

FROM POPULAR CONTROL TO INDEPENDENCE:  
REFORM OF THE ELECTED JUDICIARY IN BOSS  
TWEED'S NEW YORK

*Renée Lettow Lerner\**

INTRODUCTION.....		111
I.	THE CONSTITUTION OF 1846: POPULAR CONTROL.....	114
II.	“THE THREAT OF HOPELESS BARBARISM”: PROBLEMS WITH THE NEW YORK JUDICIARY AND LEGAL SYSTEM AFTER THE CIVIL WAR .....	116
	A. <i>Judicial Elections</i> .....	118
	B. <i>Abuse of Injunctive Powers</i> .....	122
	C. <i>Patronage Problems: Referees and Receivers</i> .....	123
	D. <i>Abuse of Criminal Justice</i> .....	126
III.	THE CONSTITUTIONAL CONVENTION OF 1867-68: JUDICIAL INDEPENDENCE.....	130
	A. <i>Participation of the Bar at the Convention</i> .....	131
	B. <i>Natural Law Theories: The Law as an Apolitical Science</i> .....	133
	C. <i>Backlash Against the Populist Constitution of 1846</i> .....	134
	D. <i>Desire to Lengthen Judicial Tenure</i> .....	138
	E. <i>Ratification of the Judiciary Article</i> .....	143
IV.	THE BAR'S REFORM EFFORTS AFTER THE CONVENTION .....	144
	A. <i>Railroad Scandals and the Times' Crusade</i> .....	144
	B. <i>Founding of the Association of the Bar of the City of New York</i> .....	147
	C. <i>The Bar's Role in the Early Reform Movement to End the Ring: Public Meetings and the Election of 1871</i> .....	150

---

\* Associate Professor of Law, George Washington University Law School. I thank David Bernstein, Robert Ellickson, Daniel Ernst, Robert Gordon, Lewis Grossman, Philip Hamburger, John Langbein, Craig Lerner, Ira (Chip) Lupu, Lawrence Mitchell, Thomas Morgan, Scott Pagel, Bruce Smith, Robert Tuttle, Martin Wald, James Whitman, and John Witt for helpful suggestions. Matthew Hank provided outstanding research assistance. Scott Pagel, Librarian of the George Washington University Law School, is owed special thanks for acquiring works important to legal historians. Richard Tuske and Alan Rothstein of the Association of the Bar of the City of New York kindly provided access to manuscripts and printed documents related to the early years of the Association. Thanks are due also to the participants in the Yale Legal History Forum.

110	GEO. MASON L. REV.	[VOL. 15:1
	D. <i>Ethnic Tensions Rising</i> .....	152
	E. <i>The Bar's Role in the Trials of Ring Judges</i> .....	154
	F. <i>1873 Referendum on Judicial Elections:</i> <i>The Bar Meets Defeat</i> .....	156
	CONCLUSION.....	159

## INTRODUCTION

This Article sheds light on America's other peculiar institution: the elected judiciary. The United States is almost alone in electing judges.<sup>1</sup> This distinctive American practice has attracted a great deal of attention, both in legal circles and in the popular press: the U.S. Supreme Court dove into an already fierce debate with an opinion on the speech rights of judicial candidates in 2002;<sup>2</sup> newspapers routinely run articles about contributions to judicial campaigns and resulting allegations of judicial bias;<sup>3</sup> and scores of law review articles propose reforms.<sup>4</sup> Since the 1980s, judicial races in many parts of the United States have become increasingly politicized, largely

---

<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. Currently, certain Swiss lay judges of canton courts are elected, and Japanese high-court judges run for election unopposed after being selected by the cabinet. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 691 n.3 (1995).

<sup>2</sup> *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

<sup>3</sup> Bret A. Adams, *There's No Justice in the Election of Judges*, COLUMBUS DISPATCH, Feb. 15, 2007, at A8; Editorial, *Cash v. Quality: Ohio's Judicial Elections Smell More of Money Than Merit, and the Rules Must Change to Give Voters Meaningful Choices*, THE PLAIN DEALER (Cleveland), Mar. 5, 2003, at B8; Robert Duncan, *Legislators Renew Effort to Appoint Texas Judges: Group Says Elections Bad for Reputation*, HOUSTON CHRON., Mar. 4, 2003, at A13; Leslie Eaton, *After Scandals, State Panel Offers Plan to Revamp Judges' Elections*, N.Y. TIMES, Dec. 4, 2003, at A1; Jonathan Groner, *Mississippi: Battleground for Tort Reform: Business Lobby and Trial Lawyers Gear Up for Judicial Elections*, LEGAL TIMES, Jan. 26, 2004, at 4; Chris Heagarty, *527 Groups Undermine Judicial Elections*, GREENSBORO NEWS & REC., Dec. 27, 2006, at A11; Editorial, *Our Turn: 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, at B6; 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, at B1.

<sup>4</sup> Following is a small sample of what has become a vast outpouring: 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); *Developments in the Law—Judicial Elections and Free Speech*, 119 HARV. L. REV. 1133 (2006); 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); 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); Christopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections After Republican Party of Minnesota v. White*, 21 J.L. & POL. 103 (2005); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's New Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985).

because of controversies about tort doctrine and how much control judges should exercise over jury verdicts in tort cases.<sup>5</sup>

Despite the issue's continuing salience, history of judicial elections has been remarkably little studied. While scholars have paid some attention to the populist origins of judicial elections,<sup>6</sup> virtually no one has traced the later history.<sup>7</sup> Following a wave of populism before the Civil War, a backlash began that aimed to make judges more independent of the electorate.<sup>8</sup> Many of the state constitutions written and ratified before the Civil War embodied the populist Jacksonian principles of distrust of government officials and of giving power directly to the people. These constitutions provided for frequent election of all government officials, including judges.<sup>9</sup> A reaction to Jacksonianism set in immediately after the Civil War, when the effects of these changes became apparent. Lawyers and judges of both parties, drawing on the Federalist and Whig tradition,<sup>10</sup> began to denounce the

---

<sup>5</sup> See, e.g., John Fund, *Cheesy Judges*, WALL ST. J., Apr. 21, 2007, at A8; Judicial Selection in Alabama: An Introduction, Report of the American Judicature Society, [http://www.ajs.org/js/AL\\_elections.htm](http://www.ajs.org/js/AL_elections.htm) (last visited July 25, 2007).

<sup>6</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). Jed Shugerman has begun to explore the origin of judicial elections in Mississippi and New York. Jed H. Shugerman, *The People's Courts*, Ch. 3 (Jan. 2007) ("Aristocrats' vs. 'Whole Hogs': Mississippi's Anti-Natchez Backbencher Adoption in 1832") (unpublished Ph.D. dissertation, Yale University) (on file with the Yale Law School Library) [hereinafter Shugerman, *People's Courts*]; Jed H. Shugerman, *Free Soil, Free Courts, Free Men: Barnburners, Hunkers, Anti-Renters, and New York's Adoption of Judicial Elections in 1846*, at 7-11 (Nov. 2006) (unpublished manuscript, on file with the Yale Law School Library) [hereinafter Shugerman, *Free Soil*].

<sup>7</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* 122-23 (1950).

<sup>8</sup> In some ways this cycle of populism followed by desire to strengthen the independence of the judiciary 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).

<sup>9</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>10</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 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* 51, 56 (Gerard W.

populist constitutions as “novel experiments” that with time had proved to be failures.<sup>11</sup>

Reformers argued that the judiciary should be as independent as possible, not subject to popular control. They 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>12</sup> Natural law theory, including the idea of the law as an apolitical science, animated the reformers.<sup>13</sup> In their view, the purpose of law as discovered and applied by judges was not to reflect the will of the majority, but to protect persons and property and thereby promote liberty.<sup>14</sup> In several states, including New York, this movement to reform the judiciary succeeded.<sup>15</sup>

New York provides an important example of these attempts to reform the bench because the state was commercially prominent and because it was one of the first to adopt an elective judiciary and one of the first to try to reform it. As Part I describes, 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 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.

---

Gawalt ed. 1984); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 581 (2002).

<sup>11</sup> See *infra* text accompanying notes 148-63.

<sup>12</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 meritocratic civil service reform. See ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883* (1961).

<sup>13</sup> See *infra* Part III.B.

<sup>14</sup> See *infra* text accompanying notes 136-47.

<sup>15</sup> Before the Civil War, 24 of the 34 states elected at least some judges. But, as one speaker in 1887 put it, “[the changes] since 1860 . . . indicate an opposite tendency—either in the lengthening of judicial terms in States still retaining the elective system, 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* 176-77 (1911). Five states—Virginia, Louisiana, Florida, Maine, and Connecticut—eventually decided to abandon judicial elections altogether and go back to an appointive system; other states were not willing to go as far as that, but did lengthen judicial terms considerably. *Id.* at 177. 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. *Id.* In 1875, Missouri lengthened the terms of supreme court judges from six to ten years, and the terms for the judges of two recently-created intermediate appellate courts were made twelve years. *Id.* In 1883, Ohio's legislature, where since 1851 the constitutional term for judges had been five years, was authorized to fix a term for judges not less than five years. *Id.* California and Maryland also changed the terms for their judges from ten to twelve and ten to fifteen years respectively. *Id.*

However, as Part II of this Article discusses, New York City after the Civil War also had deep problems with its judiciary. Contemporary observers believed it to be one of the most, if not the most, corrupt in the country. The provisions of the Constitution of 1846, combined with the rise of the Tweed Ring, fostered 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 shows how prominent New York lawyers played a leading role as reformers of the judiciary at the Constitutional Convention of 1867-68. At the convention, reformers attacked the Constitution of 1846 and focused on improving judicial independence. They decided to emphasize lengthening judicial terms rather than abolishing the elective system, as many believed the people would not ratify a proposal for returning to the appointive system. The convention proposed, and the people ratified, an amendment to the New York constitution lengthening judicial terms from eight to fourteen years.

Part IV examines reform efforts after the Convention, leading up to a popular vote on return to an appointive system in 1873. After further judicial scandals attracting attention in the local and national press, in which prominent lawyers participated, top practitioners at the bar formed the Association of the Bar of the City of New York. The Association was in part a reform organization, and at least occasionally worked to get honest judges on the bench and to remove corrupt ones. Although the 1873 state-wide referendum on returning to an appointive judiciary failed, the New York judiciary was considerably improved. New York’s rise to national and international commercial success could continue, and its citizens could be better assured of respect for their persons and property. Reform efforts based on restoring independence and removing judges from popular control had at least partly succeeded.

## I. THE CONSTITUTION OF 1846: POPULAR CONTROL

New York’s Constitution of 1846 was the first in a wave of state constitutions in the late 1840s and 1850s that required popular election of judges.<sup>16</sup> Under the previous Constitution of 1821, judicial selection in New York followed the federal model: Judges were appointed by the governor with the consent of the senate, and held their office during good behavior.<sup>17</sup> The New York Constitutional Convention of 1846 proposed a far different model: Judges were to be elected by the people, from specific districts, for

---

<sup>16</sup> Hall, *supra* note 6, at 337.

<sup>17</sup> N.Y. Const. of 1821, art. IV, § 7; *id.* art. V, §§ 3, 5.

renewable eight-year terms.<sup>18</sup> In proposing an elected judiciary, the convention reflected the Jacksonian populist ideology dominant at that time.

According to that populist ideology, all government officials were distrusted.<sup>19</sup> Officials' power was to be strictly limited by popular control. As means of achieving that control, many more officials were subject to popular election, terms of office shortened, and rotation in office mandated.<sup>20</sup> Delegate Enoch Strong, a farmer, opposed an appointive judiciary because it led to the "establishment of a superior and privileged order of human beings."<sup>21</sup> Delegate Charles Ruggles, a prominent lawyer from New York City, even suggested it would be advantageous if some people elected to judicial office were not lawyers. Election of laymen would serve to correct the tendency of professional men to be led "from the just conclusions of natural reason into the track of technical rules."<sup>22</sup> These arguments harkened back to a long American popular tradition favoring "common sense," lawyer-free law over learned law.<sup>23</sup> Some delegates believed elected judges would be less political, not more, since the people would choose "good men," and not the "politicians by trade" favored by governors.<sup>24</sup> Those in favor of popular control emphasized local elections and compact districts to keep officials responsive to the people.<sup>25</sup> The Constitution of 1846 divided the state into eight judicial districts for purposes of court organization and elections.

Populist distrust of government officials led to special distrust of the Court of Chancery, where the chancellor sat without a jury, and of the legal profession as a learned profession in general.<sup>26</sup> The Constitution of 1846 addressed this distrust by abolishing the Court of Chancery and giving equitable powers to the justices of the Supreme Court, New York's trial court of general jurisdiction. The Constitution eliminated the hierarchical organiza-

---

<sup>18</sup> N.Y. Const. of 1846, art. VI, §§ 2, 4, 12.

<sup>19</sup> Nelson, *supra* note 6, at 207-08.

<sup>20</sup> *Id.*

<sup>21</sup> REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 603-04 (William G. Bishop & William H. Attree eds., 1846) [hereinafter 1846 DEBATES] (remarks of Strong).

<sup>22</sup> *Id.* at 483 (remarks of Ruggles).

<sup>23</sup> See, e.g., John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 556-70 (1993); JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 18-32 (2004).

<sup>24</sup> 1846 DEBATES, *supra* note 21, at 883 (remarks of Swackhamer).

<sup>25</sup> Delegate Simmons, who was only cautiously in favor of judicial elections, thought "the people were in favor of some change by which [the courts] shall be brought nearer to the people, and the state courts more diffused and less centralized than the system we now have." *Id.* at 490 (remarks of Simmons).

<sup>26</sup> *The Court of Chancery*, EVENING POST (New York), Aug. 14, 1846, at 2 (quoting one who would apply the "principles of democracy" to the legal profession as favoring the abolition of professional qualifications to be a lawyer).

tion of the bar into three categories of lawyers based on experience.<sup>27</sup> It also abolished most formal qualifications for membership in the bar.<sup>28</sup>

Various factors bolstered the influence of populism at the 1846 convention and encouraged judicial elections in particular. One factor contributing to judicial elections was the class-based Anti-Rent movement. Tenants in the Hudson Valley, who farmed land owned in vast tracts by a few families known as “patroons,” organized rent strikes in the 1840s that often turned violent. They objected to the influence of patroons on the judiciary, and argued in favor of judicial elections in part to unseat judges they viewed as unfavorable to their interests.<sup>29</sup> The state of partisan conflict in New York also encouraged judicial elections. In the mid-1840s, Whigs in many parts of the United States adopted more populist positions than they had previously to compete with Democrats. Some Whigs in predominantly Democrat states believed that local judicial elections would help them gain seats on the judiciary previously denied them because of appointment by Democrat governors or Democrat-controlled legislatures. Some Whigs, therefore, joined populist Democrats in supporting judicial elections in New York.<sup>30</sup> In addition, the idea of judicial elections was not unprecedented because New Yorkers were already electing justices of the peace, and elected officials served on the Court of Errors, the highest court in the state.<sup>31</sup>

A few voices at the convention protested against the proposed constitutional changes, particularly the judicial terms of eight years. Delegate Simmons warned that such short terms would not be sufficient inducement for competent men to fill judgeships. Without longer terms, “we should effectually destroy the judiciary.”<sup>32</sup> After the Civil War, when experience had revealed the results of the local elective system in New York City and the notion of tight popular control of all officials was less fashionable, many others took up the refrain that longer judicial terms were needed. A backlash against the idea of popular control over the judiciary led many to argue for greater judicial independence.

## II. “THE THREAT OF HOPELESS BARBARISM”: PROBLEMS WITH THE NEW YORK JUDICIARY AND LEGAL SYSTEM AFTER THE CIVIL WAR

By the mid-1860s, prominent members of the New York bar were deeply concerned about corruption and incompetence among New York

---

<sup>27</sup> N.Y. Const. of 1846, art. VI, § 8.

<sup>28</sup> *Id.*

<sup>29</sup> Shugerman, *Free Soil*, *supra* note 6, at 7-11.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> 2 DOUGHERTY, *supra* note 15, at 173.

<sup>32</sup> 1846 DEBATES, *supra* note 21, at 490 (remarks of Simmons).

City's judiciary. In July 1867 an article appeared in the *North American Review*, perhaps the leading general review in the country,<sup>33</sup> entitled "The Judiciary of New York City."<sup>34</sup> No author was attributed, though it was later understood that Thomas G. Shearman, a well-known lawyer and founder of the firm known today as Shearman & Sterling, wrote the article.<sup>35</sup> It was widely read and discussed not only in New York but 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 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 prominent lawyers commented on each of these problems in private diaries and other sources, discussed below 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 lawyers' 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>36</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, two additional civil courts, the Superior Court and the Court of Common Pleas, had essentially overlapping jurisdiction.<sup>37</sup> The criminal courts in the city included those held by the justices of the Supreme Court and judges known as the

---

<sup>33</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>34</sup> *The Judiciary of New York City*, 58 N. AM. REV. 149 (July 1867) [hereinafter *Judiciary of New York*].

<sup>35</sup> 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* 226-27 (1986).

<sup>36</sup> Members of the Supreme Court sometimes formed an appellate body known as the general term. 2 DOUGHERTY, *supra* note 15, at 168-69.

<sup>37</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.*

Recorder and the City Judge; these courts heard more serious cases requiring jury trial. Other courts, composed of police justices, heard petty offenses and held prisoners to bail.

#### A. *Judicial Elections*

Far from removing judges from politics as some delegates to the convention of 1846 had hoped, judicial elections and short terms put some New York City judges under the influence of corrupt party bosses. William “Boss” Tweed, the leader of the machine known as the Ring or Tammany Hall, skillfully appealed to the large numbers of new immigrants.<sup>38</sup> Although the Ring was generally associated with the Democratic party, in that Tweed and the other ringleaders were elected as Democrats, the Ring also bought Republicans.<sup>39</sup> Tammany Hall, in existence long before Tweed’s rise,<sup>40</sup> launched Tweed on his career. In 1852, Tammany Hall ran Tweed for alderman in a successful campaign.<sup>41</sup> 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>42</sup> Tweed’s Ring was a perfect example of the kind of late-nineteenth-century urban governance that well-educated, well-to-do citizens feared: the finan-

---

<sup>38</sup> See EDWIN G. BURROWS & MIKE WALLACE, *GOthAM: A HISTORY OF NEW YORK CITY TO 1898*, at 1111-12 (1999); ALEXANDER B. CALLOW, JR., *THE TWEED RING* 61 (1966); SEYMOUR J. MANDELBAUM, JR., *BOSS TWEED’S NEW YORK* 7 (1965).

<sup>39</sup> As a leading opponent of Tweed, the Democrat Samuel J. Tilden pointed out, “[t]he 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 *THE WRITINGS AND SPEECHES OF SAMUEL J. TILDEN* 561 (John Bigelow ed., 1885). 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. MATTHEW P. BREEN, *THIRTY YEARS OF NEW YORK POLITICS UP-TO-DATE* 227 (1899).

<sup>40</sup> Other political factions were not so quick to do so, and indeed tried to play the nativist card. See CALLOW, *supra* note 38, at 20-22; DENIS TILDEN LYNCH, “BOSS” TWEED: THE STORY OF A GRIM GENERATION 115-21 (1927). 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>41</sup> KENNETH D. ACKERMAN, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK* 19 (2005).

<sup>42</sup> OLIVER E. ALLEN, *THE TIGER: THE RISE AND FALL OF TAMMANY HALL* 83 (1993). See also LYNCH, *supra* note 40, at 37-38.

cial entwining of government with party factions, enriching corrupt politicians.<sup>43</sup>

The dominance of the Ring soon affected judicial elections. Shearman and others blamed Tammany Hall for the ejection of Judge Joseph Bosworth, a life-long Democrat, from the Superior Court in 1863; Shearman complained that Bosworth's replacement "did not, in all probability, receive the votes of a thousand respectable men."<sup>44</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 press and also in the debates at the 1867-1868 Constitutional Convention.<sup>45</sup> Bosworth had a reputation for deep legal learning and sense of duty to the public.<sup>46</sup> He had attracted Tammany's ire because of the interference of the bench with the frauds of the Common Council.<sup>47</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."<sup>48</sup> A "notorious corruptionist," probably Mayor Fernando Wood,<sup>49</sup> arranged for Bosworth and another "worthy and capable" Democratic judge to lose the renomination because the corruptionist "declared he must and would have one friend on whom he could rely in each of the city courts of record."<sup>50</sup> Bosworth was replaced by the Irish-born John H. McCunn,<sup>51</sup> later removed from office by the state senate for corruption. While in office, Judge McCunn did not disappoint his political masters. He was most noted for conducting fraudulent naturalization proceedings, which not surprisingly took place just before elections.<sup>52</sup> Machine

---

<sup>43</sup> See MARK W. SUMMERS, *THE ERA OF GOOD STEALINGS* 3-15 (1993); C.K. YEARLEY, *THE MONEY MACHINES: THE BREAKDOWN AND REFORM OF GOVERNMENTAL AND PARTY FINANCE IN THE NORTH, 1860-1920*, at 6-8, 31-32, 121-23 (1970).

<sup>44</sup> *Judiciary of New York*, *supra* note 34, at 152.

<sup>45</sup> See Andrew L. Kaufman, *The First Judge Cardozo: Albert, Father of Benjamin*, 11 J.L. & RELIGION 271, 280 (1995); see also *infra* text accompanying notes 173-76.

<sup>46</sup> *Memorial of Joseph S. Bosworth*, 3 REP. ASS'N BAR CITY N.Y. 66, 68-69 (1885).

<sup>47</sup> *Judiciary of New York*, *supra* note 34, at 154.

<sup>48</sup> *Id.*

<sup>49</sup> See Kaufman, *supra* note 45, at 280.

<sup>50</sup> *Judiciary of New York*, *supra* note 34, at 154. Shearman describes another incident in which the same person, 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. *Id.* He then collected a large sum from them for "election expenses." *Id.* But at the eleventh hour he sold them out for \$10,000 cash, paid for by friends of "the regular Democratic candidates," whose names were then substituted. *Id.* "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.* at 154. For Judge Daly's comments on Woodruff, see *infra* text accompanying note 172.

<sup>51</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'Connor. GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970*, at 76 (Fordham Univ. Press 1997) (1970).

<sup>52</sup> *Id.* at 77.

bosses rounded up dozens of immigrants at a time and brought them before Judge McCunn to be hastily naturalized. 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>53</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. He was of Irish origin, and he served for some time in municipal government.<sup>54</sup> His account, described below, 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.

Breen began by describing the Democratic judicial nominating convention and explained that “the Democratic nomination was equivalent to a certificate of election.”<sup>55</sup> The convention swarmed with sycophants of all classes.<sup>56</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>57</sup> Half an hour after the convention was supposed to begin, the party leaders had not appeared.<sup>58</sup> 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>59</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>60</sup> Hickey explained the situation. Difficulties had arisen because the judicial district covered several wards, and each alderman wanted a say in the judge’s patronage, particularly the position of chief clerk of the court.<sup>61</sup> Finally Breezy satisfied each of the aldermen, and

---

<sup>53</sup> *Irish Citizenship*, N.Y. TRIBUNE May 23, 1869, quoted in W.A. SWANBERG, JIM FISK: THE CAREER OF AN IMPROBABLE RASCAL 86 (1959).

<sup>54</sup> BREEN, *supra* note 39, at iii.

<sup>55</sup> *Id.* at 207.

<sup>56</sup> *Id.* at 205-07.

<sup>57</sup> *Id.* at 208.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 209.

<sup>60</sup> BREEN, *supra* note 39, at 209.

<sup>61</sup> *Id.*

## 2007] REFORM OF THE ELECTED JUDICIARY IN BOSS TWEED'S NEW YORK 121

came out to the convention.<sup>62</sup> He was chosen as the nominee by acclaim, to wild cheering.<sup>63</sup> He launched 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, 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 was long. Colbert's doors are wide open, and I want you to drink 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>64</sup>

Other accounts reported criminal convicts and violence at nominating conventions. In 1860, the District Attorney for King's County described a judicial nominating convention in New York City in which a number of the delegates were convicts.<sup>65</sup> He said he himself had tried one for manslaughter, and the jury had convicted.<sup>66</sup> An acquaintance of his was afraid to go to

---

<sup>62</sup> *Id.* at 217.

<sup>63</sup> *Id.* at 216.

<sup>64</sup> *Id.* at 217-18. 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 242-45. 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 (Modern Library 2001) (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 FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 157 (2004).

<sup>65</sup> Editorial, *An Elective Judiciary*, 23 MONTHLY L. REP. 385, 386-88 (Nov. 1860).

<sup>66</sup> *Id.* at 387 (quoting the District Attorney for King's County).

the convention for fear of getting his “head pounded” by a notorious delegate recently released from the penitentiary after serving a sentence for robbery.<sup>67</sup> “I do not believe in the election of judges—it is one of the greatest wrongs ever inflicted on a free society, at the best—but what does it become when judges are nominated by these men whom I have described from the criminal records?”<sup>68</sup> A judge so nominated will be “yielding and conceding to the criminal element in our community, instead of administering justice.”<sup>69</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, which was 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 curried 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>70</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 hearing counsel making statements about their cases out of court without their opponents present.<sup>71</sup> Because of this practice, *ex parte* injunctions might suddenly rain down on a hapless lawyer’s client. Shearman lamented that *ex parte* contact had become so common in New York as to excite no remark, although “it is fatal to real justice.”<sup>72</sup> A few years later, in his speech at the founding of the Association of the Bar of the City of New

---

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 388.

<sup>69</sup> *Id.*

<sup>70</sup> *Judiciary of New York*, *supra* note 34, at 155. See also 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 455 (Liberty Fund, Inc. 1995) (1888) (“Injunctions granted by [Tweed judges] were moves in the party game.”).

<sup>71</sup> See 3 *PROCEEDINGS IN THE COURT OF IMPEACHMENT OF GEORGE G. BARNARD 1749* (1874) [hereinafter *BARNARD PROCEEDINGS*].

<sup>72</sup> *Judiciary of New York*, *supra* note 34, at 155.

York, William Evarts made the same complaint.<sup>73</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 speculation.”<sup>74</sup> Such practices threatened to drive businesses out of the city. The Union Pacific Railroad was said to have moved its offices from New York to Boston “overnight” because of an *ex parte* injunction prohibiting it from paying coupons on certain bonds.<sup>75</sup>

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

As the description of Breezy's nomination shows, another power judges wielded that made machine politicians anxious to get control of them was patronage. In accordance with their general ideology, the framers of the New York 1846 Constitution had done their best to strip judges of as much patronage as possible. That Constitution abolished many 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 a high art.

Judges Barnard and Cardozo together with Judge McCunn epitomized the “Tweed judges.” Whereas the uneducated immigrant John McCunn seemed naturally poised to become a Ring judge, Cardozo and Barnard were more surprising and demonstrate the hold the Ring was able to gain

---

<sup>73</sup> 1 REP. ASS'N BAR CITY N.Y. 2, 28 (1870). In a reference to the latest Erie scandal, Evarts declared, “[w]hy, 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.” *Id.* This practice was most flagrant in the litigation surrounding control of the Erie Railroad and the Albany & Susquehanna. *See* discussion *infra* Part IV.

The Field Code created problems of overlapping jurisdiction and injunctions. *See infra* note 92. 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* note 15, at 159. There were, therefore, serious problems with inconsistency in the law. *See* THERON G. STRONG, LANDMARKS OF A LAWYER'S LIFETIME 70-71 (1914) [hereinafter T. STRONG].

<sup>74</sup> *Judiciary of New York*, *supra* note 34, at 155.

<sup>75</sup> Addresses Delivered February 17, 1920, and Historical Sketch Prepared to Commemorate the Semi-Centenary of the Association of the Bar of the City of New York 1870-1920, 23 REP. ASS'N BAR CITY N.Y. 5, 14 (1920) [hereinafter Addresses] (remarks of Davies).

among individuals from established families by appealing to greed. Albert Cardozo, thanks in part to his marriage into the prominent Nathan family, was a prosperous member of New York's Sephardic Jewish elite.<sup>76</sup> Many of his relatives were lawyers,<sup>77</sup> and his son Benjamin was destined to become a justice of the U.S. Supreme Court.<sup>78</sup> Judge George 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>79</sup> George Barnard was clearly the black sheep of the family. Tales of his cavalier, irreverent, and flagrantly partial behavior on the bench are legion.<sup>80</sup> In *Harper's Weekly*, Thomas Nast portrayed Barnard dressed as a clown straddling a bench as if it were a horse in a cartoon entitled "The Clown in the Judicial Ring: To What Base Use the Bench Is Put."<sup>81</sup>

The Constitution of 1846 gave these judges ample opportunity to display their partiality. That Constitution provided for a method of quasi-arbitration called referral,<sup>82</sup> which was a response to an overloaded court system. If the parties consented, a referee (essentially a special master) rather than a judge could hear their case. 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>83</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>84</sup> As a result, there 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 notorious for 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 pro-

---

<sup>76</sup> ANDREW L. KAUFMAN, *CARDOZO* 6-7 (1998); Kaufman, *supra* note 45, at 272-75.

<sup>77</sup> See Edgar J. Nathan, *Memorial of Michael H. Cardozo*, 11 REP. ASS'N BAR CITY N.Y. 134-37 (1906).

<sup>78</sup> Kaufman notes that, in contrast to his father, Benjamin Cardozo was known for extreme probity on the bench. KAUFMAN, *supra* note 76, at 20.

<sup>79</sup> MARTIN, *supra* note 51, at 76.

<sup>80</sup> See, e.g., BREEN, *supra* note 39, at 158-59; T. STRONG, *supra* note 73, at 72-73; *Judiciary of New York*, *supra* note 34, at 153.

<sup>81</sup> Thomas Nast, *Cartoon, The Clown in the Judicial Ring*, HARPER'S WEEKLY, Apr. 13, 1872, at 296.

<sup>82</sup> These were also known as "tribunals of conciliation." 2 ALDEN CHESTER, *COURTS AND LAWYERS OF NEW YORK: A HISTORY 1609-1925*, at 686 (1925).

<sup>83</sup> *Judiciary of New York*, *supra* note 34, at 153.

<sup>84</sup> *Id.*

portions before this judge took his seat; but it was reserved for him to give it the form of a science.”<sup>85</sup> No matter what the circumstances, if a case was valuable enough he sent it to one of the lawyers in his former law office. Objection was useless, since “even the agreement of all the parties on other names did not help the matter.”<sup>86</sup> Breen described how Judge Cardozo gave most of his valuable references to Gratz Nathan, who was Judge Cardozo’s nephew.<sup>87</sup> Barnard gave his references 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. Barnard exclaimed: “‘Gratz Nathan! No, gentlemen; ‘Jimmy’ Coleman is my Gratz.’”<sup>88</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 friends. He evaded the law primarily by letting lawyers know that it was “dangerous to object to his nominations for referee.”<sup>89</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>90</sup> George Templeton Strong, a

---

<sup>85</sup> *Id.* at 159.

<sup>86</sup> *Id.*

<sup>87</sup> BREEN, *supra* note 39, at 390; *see also* Kaufman, *supra* note 45, at 296; *Charges Against Justice Albert Cardozo and Testimony Thereunder* 286-87, 689-92, 830, 834 (J. Polhemus, 1872).

<sup>88</sup> BREEN, *supra* note 39, 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 THE DIARY OF GEORGE TEMPLETON STRONG 273-74 (Allan Nevins & Milton H. Thomas eds., 1952) [hereinafter STRONG DIARIES]. *See also* KAUFMAN, *supra* note 76, at 295.

<sup>89</sup> *Judiciary of New York*, *supra* note 34, at 159.

<sup>90</sup> *Id.* at 159, 163. 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* note 39, at 319-20. While Brady was cross-examining a receiver appointed by Judge Barnard, the judge constantly intervened to aid the receiver in dodging the questions. *Id.* at 319. Exasperated, Brady finally turned to Barnard with raised arm pointing directly at the judge and, “in vibrant tones” all but accused Barnard and his receiver of joint corruption. *Id.* at 320. 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 men and all courageous lawyers to aid him in driving from power those who were degrading the administration of justice.” *Id.* Breen wrote that it was “the first, forward step in the fight against the corrupt Judiciary.” *Id.* 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

lawyer from a distinguished New York legal family and author of a famous diary recording social, legal, and political events in New York City,<sup>91</sup> wrote in his diary about the grave consequences abuse of receivership 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>92</sup> One president of an “amply solvent” company, on hearing that a Ring judge had signed an *ex parte* order appointing Tweed receiver, was said to have “introduced a small howitzer into the company’s offices and armed its clerks and sent word to Tweed that any attempt to take possession would be resisted by force of arms.”<sup>93</sup> The company took the additional precaution of hiring a lawyer who “had the confidence of the judge”; the judge vacated the order and no attempt was made to take possession.<sup>94</sup>

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

Tweed and his associates did not overlook the criminal justice system in their quest to dominate and bilk city government, and used a combination of political pressure and bribery to keep the judges under control. The politically-favored, especially if they were also wealthy, had nothing to fear. Indictments against them could be prevented by control of the district attor-

---

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 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>91</sup> Allan Nevins, *George Templeton Strong: The Man and the Diarist*, in STRONG DIARIES, *supra* note 88, at ix, ix-xli.

<sup>92</sup> STRONG DIARIES, *supra* note 88, at 264. Strong described the problems with receivers: “No banker or merchant is sure that some person, calling himself a ‘receiver,’ 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.* As with injunctions, the Erie Railroad litigation and the Albany & Susquehanna litigation illustrated the worst abuse of the power to appoint receivers. See Charles F. Adams, Jr., *An Erie Raid*, in HIGH FINANCE IN THE SIXTIES: CHAPTERS FROM THE EARLY HISTORY OF THE ERIE RAILWAY 135, 173-180 (Frederick C. Hicks ed., 1929) [hereinafter HIGH FINANCE IN THE SIXTIES]; Albert Stickney, *The Lawyer and His Clients*, in HIGH FINANCE IN THE SIXTIES, *supra*, at 193, 224. Stickney noted that almost at the same time David Dudley Field was busy persuading judges to grant dubious *ex parte* injunctions in favor of his clients in the Albany & Susquehanna litigation, he was urging an amendment to the New York Code providing that no receiverships should be granted on the *ex parte* order of a judge. Stickney, *supra*, at 241. Such contrasts were entirely characteristic of Field.

<sup>93</sup> Addresses, *supra* note 75, at 6-7 (remarks of Davies).

<sup>94</sup> *Id.* at 7.

ney<sup>95</sup> or grand jury; or quashed. For example, Shearman reported that a man was indicted for “a series of enormous frauds” by which he had made himself rich.<sup>96</sup> 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.<sup>97</sup> 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>98</sup> Those who were not so wealthy also benefited, 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. George Strong wrote in his diaries: “Law protects life no longer. Any scoundrel who is backed by a little political influence in the corner groceries of his ward can commit murder with almost absolute impunity.”<sup>99</sup>

Should the defendant be so unlucky as to have a case come up for trial, the judge might exert his power over the jury. A good lunch and a \$100 bribe might be all the evidence the judge needed for the prosecution to become unconvincing, and a verdict of acquittal directed.<sup>100</sup> Another form of control was found in the power that New York judges had, along with English and federal judges, to sum up the evidence for the jury and to comment on it.<sup>101</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>102</sup> Judge George C. Barrett, president

---

<sup>95</sup> In 1857, Tweed arranged for his good friend Peter B. Sweeny to become District Attorney. BREEN, *supra* note 39, at 55. In the 1867-68 New York constitutional convention, delegates discussed allegations that the District Attorney of New York City and County, A. Oakey Hall (later mayor of New York City with close ties to the Tweed Ring), was corrupt and politically biased. See REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1867-68, at 912-15 (1868) [hereinafter 1867-68 DEBATES]. Carolyn Ramsey discusses the influence Tammany Hall wielded over criminal justice, and particularly the corruption of the office of District Attorney, during the 1880s and 90s. Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1338-51 (2002).

<sup>96</sup> *Judiciary of New York*, *supra* note 34, at 166.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* 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 endorsement on it. *Id.* at 165-66.

<sup>99</sup> STRONG DIARIES, *supra* note 88, at 264.

<sup>100</sup> See *Judiciary of New York*, *supra* note 34, at 165.

<sup>101</sup> As a result of a movement favored by many lawyers in the South and West, other state judges lost this ability. See Lerner, *supra* note 9, at 225.

<sup>102</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* note 73, at 16-17, 44, 111, 127. He seems to have thought the practice was valuable. Interestingly, he had harsh words for what he called the “‘settling’ judge” who tried to force the parties into compromise, a common type today in the era of managerial judging. *Id.* at 130.

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, a municipal reform organization.<sup>103</sup> Judge Barrett was a judge in the English mode favored by reformers—he exerted his influence with the jury to make sure there was no miscarriage of justice. He “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 marshaled with very great skill.”<sup>104</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 reelection 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.”<sup>105</sup> His colleague was astonished at Barrett's bluntness, until he realized that this was his way of reminding Croker of “the great personal service done him in presenting the case to the jury in such a manner as to justify an acquittal.”<sup>106</sup> A tender scene ensued; “within the next five minutes” judge and political boss were “enfolding each other in a loving embrace.”<sup>107</sup> Indeed, for a number of years after this meeting, according to Strong, few had greater influence with Croker than Judge Barrett.<sup>108</sup>

Others, less wealthy or disfavored by the Ring, were not so lucky. The Ring sometimes used 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

---

<sup>103</sup> Barrett was himself a member of the Committee of Seventy. PROCEEDINGS OF THE BENCH AND BAR IN MEMORY OF HONORABLE GEORGE CARTER BARRETT 5 (Privately Printed, n.d.) [hereinafter PROCEEDINGS IN MEMORY OF GEORGE BARRETT] (remarks of Gray). His opponent was the Tammany candidate Thomas A. Ledwith, who was attacked by the Association of the Bar. T. STRONG, *supra* note 73, at 101.

<sup>104</sup> T. STRONG, *supra* note 73, at 101. 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.” *Id.* 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. *Id.* “He was what would be described as a verdict-getting judge.” T. STRONG, *supra* note 73, at 103. 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. *Id.* 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.” *Id.* at 103-04. *See also* PROCEEDINGS IN MEMORY OF GEORGE BARRETT, *supra* note 103, at 7 (remarks of Gray), 14 (remarks of Root).

<sup>105</sup> T. STRONG, *supra* note 73, at 103-04.

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

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

<sup>108</sup> *Id.* at 106-07.

willing to give bail.”<sup>109</sup> In litigation over control of a railroad (the Albany & Susquehanna), unjustified arrests occurred that deliberately disrupted crucial shareholders’ meetings.<sup>110</sup> 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>111</sup>

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.”<sup>112</sup> 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>113</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>114</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 Civil 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>115</sup> Some judges made a great show of sentencing certain

---

<sup>109</sup> *Judiciary of New York*, *supra* note 34, at 167.

<sup>110</sup> Adams, *supra* note 92, at 202-03; Stickney, *supra* note 92, at 232-34.

<sup>111</sup> *Judiciary of New York*, *supra* note 34, at 167.

<sup>112</sup> *Id.* at 166.

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

<sup>114</sup> See *id.* at 166-67, 169-70. See also 1 BRYCE, *supra* note 70, at 1302-03 (characterizing “tomb” lawyers were practitioners of the lowest sort, making their living by picking up the poorest criminal defendants).

<sup>115</sup> *Judiciary of New York*, *supra* note 34, at 170-71.

defendants severely to cover for letting off more dangerous criminals who had given bribes or employed the right lawyers.<sup>116</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 situation.<sup>117</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.”<sup>118</sup> This state of affairs was largely due to “a tardy and inefficient administration of justice.”<sup>119</sup> Unless some remedy was found, “life in the metropolis will drift rapidly towards the condition of barbarism.”<sup>120</sup>

Shearman 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>121</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>122</sup> What to do? The opportunity had finally arrived, Shearman urged, in the form of 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 [sic] the gloomy forebodings of the Police Commissioners, and sink into hopeless barbarism.”<sup>123</sup>

### III. THE CONSTITUTIONAL CONVENTION OF 1867-68: JUDICIAL INDEPENDENCE

As Shearman pointed out, the elite of the New York bar had a rare opportunity to secure judicial reform at the Constitutional Convention of 1867. Many prominent members of the bar were delegates, often elected at large. Shearman’s article had emboldened the proponents of reform. At the

---

<sup>116</sup> *Id.* at 171.

<sup>117</sup> The Board of the Police Commissioners that year was equally divided between the parties, and so less open to the charge of partiality than most. *Id.*

<sup>118</sup> *Id.* at 171-72.

<sup>119</sup> *Id.* at 172.

<sup>120</sup> *Id.*

<sup>121</sup> *Judiciary of New York*, *supra* note 34, at 175.

<sup>122</sup> *Id.* at 176.

<sup>123</sup> *Id.*

1867 Convention in New York, many delegates made clear their opinion that the reforms of the populist Constitution of 1846 had failed miserably. Populist Democrats were present and vocal, but outnumbered. Many delegates—both Republicans and Democrats—expressed their desire to make the judiciary as independent as possible. While a 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.

A. *Participation of the Bar at the Convention*

Through a series of 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>124</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.<sup>125</sup> The New York legislature provided for election of 128 delegates from the various senatorial districts and thirty-two delegates at large. No elector could vote for more than sixteen 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>126</sup> The at-large delegates were divided evenly between the parties, with sixteen Democrats and sixteen Republicans. The Republicans won a majority of the districts, and so were able to elect the president of the convention and to some extent to control its committees.<sup>127</sup> The convention began in June 1867, and finished its work in February 1868. Tension between Republicans and Democrats was high as the convention sat, because President Andrew Johnson and the U.S. Congress were battling over Reconstruction. 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

---

<sup>124</sup> N.Y. CONST. of 1846, art. XVIII.

<sup>125</sup> 2 DOUGHERTY, *supra* note 15, at 177.

<sup>126</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. *Id.* at 177-78; *see also* FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932, at 98 (1985).

<sup>127</sup> 2 CHESTER, *supra* note 82, at 698.

incentive to design the best system possible.<sup>128</sup> Whatever the reason, it is remarkable how thorough and serious the debates at the New York convention were, compared with modern political discourse. Fortunately for historians, we have available five thick volumes of verbatim reports of the debates.

Although the debates covered a wide range of fascinating topics,<sup>129</sup> much of the convention's effort focused on the judiciary. Lawyers formed a majority of the delegates. Many of the most prominent lawyers and judges in the state were members, including William Evarts,<sup>130</sup> Charles Daly,<sup>131</sup> and Joshua Van Cott. Given the composition of the convention, it is perhaps not surprising that the judiciary article took up so much of the convention's time. However, many delegates seemed to genuinely believe the people had called the convention primarily 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>132</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>133</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."<sup>134</sup> In his opinion, "the evils and defects in our present judicial system were the occasion of the calling of this Convention."<sup>135</sup>

---

<sup>128</sup> 1867-68 DEBATES, *supra* note 95, at 2197 (remarks of Parker).

<sup>129</sup> The debates include absorbing discussions of colored suffrage, women's suffrage, and state support of religious charitable institutions.

<sup>130</sup> Evarts came from prominent New England families on both his father's and mother's sides (he was a grandson of Roger Sherman, signer of the Declaration of Independence). CHESTER L. BARROWS, WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN 2-4 (1941); BRAINERD DYER, THE PUBLIC CAREER OF WILLIAM M. EVARTS 1-3 (1933). A nationally prominent lawyer, he served as Attorney General in the Johnson administration, Secretary of State in the Hayes administration, and U.S. senator from New York. BARROWS, *supra*, at 164, 311, 440.

<sup>131</sup> See *infra* note 152 and accompanying text.

<sup>132</sup> 1867-68 DEBATES, *supra* note 95, at 2369 (remarks of Evarts).

<sup>133</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 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 endowed 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>134</sup> *Id.* at 2181 (remarks of Hale).

<sup>135</sup> *Id.*

B. *Natural Law Theories: The Law as an Apolitical Science*

Certain delegates held an especially exalted view of the judiciary, which touched on questions of jurisprudence. This view linked the independence of judges with natural law theories and with the idea of law as a science, distinct from politics. Two of the most prominent lawyers at the convention, the Republicans Joshua Van Cott and William Evarts, expressed similar conceptions. In their view, a judge 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>136</sup> The legislature “determines the policy of the State . . . so far as it can be regulated by statute.”<sup>137</sup> The executive’s function was to administer the laws, 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.”<sup>138</sup> 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.”<sup>139</sup> 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. 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>140</sup> The Federalists, including Hamilton, Marshall, and Kent, had earlier expounded this natural-law concept of the rule of law acting to preserve persons and property.<sup>141</sup>

Evarts likewise went to great 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 aristocracy, or in the unnumbered and unnamed mass of the people.”<sup>142</sup> Rather, “the judiciary is the

---

<sup>136</sup> 1867-68 DEBATES, *supra* note 95, at 2188 (remarks of Van Cott). This concept of the rule of law is related to that of A.V. Dicey. See ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1959).

<sup>137</sup> 1867-68 DEBATES, *supra* note 95, at 2188 (remarks of Van Cott).

<sup>138</sup> *Id.* This theme that judge-made law should have little to do with the will of the people is found in other states’ debates over the judiciary at the time. See, e.g., 3 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 1861-1863, at 854 (Charles H. Ambler et al. eds., Gentry Brothers 1942) (1863) (remarks of Brown) (“The labors and duties assigned to this court are those of a scholar in seclusion. These judges have little or nothing to do with the people—ought, in fact, to have as little to do with the people as possible.”).

<sup>139</sup> 1867-68 DEBATES, *supra* note 95, at 2188 (remarks of Van Cott).

<sup>140</sup> *Id.*

<sup>141</sup> REID, *supra* note 23, at 33-55.

<sup>142</sup> 1867-68 DEBATES, *supra* note 95, at 2367 (remarks of Evarts).

representative of the JUSTICE of the state, and not of its POWER.”<sup>143</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>144</sup> A judge should thus “hold his office during the pleasure of no representative of power” except “God, the Judge of all.”<sup>145</sup>

The notion of the judge discovering principles of a science utterly divorced from politics, later echoed by Christopher Columbus Langdell and others, may strike us today as naive, living as we do after the legal realists. Perhaps we can understand these men better in light of their daily experience practicing law in the New York City of the 1860s. They observed at first hand, and indeed even the best of them were participants in, the almost complete subjection of law to politics. Recent scholarship has shown that Langdell’s experience practicing law in New York City in the 1860s provoked his deep disgust with the bench and bar there and led him to leave in 1870 to join the faculty at Harvard Law School.<sup>146</sup> His New York experience led him to emphasize more than ever the apolitical character of law.<sup>147</sup>

### C. *Backlash Against the Populist Constitution of 1846*

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. Reformers far outnumbered supporters of the system. 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 the judiciary, in its establishment and constitution” —a unanimity, he added, that was in accord with popular sentiment.<sup>148</sup>

---

<sup>143</sup> *Id.* “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 DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS 70-75*, 235-36 (1979).

<sup>144</sup> 1867-68 DEBATES, *supra* note 95, at 2367 (remarks of Evarts).

<sup>145</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* note 39, at 24.

<sup>146</sup> Bruce A. Kimball & R. Blake Brown, “*The Highest Legal Ability in the Nation: Langdell on Wall Street, 1855-1870*,” 29 *LAW & SOC. INQUIRY* 39, 65-72 (2004).

<sup>147</sup> *Id.*

<sup>148</sup> 1867-68 DEBATES, *supra* note 95, at 2367 (remarks of Evarts).

The prevailing feeling was that the past glories of the New York judiciary—the days of Chancellor Kent and Ambrose Spencer—had dimmed.<sup>149</sup> The Convention of 1846 had foolishly and unthinkingly done away with the conditions for that glory.<sup>150</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, “[t]he 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>151</sup> Frequent rotation in office had to be stopped.<sup>152</sup> Permanence and independence were the watchwords.<sup>153</sup>

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 had served for a number of years on that court with Albert Cardozo.<sup>154</sup> 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>155</sup> Daly compared the

<sup>149</sup> *Id.* at 2182 (remarks of Hale).

<sup>150</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.”); Dorman B. Eaton, *Article on Judiciary*, in 2 CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND THE POLITICAL HISTORY OF THE UNITED STATES BY THE BEST AMERICAN AND EUROPEAN WRITERS 644 (John J. Lalor ed., 1899).

<sup>151</sup> 1867-68 DEBATES, *supra* note 95, at 2367-68 (remarks of Evarts). *See also id.* at 2224 (remarks of Parker) (stating that American judges are very courteous, but that “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”).

<sup>152</sup> *Id.* at 2173; *id.* at 2179, 2193 (remarks of Rathbun); *id.* at 2188 (remarks of Van Cott); *id.* at 2362 (remarks of Daly). A few populist delegates spoke in favor of rotation. 1867-68 DEBATES, *supra* note 95, at 2200 (remarks of McDonald).

<sup>153</sup> *See infra* text accompanying notes 190-209.

<sup>154</sup> Kaufman, *supra* note 45, at 283, 285.

<sup>155</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. For a wonderful portrait of him, see 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. T. STRONG, *supra* note 73, at 133-37.

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>156</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>157</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 . . . .”<sup>158</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>159</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 would spread throughout the state.<sup>160</sup> Evarts took up the theme from Daly, stressing the low repute of the judiciary as illustrated by Daly’s response to Graves.<sup>161</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.”<sup>162</sup> 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>163</sup>

In considering how to rectify the problems pointed out in the article in the *North American Review*, delegates focused on short terms of office. They were not much concerned about partisanship in the initial selection of

---

<sup>156</sup> 1867-68 DEBATES, *supra* note 95, at 2364 (remarks of Daly).

<sup>157</sup> *Id.* at 2365.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2366.

<sup>160</sup> *Id.*; *see also id.* at 2406-07.

<sup>161</sup> 1867-68 DEBATES, *supra* note 95, at 2371 (remarks of Evarts).

<sup>162</sup> *Id.* (remarks of Schumaker).

<sup>163</sup> *Id.* at 2372. There is also mention of corrupt referees, *id.* at 2413, and references to Judges Cardozo and Barnard, *id.* at 2419.

judges. Delegates were far more concerned about the influence party operatives wielded after a judge went on the bench.<sup>164</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>165</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>166</sup> Such a judge “soon learns that his continuance in office does not depend upon his learning, his ability or his integrity.”<sup>167</sup> 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>168</sup> Judges thus threw themselves into politics.<sup>169</sup> 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>170</sup>

Judge Daly illustrated the truth of these principles with specific examples.<sup>171</sup> Daly preferred, for reasons of tact, to stress the loss of good men

---

<sup>164</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 (remarks of Daly).

<sup>165</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.” 1867-68 DEBATES, *supra* note 95, at 2365 (remarks of Daly). 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>166</sup> *Id.* at 2365.

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

<sup>168</sup> *Id.*

<sup>169</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.

<sup>170</sup> 1867-68 DEBATES, *supra* note 95, at 2359 (remarks of Daly). 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>171</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 apolo-

from the bench rather than the gain of bad ones. He lamented that his late colleague Judge Woodruff, a man of learning, ability, and integrity, could not be re-elected because he was a Republican.<sup>172</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.”<sup>173</sup> Although Bosworth was a Democrat, and his party was in power, he was not renominated.<sup>174</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 [probably Mayor Fernando Wood],<sup>175</sup> 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>176</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.

#### D. *Desire to Lengthen Judicial Tenure*

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 with a 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>177</sup> A majority of the Judiciary Committee of the Convention, composed of some of the most eminent lawyers and judges in the state,<sup>178</sup> proposed that the judges of the Court of Appeals and of the Supreme Court be elected, with

---

gizing. *See, e.g., 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>172</sup> *Id.* (remarks of Daly). 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 Hale). Even one of Comstock’s political opponents said he was “sorry that his judicial abilities were lost to the state.” 1867-68 DEBATES, *supra* note 95, at 2382 (remarks of Townsend).

<sup>173</sup> *Id.* at 2365 (remarks of Daly).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 2368 (remarks of Evarts). Twenty-one of 28 judges were re-elected, one delegate remarked.

<sup>177</sup> *Id.* at 2365 (remarks of Daly). Daly was assuming the judge was to serve until seventy, and that care would be taken in his selection.

<sup>178</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. 1867-68 DEBATES, *supra* note 95, at 1306.

tenure during good behavior until age seventy.<sup>179</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>180</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>181</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>182</sup> Others stated they favored an appointive system but doubted whether the people would ratify it.<sup>183</sup> The combination of belief that election with life tenure or a long term was not so much worse than 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 elevated, 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 1867-1868 Convention, many delegates favored more permanency. The judiciary committee's 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>184</sup> An amendment proposed that the chief justice be appointed by the governor. The delegate who proposed the amendment argued that strong leader-

---

<sup>179</sup> Report of the Committee on the Judiciary, in 1867-68 DEBATES, *supra* note 95, § 2, at 1306, § 16, at 1308 [hereinafter Judiciary Report].

<sup>180</sup> 1867-68 DEBATES, *supra* note 95, at 2182 (remarks of Hale).

<sup>181</sup> *Id.* at 2183 (remarks of Smith).

<sup>182</sup> *Id.* (remarks of 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.* See also *id.* at 2188 (remarks of 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.”).

<sup>183</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 . . . .”); 1867-68 DEBATES, *supra* note 95, 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”).

<sup>184</sup> Judiciary Report, *supra* note 179, § 2, at 1306.

ship 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>185</sup> These laudatory references to Federalist 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 proposal to appoint the chief justice was evidence of a desire “to ingraft into our republican institutions remnants and fragments of monarchical institutions.”<sup>186</sup> On an initial vote, the convention voted in favor of appointing the chief justice.<sup>187</sup> An amendment was later introduced providing for the election by the people of the chief justice as such, which carried.<sup>188</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.

---

<sup>185</sup> 1867-68 DEBATES, *supra* note 95, at 2196 (remarks of Beckwith). 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. *Id.* In his opinion, increasing the dignity of the court’s presiding officer would reflect on the court and “will add much to the confidence which the people will have in their decisions.” *Id.* 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.” *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>186</sup> 1867-68 DEBATES, *supra* note 95, at 2196 (remarks of Brown). 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.

*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* note 73, 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 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>187</sup> 1867-68 DEBATES, *supra* note 95, at 2192 (remarks of Rathbun).

<sup>188</sup> *Id.* at 2372, 2374.

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 that a term of eight years was too short.<sup>189</sup> The words “permanence” and “independence” occur repeatedly in the debates on this topic. As mentioned previously, the majority report of the Committee on the Judiciary called for judges elected for tenure during good behavior until seventy years of age.<sup>190</sup> A substitute was offered calling for terms of fourteen years.<sup>191</sup> Proponents of the fourteen-year term argued that if a bad judge were elected for life, “there is no escaping from him unless he be found guilty of some overt act . . . .”<sup>192</sup> They also claimed that life tenure tends “to make the incumbent lazy, to use a plain Saxon term.”<sup>193</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>194</sup> Others, less inclined to populism, noted an incongruity between elected judges and life tenure.<sup>195</sup> They also suggested that fourteen-year terms were equivalent to life tenure in many cases, given the likely average length of tenure on the bench.<sup>196</sup> Many delegates believed that a term of fourteen years might be acceptable, but only if the judges were ineligible for re-election.<sup>197</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 of the king, followed by glowing praise of those serving with life tenure.<sup>198</sup> The latter, he said, have all “been men of character, most of whom have adorned the seat of

---

<sup>189</sup> *Id.* at 2188 (remarks of 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>190</sup> *See supra* notes 178-79 and accompanying text.

<sup>191</sup> 1867-68 DEBATES, *supra* note 95, at 2165.

<sup>192</sup> *Id.* (remarks of Smith).

<sup>193</sup> *Id.* *See also id.* at 2169 (remarks of Nelson).

<sup>194</sup> *Id.* at 2169 (remarks of Nelson).

<sup>195</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>196</sup> 1867-68 DEBATES, *supra* note 95, at 2189 (remarks of Van Cott).

<sup>197</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 Parker).

<sup>198</sup> *Id.* at 2363-64 (remarks of Daly).

justice by their talents, their acquirements and their virtues.”<sup>199</sup> Van Cott, Evarts, and others also made ardent pleas depicting the plight of a younger man, elected at forty, whose term would end at age fifty-four and who would then be compelled to resume private practice with his former clients gone and diminished capacity for getting new ones.<sup>200</sup> Besides being undignified and an affront to the profession, this prospect would deter many able lawyers from joining the bench.<sup>201</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>202</sup> If New York judges were paid the “splendid salaries” English judges were paid, a prudent man could save enough in fourteen years not to worry about retirement.<sup>203</sup> However, given New York’s record, judicial salaries were likely to remain a “pittance.”<sup>204</sup>

Evarts conceded that while the proposal of a fourteen-year term, with ineligibility for re-election, contained “a great many elements of usefulness,” it still “falls short of a practical application of the true principle of the judicial tenure.”<sup>205</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>206</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>207</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>208</sup>

---

<sup>199</sup> *Id.* at 2364.

<sup>200</sup> *Id.* at 2189 (remarks of Van Cott); *id.* at 2369 (remarks of Evarts).

<sup>201</sup> 1867-68 DEBATES, *supra* note 95, at 2185 (remarks of Conger).

<sup>202</sup> *Id.* at 2199 (remarks of Hale). For an account of the parable of the unjust steward, see *Luke* 16:1-8.

<sup>203</sup> 1867-68 DEBATES, *supra* note 95, at 2189 (remarks of Van Cott).

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

<sup>205</sup> *Id.* at 2370 (remarks of Evarts).

<sup>206</sup> *Id.* at 2369.

<sup>207</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>208</sup> *Id.* at 2370.

Smith tried to bring the debate down to earth by asking 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 only to make a good Constitution, but one that the people will adopt.”<sup>209</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>210</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>211</sup> In the end, sufficient delegates were convinced either of the superiority of a fourteen-year term in itself or of the people’s willingness to reject life tenure. The fourteen-year term prevailed for judges of the Court of Appeals and the Supreme Court, and judges were to be eligible for re-election.

#### E. *Ratification of the Judiciary Article*

Although they were not bold enough to call 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>212</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>213</sup> The section was regarded as a concession to those delegates who believed judges should be selected by appointment.<sup>214</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>215</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>216</sup> A

---

<sup>209</sup> 1867-68 DEBATES, *supra* note 95, 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>210</sup> *Id.* at 2375 (remarks of Evarts).

<sup>211</sup> *Id.* at 2376 (remarks of Smith).

<sup>212</sup> Judiciary Report, *supra* note 179, § 11, at 1307.

<sup>213</sup> 1867-68 DEBATES, *supra* note 95, at 2544-45 (remarks of Rathbun).

<sup>214</sup> *Id.* at 2545.

<sup>215</sup> *Id.* at 2545 (remarks of Brown, Cooke, and Townsend).

<sup>216</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

motion to strike the section was narrowly defeated.<sup>217</sup> Thus a battle was predetermined for a date four years away.

In the meantime, there was 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 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>218</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 1867 that the people ratified at the election of 1869.<sup>219</sup> The vote was fairly close, 247,240 to 240,442.<sup>220</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>221</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.

#### IV. THE BAR'S REFORM EFFORTS AFTER THE CONVENTION

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

Meanwhile, legal scandals were breaking that no doubt encouraged voters to ratify the judicial reforms proposed by the Convention of 1867-1868<sup>222</sup> and suggested the bar's work was not over. The scandals, which involved struggles for control of several railroads, 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* launched an editorial campaign, trying to shame the bar into organiz-

---

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>217</sup> The amendment to strike the provision was defeated 42 to 43, and on reconsideration 40 to 47. *Id.* at 2546.

<sup>218</sup> *The Bar Association of New York*, 3 ALB. L.J. 228, 228 (Mar. 25, 1871).

<sup>219</sup> N.Y. Const. of 1846, art. VI, §§ 2, 18 (amended Nov. 1869).

<sup>220</sup> 2 DOUGHERTY, *supra* note 15, at 189.

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

<sup>222</sup> Adams, *supra* note 92, at 179-80.

ing 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, which sprang up across the country in alarming numbers in the wake of the Civil War. But those in New York did tend to be 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 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>223</sup> Not long after, when the 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>224</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>225</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 laborious efforts of Charles Francis Adams, Jr., of the famous Boston family.<sup>226</sup> A tangled web of legal maneuvers and counter-maneuvers 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.<sup>227</sup> All three came from rather hardscrabble backgrounds, a far cry from old New York, and were already known for their dubious business methods.<sup>228</sup> Each side retained leaders of the bar as counsel. Vanderbilt hired Charles O'Connor, an Irish Catholic lawyer and one of the most prominent members of the New York bar at the time, while the Erie clique hired David Dudley Field.<sup>229</sup> By the time the struggle was over, each side had hired dozens more elite lawyers. On the side of the Erie

---

<sup>223</sup> STRONG DIARIES, *supra* note 88, at 202.

<sup>224</sup> *Id.* at 236.

<sup>225</sup> *Id.*

<sup>226</sup> Adams published a scathing description of the scandal in the *American Law Review* in October 1868, and followed it up with several articles in the *North American Review*. CHARLES F. ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS (1871); Charles Francis Adams, Jr., *The Erie Railroad Row*, 3 AM. L. REV. 41 (1869); *see also* Charles F. Adams, Jr., *A Chapter of Erie*, in HIGH FINANCE IN THE SIXTIES, *supra* note 92, at 20 [hereinafter Adams, *Chapter of Erie*]; Adams, *supra* note 92, at 173.

<sup>227</sup> Adams, *Chapter of Erie*, *supra* note 226, at 31-33, 46.

<sup>228</sup> Henry Adams, *The New York Gold Conspiracy*, in HIGH FINANCE IN THE SIXTIES, *supra* note 92, at 101, 123-25.

<sup>229</sup> *Id.* at 129; Adams, *Chapter of Erie*, *supra* note 226, at 55.

clique, 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 on opposing sides casting the entire New York legal system in disrepute. Each side obtained numerous injunctions under dubious conditions, many of them nullifying other judges' injunctions.<sup>230</sup> Judge Barnard, as might be expected, was in the thick of the action.<sup>231</sup> 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.<sup>232</sup> 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, parties handed out thousands of dollars in bribes to members of the state legislature.<sup>233</sup> In the end, Vanderbilt secretly arranged a settlement with the Erie clique.<sup>234</sup> Needless to say, the lawyers charged vast sums in fees; they split \$150,000 among them.<sup>235</sup>

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. This call lauded the English bar and its hierarchical pattern of organization, recommending them as a model for their New York City counterparts.<sup>236</sup> After this first ringing call upon the bar for "united action and organization,"<sup>237</sup>

---

<sup>230</sup> Adams, *Chapter of Erie*, *supra* note 226, at 41-42, 47, 52-53. See also JOHN S. GORDON, *THE SCARLET WOMAN OF WALL STREET: JAY GOULD, JIM FISK, CORNELIUS VANDERBILT, THE ERIE RAILROAD WARS, AND THE BIRTH OF WALL STREET* 217 (1988).

<sup>231</sup> Adams, *Chapter of Erie*, *supra* note 226, at 37-41. A writer describing the Erie litigation explained Judge Barnard's role in it to the English readers of *Fraser's Magazine*: "[I]n New York there is a custom among litigants as peculiar to that city, it is to be hoped, as it is supreme within it, of retaining a judge as well as a lawyer. Especially in such litigation as that now impending, it was absolutely necessary to each party to have some magistrate in whom they could place implicit confidence in an hour of sudden emergency." *FRASER'S*, May 1869, (*Magazine*), at 574, *quoted in* JOHN GORDON, *SCARLET WOMAN*, *supra* note 230, at 165.

<sup>232</sup> *Id.* at 41-42; Adams, *supra* note 92, at 178-79.

<sup>233</sup> Adams, *Chapter of Erie*, *supra* note 226, at 63-67, 70-72, 74.

<sup>234</sup> *Id.* at 78.

<sup>235</sup> *Id.* at 61.

<sup>236</sup> Editorial, *A Lawyer's Mutual Protective Association*, *N.Y. TIMES*, June 20, 1869, at 4.

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

the *Times* steadily prodded the bar to take action over the next few years.<sup>238</sup> Other reform-minded newspapers eventually joined in.<sup>239</sup>

Soon 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.<sup>240</sup> Again contradictory injunctions poured out from the courts.<sup>241</sup> An apparent murder and a pitched physical battle for control of the railroad punctuated this scandal.<sup>242</sup> 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. . . . [W]e must again proclaim that the bar must lead the way."<sup>243</sup>

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

A sense of desperation permeates lawyers' accounts from this time. Strong wrote in his diaries, "[t]he stink of our state judiciary is growing too strongly 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>244</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>245</sup> A Thomas Nast cartoon of the era shows Tweed and several other members of the Ring in front of a noose with the caption, "The Only Thing They Respect or Fear."<sup>246</sup>

Under these circumstances, the bar finally began to organize itself. Charles Wingate, a reform-minded journalist, believed the "servile" bar was

---

<sup>238</sup> See, e.g., *A Word to the Lawyers*, N.Y. TIMES, Apr. 6, 1872, at 4.

<sup>239</sup> See, e.g., *Ruin to the Ring*, WORLD (New York), Feb. 17, 1870, at 4.

<sup>240</sup> Adams, *supra* note 92, at 164.

<sup>241</sup> *Id.* at 170-71.

<sup>242</sup> *Id.* at 185-86.

<sup>243</sup> Editorial, *The Degradation of the Judiciary and the Responsibility of the Bar*, N.Y. TIMES, Dec. 16, 1869, at 4.

<sup>244</sup> STRONG DIARIES, *supra* note 88, at 264.

<sup>245</sup> BREEN, *supra* note 39, at 353-57.

<sup>246</sup> Thomas Nast, Cartoon, *The Only Thing They Respect or Fear*, HARPER'S WKLY., Oct. 1, 1871, at 977.

driven to action because clients were increasingly fearful of the courts, and preferred to suffer loss rather than embark on litigation.<sup>247</sup> “This touched the lawyers in that most sensitive point, the pocket nerve; and they began to question whether the perpetuation of the Ring judiciary was wholly compatible with a suitable future increase of their own professional emoluments.”<sup>248</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.<sup>249</sup> 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 were not necessarily contradictory, in practice there was often tension between them.

The first meeting of subscribers took place on February 1, 1870, and was by invitation only.<sup>250</sup> At the organizational meeting, the two principal speakers—Henry Nicoll and William Evarts—had evidently prepared carefully and conveyed somewhat different emphases, though both inveighed against the Constitution of 1846. Nicoll was most concerned about its effects on the bar, and believed that Constitution “gave almost a death blow to the legal profession.”<sup>251</sup> The most serious problems were, in his view, the Constitution’s destruction of differing ranks within the legal profession based on seniority, and the loosening of requirements to enter the profession.<sup>252</sup> Nicoll hoped to gather 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.”<sup>253</sup> Evarts urged reform of the judiciary as well, asserting that the Association’s goal should be to “restore the honor, integrity and fame of the profession in its two manifestations of the Bench and of the Bar.”<sup>254</sup> Nicoll and Evarts were echoed by

---

<sup>247</sup> Charles F. Wingate, *An Episode in Municipal Government*, 121 N. AM. REV. 113, 145-46 (July 1875).

<sup>248</sup> *Id.* at 146.

<sup>249</sup> See MARTIN, *supra* note 51, at 16-28.

<sup>250</sup> Invitation Issued to Subscribers, ASS’N BAR CITY N.Y., *reprinted in id.* illus. 3. The Association contained some problematic 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. See Wingate, *supra* note 247, at 146.

<sup>251</sup> 1 REP. ASS’N BAR CITY N.Y. 2, at 8 (1870).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</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 impor-

impromptu speaker Samuel J. Tilden, a Democrat from upstate New York and later presidential candidate, who warned that unless New York had an honest and independent bench and bar, it would not remain a great commercial center.<sup>255</sup>

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>256</sup> There were several possible motives for the attack besides Eaton's role in the Association, as he 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 has offended in his attack upon dishonesty and corruption, deliberately hired an assassin to perform this work."<sup>257</sup> The assailants were not found, but at the trial of Fisk's murderer over a year later, evidence emerged suggesting that Fisk himself was behind the attack.<sup>258</sup> Eaton recovered, and perhaps the main effect of the attack was to make him a stauncher reformer than ever. Indeed he gradually gave up his law practice after the attack and devoted himself full-time to municipal reform;<sup>259</sup> he became the mouthpiece for the Association on the question of judicial elections. Eaton was typical of the well-educated liberal reformers—called "best men," "Mugwumps," and "independents," among other names<sup>260</sup>—who were attracted to the Association.

---

tance 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.

*Its Quarter Century Mark: Bar Association Gives a Reception to Its Ex-Presidents*, N.Y. TIMES, Feb. 16, 1895, at 8.

<sup>255</sup> *Id.*

<sup>256</sup> *The Attack on Mr. Eaton*, SUN (New York) Feb. 19, 1870, at 1.

<sup>257</sup> *Who is the Hirer of Assassins?*, N.Y. TIMES, Feb. 17, 1870, at 4. 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. Minutes, ASS'N BAR CITY N.Y., Feb. 15, 1870, at 2.

<sup>258</sup> At the trial of Edward Stokes, who was accused of murdering Fisk, Fisk's mistress Josie Mansfield mentioned during her testimony that Fisk had told her his men had attacked Eaton. STRONG DIARIES, *supra* note 88, at 410, 431.

<sup>259</sup> 3 DICTIONARY OF AMERICAN BIOGRAPHY 607 (1958) (entry for "Dorman Bridgman Eaton"); Gerald W. McFarland, *Partisan of Non-Partisanship: Dorman B. Eaton and the Genteel Reform Tradition*, 54 J. AM. HIST. 806, 806-822 (1968); John B. Pine, *Memorial of Dorman B. Eaton*, 9 REP. ASS'N BAR CITY N.Y. 114, 114-15 (1901).

<sup>260</sup> ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 119 (2000); MCFARLAND, *supra* note 33, at 40-41; MICHAEL E. MCGERR, *THE*

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

A controversial figure prompted the Association to take action for reform: David Dudley Field.<sup>261</sup> 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 voted 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, and a few other steps 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 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.

The movement gained momentum in the summer of 1871 when the *Times* suddenly 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

---

DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865-1928, at 43 (1986); JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 7-10 (1968).

<sup>261</sup> Field was famous both for his unscrupulous legal maneuverings on behalf of clients and for his efforts at reform. See DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW 254-281 (1986). In this he illustrated, in exaggerated form, the tensions within many elite lawyers in the gilded age. Ethical theories similar to those of British Idealist writers such as F.H. Bradley may have helped ease these tensions in lawyers' minds. Bradley emphasized adhering to conduct appropriate to specific roles in the interest of a larger, organic society, while at the same time he did not deny universal standards of justice which might be used to critique a society's institutions. F.H. BRADELY, *My Station and Its Duties*, in ETHICAL STUDIES 98- 147 (2d ed.1951) (1876).

<sup>262</sup> Minutes, ASS'N BAR CITY N.Y., Feb. 7, 1871, at 34. See also Albert Stickney, *The Lawyer and His Clients*, 112 N. AM. REV. 418 (Apr. 1871).

<sup>263</sup> Minutes, ASS'N BAR CITY N.Y., Feb. 21, 1871, at 36.

<sup>264</sup> Minutes of the Executive Committee, ASS'N BAR CITY N.Y., 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.

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 created a sensation.<sup>266</sup> 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 situation."<sup>267</sup> After several speeches, one by prominent Association member Judge James Emott, a committee on resolutions was appointed. Of the seven committee members, three were Association members: Joseph H. Choate, James Emott, and Henry Nicoll.<sup>268</sup> 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 the resolutions 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>269</sup> The meeting bore fruit rapidly. On October 17, Charles O'Connor became special state attorney general charged with recovering money stolen in the Ring's frauds.<sup>270</sup> He chose as his assistants Evarts, Emott, and Wheeler H. Peckham.<sup>271</sup> The next week Tilden, acting for the Committee of Seventy, swore out a warrant for Tweed's arrest for fraud.<sup>272</sup> On October 27, Tweed was arrested and Jay Gould posted most of the bail of one million dollars.<sup>273</sup>

Meanwhile, the election of 1871 was fast approaching. The Association worked with politicians to encourage appropriate nominations for judicial candidates and opposed unworthy candidates. In September 1871, the

---

<sup>265</sup> BREEN, *supra* note 39, at 334-35.

<sup>266</sup> The story of how the *Times* received copies of entries from the comptroller's books and published them is told in ACKERMAN, *supra* note 41, at 91-104; 129-41, 160-73; MEYER BERGER, THE STORY OF THE NEW YORK TIMES 1851-1951, at 33-53 (1951); ELMER DAVIS, HISTORY OF THE NEW YORK TIMES 1851-1921, at 81-116 (1921).

<sup>267</sup> BREEN, *supra* note 39, at 336.

<sup>268</sup> *Id.* at 337.

<sup>269</sup> *Id.*

<sup>270</sup> MARTIN, *supra* note 51, at 65.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

executive committee resolved to recommend appointing a special committee to confer with “the political organizations” to secure nomination of suitable candidates.<sup>274</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 fifteen members, authorized to “report such measures as they may deem advisable” to secure election of suitable and competent judges.<sup>275</sup> This committee worked 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 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.”<sup>276</sup> Ledwith was indeed defeated and Barrett elected, although it is difficult to say what effect the Association’s resolution had. Some members of the Association were convinced it had played a significant role and were emboldened to go after corrupt sitting judges.

#### D. *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 caused 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.

Unlike the English and Irish communities, the large German community in New York to some extent stayed out of the rancorous 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>277</sup>

Some newspapers attacked the Irish and others counter-attacked those of English origin. The print battle over ethnicity, or what was then known as “race,” raged throughout 1870 and 1871, as the fight over the Ring gained momentum. The anti-Irish forces struck hard. The *Evening Post*,

---

<sup>274</sup> Minutes of the Executive Committee, ASS’N BAR CITY N.Y., Sept. 22, 1871, at 44.

<sup>275</sup> Minutes, ASS’N BAR CITY N.Y., Oct. 10, 1871, at 67. The vote was 45 to 23.

<sup>276</sup> Minutes, ASS’N BAR CITY N.Y., Oct. 21, 1871, at 73.

<sup>277</sup> BREEN, *supra* note 39, at 336.

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>278</sup> The *Nation* denounced the "folly and wickedness of the Irish."<sup>279</sup> The *New York Times* took the toughest line of all, declaring that the Irish were not "true American[s],"<sup>280</sup> and that the Catholic Church sought to supplant secular authority.<sup>281</sup> Illustrating the connection between its view of the Irish and the 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>282</sup>

The Irish-sympathizing press hit back, accusing the Anglophilic press of being elitist, aristocratic, and fundamentally anti-democratic. Memories of conflict in the old country no doubt increased the papers' fervor. The Democrat-leaning *Sun* attacked the *Times* as a group of "arrogant Englishmen" who "lived by denouncing American Judges."<sup>283</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>284</sup> The *World*, another Democratic publication, lambasted the *Times* for its anti-Catholicism.<sup>285</sup> (The *World* had crusaded for reform until its owner, Manton Marble, "came to terms" with the Ring in 1870 and its revenue immediately shot up.)<sup>286</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 hands of Republicans in Albany,<sup>287</sup> such appeals to ethnic solidarity must have resonated. Given the large numbers of recent immigrants who recently had become naturalized citizens, soon outnumbering native-born New Yorkers on the voting rolls,

---

<sup>278</sup> *What Might Have Been Done*, EVENING POST (New York), Nov. 9, 1871, at 2.

<sup>279</sup> *The Irish and the Riots*, NATION (New York), July 20, 1871, at 36.

<sup>280</sup> *Democrats and Republicans*, N.Y. TIMES, Mar. 18, 1871, at 4.

<sup>281</sup> See *The Latest Pretensions of the Romish Church*, N.Y. TIMES, July 17, 1871, at 4. 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. See STEPHEN HESS AND MILTON KAPLAN, *THE UNGENTLEMANLY ART: A HISTORY OF AMERICAN POLITICAL CARTOONS* 93-99 (1968).

<sup>282</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>283</sup> *Foolish Attacks on Judges*, SUN (New York), Feb. 7, 1870, at 2.

<sup>284</sup> See *The Anglo-Saxon Judge*, NATION (New York), July 27, 1871, at 52-53; see also *supra* text accompanying notes 236-39.

<sup>285</sup> See *A War of Race and Sect*, WORLD (New York), Nov. 1, 1872, at 4.

<sup>286</sup> ACKERMAN, *supra* note 41, at 132.

<sup>287</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.

such ethnic tensions did not help the reforms espoused by New York City's bar.<sup>288</sup>

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

While ethnic invective poured from 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 Bar 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."<sup>289</sup> 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."<sup>290</sup> He was so frustrated that he wrote, "I feel inclined to resign from this Bar Association."<sup>291</sup>

However, encouraged by the results of the election of 1871, the Association was already moving to confront the corrupt judges. In January 1871, the Association voted to present a memorial and report to the legislature, stating that for some time the administration of justice in the city had "failed to command that measure of public confidence which is essential in order that it may accomplish its beneficent ends."<sup>292</sup> Furthermore, 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>293</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>294</sup> The memorial went on to refer to the election in November 1871 as a "popular uprising" whose fruits should not

---

<sup>288</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>289</sup> STRONG DIARIES, *supra* note 88, at 404.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> 3 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 1872, No. 40, at 1.

<sup>293</sup> *Id.* at 2.

<sup>294</sup> *Id.*

be squandered by failure to take action against the judges.<sup>295</sup> It called on the legislature to institute a “rigid inquiry” and to apply “such remedies . . . as the results of the inquiry may demand.”<sup>296</sup> The Association included the committee’s report summarizing the various types of misconduct the corrupt judges had engaged in, although it did not mention any of the judges by name.<sup>297</sup>

Members of the Association were active in the investigations and proceedings that followed; indeed they acted in effect as counsel to the legislative committees and Senate. Three members of the Association—Joshua Van Cott, John E. Parsons, and Albert Stickney—spent six months on the hearings and the later proceedings, supported financially by the Association.<sup>298</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>299</sup> The committee recommended impeachment for all three judges. At that point, Judge Cardozo resigned, despite an alleged agreement between him and Judge Barnard that neither would resign, thereby cementing his reputation as the most despicable member of the Ring.<sup>300</sup> The Assembly voted to impeach Barnard but urged that McCunn’s case be resolved more informally; it submitted charges to the governor and recommended that the Senate investigate. 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>301</sup> Despite the efforts of Barnard’s counsel to suggest that

---

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 3.

<sup>298</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. Minutes of the Executive Committee, ASS’N BAR CITY N.Y., Jan. 7, 1873, at 64. The Association’s total outlay in the proceedings was substantial; it reached \$40,000, and was raised by subscription. *Id.*; see also BARNARD PROCEEDINGS, *supra* note 71.

<sup>299</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>300</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* note 76, at 20.

<sup>301</sup> PROCEEDINGS IN THE SENATE ON THE INVESTIGATION OF THE CHARGES PREFERRED AGAINST JOHN H. MCCUNN 584 (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

the Association was attacking Barnard for political reasons,<sup>302</sup> both judges were convicted and removed from office.

F. *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 extensive 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>303</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 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 public evidence of corruption in the current system, the Association and its members threw themselves into promoting the referendum against judicial elections.<sup>304</sup> The reformers 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 elective principle found in the 1846 constitution.<sup>305</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>306</sup> Although it was signed by Evarts, it was probably written by Dorman Eaton,<sup>307</sup> the reformer who had been attacked and brutally beaten in 1871. Eaton wrote a much longer pamphlet for the Union League Club and the

---

"[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>302</sup> BARNARD PROCEEDINGS, *supra* note 71, 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* note 39, at 402.

<sup>303</sup> See *supra* text accompanying notes 212-23.

<sup>304</sup> WHEELER H. PECKHAM, *The Association of the Bar*, in 1 HISTORY OF THE BENCH AND BAR OF NEW YORK 191, 201 (David McAdam ed., 1897).

<sup>305</sup> *A Third Stage of Constitution-Making*, NATION (New York), Apr. 17, 1873, at 265-66.

<sup>306</sup> 1 REP. ASS'N BAR CITY N.Y. 7 (1873).

<sup>307</sup> MARTIN, *supra* note 51, at 107.

New York Council of Political Reform in which he laid out the same arguments in greater detail with supporting facts and tables of statistics.<sup>308</sup>

Eaton argued that elected judges were of lower quality than appointed ones. Eaton believed his most 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>309</sup> In the pamphlet signed by Evarts, 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>310</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 impartial, as if he had been appointed by the governor and confirmed by the senate.”<sup>311</sup> With the bench so perverted, the bar could not help 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>312</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>313</sup>

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 chance, but they were dis-

---

<sup>308</sup> DORMAN B. EATON, SHOULD JUDGES BE ELECTED? OR THE EXPERIMENT OF AN ELECTIVE JUDICIARY IN NEW YORK (1873). *See also* Pamphlet, 8 ASS'N BAR CITY N.Y. 5 (1873).

<sup>309</sup> Pamphlet, *supra* note 308, at 5.

<sup>310</sup> 1 REP. ASS'N BAR CITY N.Y. 7, at 5.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

appointed. The people voted 319,979 to 115,337 against appointment.<sup>314</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 in part to the economic downturn caused by the financial panic of 1873.<sup>315</sup>

Rural voters most likely perceived fewer problems with the elective system in their areas, as they did not share many of the circumstances that made judicial elections problematic in cities.<sup>316</sup> Even Eaton conceded that the elective system did not affect rural areas as badly as it affected cities,<sup>317</sup> a pattern found throughout the United States.<sup>318</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>319</sup> The same pattern of rural voters favoring judicial elections persisted into the late 20th century, when New Yorkers in 1977 voted to make the Court of Appeals appointive.<sup>320</sup>

In New York City, trouble with the judiciary was evident, but advocates of reform in the press likely harmed their chances for success by engaging in ethnic attacks. In the city, the vast immigrant vote was decisive, and the reformist press had harshly criticized immigrants, the Irish in particular, as essentially unfit to govern themselves. For many voters, issues of ethnicity and class may have outweighed other considerations. They may

---

<sup>314</sup> 2 DOUGHERTY, *supra* note 15, at 188.

<sup>315</sup> See BURROWS & WALLACE, *supra* note 38, at 1020-24.

<sup>316</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. See also *The Elective Judiciary in the Great Cities*, 26 *ALB. L.J.* 504, 504-05 (1887).

<sup>317</sup> See EATON, *supra* note 308, at 89-90; see also *The Bar and Judicial Nominations*, 4 *ALB. 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>318</sup> See *Better Criminal Justice*, 7 *IOWA L. BULL.* 48, 48-49 (1921).

<sup>319</sup> Stuart H. Perry, *Shall We Appoint Our Judges?*, 19 *ANNALS AM. ACAD. POL. & SOC. SCI.* 97, 97 (1935). Perry wrote this shortly after the rural vote resoundingly defeated a constitutional amendment providing for nonpartisan elections in Michigan.

<sup>320</sup> 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); *Amendment Victory Spurs Court Change*, *N.Y. TIMES*, Nov. 10, 1977, at 49 (reporting that the amendment to make Court of Appeals judges appointive “was approved by an overwhelming margin in New York City, which more than offset a negative vote upstate”). The *New York Times* has steadily editorialized in favor of ending election of judges and making judges appointive. See, e.g., Editorial, *Judicial Crisis*, *N.Y. TIMES*, Apr. 23, 1968, at 46 (“The whole sordid business of backstage bargaining would be permanently eliminated by abolishing election of judges and substituting a merit appointive system . . .”); Editorial, *Well-Chosen Judges in New York*, *N.Y. TIMES*, Apr. 16, 1979, at A22 (“The popular election of judges sounds democratic but in practice the public rarely learns enough about judicial candidates to make a wise choice. In fact, the voters are customarily asked not to select their jurists but merely to ratify the selections of party leaders.”).

also have believed that enough had already been done—through the reforms of the 1868 Constitution and the removal of Ring judges from office—to set the New York judiciary on a better path.

## CONCLUSION

Despite the 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 reduced.<sup>321</sup> 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>322</sup> The same could not be said of the bench twenty-five years previously. In its 50th anniversary celebrations, the Association of the Bar was justly self-congratulatory about the role it had played in cleaning up the bench.<sup>323</sup> The reforms of the Constitutional Convention of 1867-68 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 1880s. A respectable judiciary meant New York's rise to national and international commercial prominence could continue unimpeded. The bar hoped to further assure that result by limiting the power of legislatures over basic commercial law. Legislatures, prominent 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>324</sup> Assuming a reasonably honest and competent judiciary, the common law was the better instrument to deal with commercial law, they believed. James Carter and the Association of the Bar did their utmost to thwart passage of the Civil Code, and they succeeded.

---

<sup>321</sup> The Association of the Bar of the City of New York continued to play an active role in advising on judicial nominations, and had a standing committee for that purpose. In 1898, Elihu Root, the chairman of that committee, vigorously objected to certain Tammany nominees. It was later revealed that most of the Tammany nominees had bought their positions for prices ranging from \$10,000 to \$25,000. GEORGE MARTIN, *CCB: THE LIFE AND CENTURY OF CHARLES C. BURLINGHAM, NEW YORK'S FIRST CITIZEN, 1858-1959*, at 153-57 (2005).

<sup>322</sup> James C. Carter to Governor Levi P. Morton, Feb. 19, 1895, Levi P. Morton Papers, Syracuse University, *quoted in* Grossman, *supra* note 10, at 600-01.

<sup>323</sup> Addresses, *supra* note 75, at 5-15 (remarks of Davies).

<sup>324</sup> Grossman, *supra* note 10, at 601-02.

Although legislation later gained ground with the progressives, the strand of reform that focused on the independence of the judiciary proved more enduring. 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. Although some states did succeed in eliminating judicial elections, many others found relief from some of the worst aspects of judicial elections by lengthening terms or by adopting the merit selection plan and retention elections developed by the American Judicature Society (founded 1913).<sup>325</sup> The legacy of the Jacksonian populist movement, however, still affects the judiciaries of many states, and calls continue for greater judicial independence.

---

<sup>325</sup> Glenn R. Winters, *Judicial Selection and Tenure*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE 24-25* (Glenn R. Winters ed., 2d ed. 1973).