption trials, but also by the ongoing trials of Boss Tweed beginning in January 1873, which eventually led to his conviction and prison sentence.

Encouraged by such public evidence of corruption in the current system, the Association and its members threw themselves into promoting the referendum against judicial elections.<sup>296</sup> The reformers in the spring of 1873 were confident they could undo the damage done by the Constitution of 1846. In April 1873, the *Nation* boldly predicted that the referendum would begin the “third period of constitution-making in the United States,” in which the people would demand a curtailment of the widespread Republicanism that sprang from the 1846 constitution.<sup>297</sup> Also in April 1873, the Association began to prepare its campaign. It arranged to publish a resolution in favor of judicial appointment in various newspapers, and Association members spoke forcefully at public gatherings in favor of reform. Shortly before the vote the Association published a brief and forcefully argued pamphlet in favor of judicial appointment.<sup>298</sup> Although it was signed by Evarts, in fact it was probably written by Dorman Eaton, the reformer who had been attacked and brutally beaten in 1871. Eaton wrote a much longer pamphlet for the Union League Club and the New York Council of Political Reform in which he laid out the same arguments in greater detail and with supporting facts.<sup>299</sup>

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<sup>296</sup>1 HISTORY OF THE BENCH AND BAR OF NEW YORK 201 (David McAdam ed., 1897).

<sup>297</sup>*A Third Stage of Constitution-Making*, NATION (New York), Apr. 17, 1873, at 265-66.

<sup>298</sup>1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORTS 7 (1873).

<sup>299</sup>DORMAN B. EATON, SHOULD JUDGES BE ELECTED? OR THE EXPERIMENT OF AN ELECTIVE JUDICIARY IN NEW YORK (New York, privately published, 1873). *See also* 8 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PAMPHLETS 5.

Eaton, who included tables of statistics in the longer version of the pamphlet, argued that elected judges were of lower quality than appointed ones. He attempted to show that since judges were elected there were more appeals, new trials, and reversals in civil cases. In criminal cases, he tried to show there were lower numbers of convictions per arrest.<sup>300</sup> Of course, modern wariness of statistics would lead us to probe into all sorts of factors besides election of judges that could produce such shifts. Eaton himself seemed to believe his powerful argument was “the unexampled number of five judges . . . awaiting trial for official corruption [in 1872]—a number greater than were arraigned in the whole period of appointed judges in this state from 1777 to 1846.”<sup>301</sup>

Eaton argued that the system of judicial elections had corrupted both the bench and the bar. According to the address to the voters, “Judicial elections have, in our opinion, as a rule, been unfavorable to the selection of man of the greatest ability and attainments for the bench, and not less unfavorable to the prevalence of courage and fidelity in the discharge of judicial functions.”<sup>302</sup> The process of elections itself was incompatible with the judicial office. “The judicial canvass is in its very nature demoralizing, and the temptation is dangerously strong to make commitments unfavorable to justice. The judge who reaches the bench through a party contest at the polls, where one portion of the people support and the other oppose him, by no means finds it as easy to be impartial, nor do lawyers and suitors find it as easy to believe him

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<sup>300</sup>*Id.*

<sup>301</sup>*Id.*

<sup>302</sup>1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORTS 7, at 5.

impartial, as if he had been appointed by the governor and confirmed by the senate.”<sup>303</sup> With the bench so perverted, the bar could not but be corrupted also.

Such selections have also been prejudicial to learning and character among lawyers. Lawyers of inferior capacity, aspiring to the bench, have been induced to intrigue for caucus and party influence, and thus the more honorable conditions of professional advancement have been disparaged and neglected. Much in the same ratio in which inferior lawyers have been able to reach the bench, under the elective system, persons of small education and uncertain character have made their way at the bar.<sup>304</sup>

Last, but not least, judicial elections had bolstered the power of the Ring. “The election of judges, by giving more offices to be made the subject of bargaining and intrigues by the managers of popular elections, has increased the number and power of those party mercenaries who live by the spoils of elections, and the same cause has aggravated the excessive power of the mere party majority.”<sup>305</sup> This argument smacks a bit of criticism of popular politics, and indeed such an aristocratic attitude may well have soured some voters on the proposal.

The reformers had hoped that the shocking evidence of corruption revealed by the trials of McCunn, Barnard, and Tweed combined with their own campaign efforts would give the measure a fighting chance, but they were destined to be disappointed. The people voted 319,979 to 115,337 against appointment.<sup>306</sup> Voters in rural areas voted especially strongly to continue to elect judges, although the city vote was lopsided too. In general, Republicans and reform Democrats lost ground to Tammany Hall Democrats, possibly due to the economic downturn

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<sup>303</sup>*Id.*

<sup>304</sup>*Id.*

<sup>305</sup>*Id.*

<sup>306</sup>DOUGHERTY, *supra*, at 188.

caused by the financial panic of 1873.<sup>307</sup>

With respect to the farmers of upstate New York, it seems that distrust of the bar for its role in the Anti-Rent wars was still strong. And rural voters most likely perceived fewer problems with the elective system in their areas. Jacksonian theories remained powerful in rural areas and were regarded as workable; in contrast, many believed cities were unfit for Jacksonian democracy.<sup>308</sup> As one bar association later noted, “in rural counties, unlike our city counties, the Judges are chosen by voters who know them personally, and who thus give some substantial consideration to their characters and abilities.”<sup>309</sup> Agrarian regions, in other words, continued to exhibit the same social conditions that led some states to elect justices of the peace since the 1700s. Rural areas did not share the circumstances that made judicial elections problematic in cities.<sup>310</sup> After weighing the evidence, one contemporary critic could reach only the conclusion

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<sup>307</sup>See BURROWS & WALLACE, *supra*, at 1020-1023.

<sup>308</sup>See *Selecting and Retiring Judges--Why Popular Elections Fail in Cities*, 3 J. AM. JUDICATURE SOC'Y 165, 165-67 (1920) (discussing why the elective system works more poorly in urban than rural areas); *The Struggle in New York for the Independence of the Judiciary from the Control of the Party "Boss,"* 32 AM. L. REV. 909, 913-14 (1898) (commenting that the “inhabitants of great cities, taken *en masse*, are wanting in civic virtue and unfit for self-government”); *Elected Judges*, 24 AM. L. REV. 807, 807 (1890) (noting that “it has been a fortunate thing for the State that the country voters have outnumbered the voters of large cities”); *cf. How Shall Judges Be Chosen: Defects and Merits of Popular Election Debated by Commonwealth Club of California*, 3 J. AM. JUDICATURE SOC'Y 75, 82 (1919) (discussing why the elective system was “a product of the democratic movement in the earlier half of the last century, when the country was sparsely inhabited and the candidates were well known to the electors”). In Philadelphia’s press, concern over judicial inefficiency was high. See, e.g., *How to Strengthen the Supreme Court*, PHILADELPHIA INQUIRER, May 10, 1873, at 4.

<sup>309</sup>*Bar Seeks to End Disgraceful Scrambles*, 3 J. CLEVELAND BAR ASS'N 9, 9 (1929).

<sup>310</sup>See RICHARD HOFSTADTER, *THE AGE OF REFORM 175-86* (1955). At the height of the Tweed scandals, the *Nation* opined that “the leading conditions of our problem are to be found, though in a lower stage of development, in Boston, Philadelphia, Cincinnati, [and] Chicago,” among other cities. *Rich Men in City Politics*, NATION (New York), Nov. 16, 1871, at 316.

that judicial elections failed in large cities.<sup>311</sup> Even Eaton conceded that the elective system did not affect rural areas as badly as it affected cities,<sup>312</sup> which was a pattern that repeated itself throughout the United States.<sup>313</sup> More than half a century later, this phenomenon would continue to bedevil would-be reformers: as one critic of the elective judiciary complained, in rural areas “people say, ‘We are getting good judges now, so why change?’”<sup>314</sup> The same pattern of rural voters favoring judicial elections persisted into the late 20<sup>th</sup> century, when New Yorkers in 1979 finally voted to make the Court of Appeals appointive.<sup>315</sup>

In New York City, voters were not entitled to such a sanguine view of their judiciary. There, the vast immigrant vote was decisive, and the reformist press had harshly criticized immigrants, the Irish in particular, as essentially unfit to govern themselves. Most likely, for many voters, issues of ethnicity and class outweighed any desire to see reform triumph. They may also have believed that enough had already been done to set the New York judiciary on a better path.

## V. Conclusion

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<sup>311</sup>See *The Elective Judiciary in the Great Cities*, 26 ALBANY L. J. 504, 504-05 (1887).

<sup>312</sup>See EATON, *supra*, at 89-90; see also *The Bar and Judicial Nominations*, 4 ALBANY L. J. 21, 21 (1871) (noting that “it is only in the city of New York that [political wire pullers] have succeeded in taking away from the people and their chosen agents, the lawyers, the selection of judicial officers”).

<sup>313</sup>See *Better Criminal Justice*, 7 IOWA L. BULLETIN 48, 48-49 (1921).

<sup>314</sup>Stuart H. Perry, *Shall We Appoint Our Judges?*, 19 J. AM. JUDICATURE SOC’Y 78, 78 (1935). Perry wrote this shortly after the rural vote resoundingly defeated a constitutional amendment providing for nonpartisan elections in Michigan. See *id.* at 84.

<sup>315</sup>Cite to Wald articles in the New York Times; Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791 (2004).

Despite the elite bar's failure to win ratification of an appointive system, much judicial reform had been accomplished in a short time. Although Tammany Hall was not eliminated, judicial corruption was greatly lessened. In 1895, James C. Carter wrote to the governor about the Supreme Court justices in New York city, "I suppose all of them owe their positions pretty much to Tammany Hall, and I have been surprised at two things: first, that that organization should have selected such good men, and, second, that they should have exhibited so little subserviency to the power to which they are indebted for their places."<sup>316</sup> The same could not be said of the bench 25 years previously. In its 50<sup>th</sup> anniversary celebrations, the Association of the Bar was justly self-congratulatory about the role it had played in cleaning up the bench. The reforms of the Constitutional Convention of 1867 and the Association's working to remove corrupt judges had each had a significant effect.

The bar's achievements in reforming the judiciary paved the way for improvements in municipal government and for its defeat of Field's Civil Code in the 1880's. A respectable judiciary meant New York's rise to national and international commercial prominence could continue unimpeded. The elite bar hoped to further assure that result by limiting the power of legislatures over basic commercial law. Legislatures, elite lawyers feared, were prone to capture by the unscrupulous rich or by redistributionist poor. A civil code in the legislature's hands would soon become an instrument to aid one or the other of these groups, or both.<sup>317</sup> Assuming a reasonably honest and competent judiciary, the common law was the better instrument to deal

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<sup>316</sup>James C. Carter to Governor Levi P. Morton, Feb. 19, 1895, Levi P. Morton Papers, Syracuse University, quoted in Grossman, *supra*, at 600-601.

<sup>317</sup>See Grossman, *supra*, at 601-602.

with commercial law. James Carter and the Association of the Bar did their utmost to thwart passage of the Civil Code, and they succeeded. Although legislative solutions later gained ground with the progressives, the legacy of men such as Carter did not die out entirely. The U.S. Supreme Court built up a sort of common law of individual liberties, including economic liberties, at the end of the nineteenth century and beginning of the twentieth. That legacy lives on, albeit in altered form, in certain of the Supreme Court's individual rights cases today.<sup>318</sup>

The New York bar's more successful efforts showed the wisdom of not trying to completely abolish judicial elections, but of taking the more indirect approach of lengthening terms. The bar could thereby more effectively parry charges of anti-democratic elitism. Although some states did succeed in eliminating judicial elections, many others have found relief from some of the worst aspects of judicial elections by lengthening terms or adopting retention elections. I will explore the changes to the elective system of judges in other states after the Civil War in future work.

This history also demonstrates that, in the area of judicial elections, at least, organizations within the bar had an important role to play. Several things about the New York bar's involvement were significant. First, the Association of the Bar was made up of a small and committed group, not the entire bar. Second, members went out of their way to make sure the Association was bipartisan. Reform-minded Democrats were as welcome as Republicans, and the emphasis on bipartisanship greatly increased the Association's effectiveness. The American Judicature Society (founded 1913), which developed the merit selection plan and retention

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<sup>318</sup>See generally David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

elections, is another example of a committed and nonpartisan group within the bar carrying out successful reform of judicial elections. Certain members of the elite bar during this period went some way toward justifying Evarts' remark that "we lawyers, not less than judges, are sworn in our duty to subserve the interests of the State; and a good, and an able lawyer, I think, may claim for the exercise of his profession the honor of advancing the glory of the State, protecting the interests of the community, and serving the public good."<sup>319</sup>

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<sup>319</sup>1867-68 DEBATES, at 2369 (Evarts).