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LAISSEZ-FAIRE THEORY IN THE EARLY
AMERICAN BAR ASSOCIATION

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The organized bar in the United States has, throughout its history, been shaped by the currents moving the history of the country at large. Thus, when the revolution that was Jacksonian democracy gathered strength in the 1820's, the legal profession felt its effects. The common view of the bar was that of Alexis de Tocqueville, who remarked: "If I were asked where I place the American Aristocracy, I should reply without hesitation... that it occupies the judicial bench and bar." In the rising tide of Jacksonianism, this feeling could only result in a reaction against the organized bar. It was not uncommon for editors to accuse associations of undermining the bar, or even of being "conspiracies against the community at large."

Traditionally, lawyers had been "called" to the bar, the admitting agent in the United States invariably being the court system. The Jacksonian spirit, however, embodied a deep distrust of any special class which enjoyed public privilege. Consequently, in the years before the Civil War the tendency was to open bar admission to a greater number of citizens by lowering standards for admission. In New York, applicants were required to pass "an examination which was little more than a sham." The same journal making this accusation alleged that the "practice of the law was converted into a trade, and placed under the rule of caveat emptor." This was blamed on the state Constitution of 1846.

The same pattern was repeated across the country. A charming story is told of Abraham Lincoln, who served for many years as bar examiner for the State of Illinois. One candidate found himself being examined while the future president was taking a bath. The questioning was as casual as the circumstances. The breakdown in bar admissions standards reached its apogee in the Indiana constitutional provision, ratified in 1851, which read: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." By 1860, nominal educational requirements existed in only nine states. Elsewhere, not even the form was maintained. That this condition existed well into the latter part of the century is testified to by the terse remark of the biographer of President William Howard Taft, admitted to the Ohio bar in 1880: "Only obvious idiots or persons of demonstrable depravity were denied a certificate of fitness for the Ohio bar."

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1 De Tocqueville Democracy in America 278 (New York, Knopf 1945).
2 Bar Associations, 4 Southern Literary Messenger 581 (1838).
3 The Bar and the Courts, 25 The Nation 222 (1877).
4 Woldman, Lawyer Lincoln 153-54 (Boston, Houghton Mifflin 1936).
5 Ind. Const., art. VII, § 21 (1851). This was repealed by referendum in 1932.
The Bar Association Movement

It is in the context of internal decay that the bar association movement of the 1870's and 1880's must be understood. By 1870, the general feeling of unrest among the better-educated lawyers brought about the foundation of the first viable bar associations, the most prominent of which was the Association of the Bar of the City of New York. Within a few years, eight state and eight local associations were organized. The major motivation was the reform of the bar, although in some cases the reform notion was somewhat broader in scope. It is generally conceded, for instance, that one of the purposes in organizing the New York City association was opposition to the Tweed Ring.7

Promulgation of new court rules governing admission was the usual means of raising standards in most jurisdictions, since the states’ legislatures were controlled by the poorly-educated element of lawyers, who were not anxious to improve the low standards and requirements that had made their careers possible.8

These new associations brought together the leaders of the bar in the larger cities and states. Many of these men knew one another through political activities, and the associations generally provided opportunities for increasing social contacts as well.9 Many of the more scholarly lawyers, who often devoted much of their energies and fortunes to legal education and the formation of modern law schools, were at the same time practitioners with wide contacts. They served to focus interest upon legal education and gave it its position as the preferred form of legal training.

A national occasion for the meeting of those lawyers involved in legal education was the annual meeting of the Department of Jurisprudence of the American Social Science Association. At the meeting held in September, 1877, Simeon E. Baldwin, scion of the prominent Connecticut family and Professor in the Yale Law School, delivered a paper entitled “A Graduate Course in Law Schools.”10 During the convention, Baldwin discussed the malaise of legal training with Judge Felix P. Poché of the Louisiana Supreme Court, and in the course of their conversation Judge Poché suggested that the need existed for a nation-wide bar association.11

Baldwin was immediately taken with the idea, and he moved rapidly to follow through on it. At the 1877 meeting were a number of leaders in the law school movement, and doubtless the idea for a national bar association was discussed with some of them, because several became sponsors of the organizational meeting of the American Bar Association which came shortly after. Baldwin stated some years later that the Department of Jurisprudence of the A.S.S.A. passed a resolution at the 1877 meeting endorsing the formation of a national bar association.12

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9 This was an important purpose in the early years. See, in this regard, Hill, Bar Associations, 23 Am. L. Rev. 213 (1889).
10 9 Journal of Social Science xii (1878). The address is not printed.
11 Weart, American Bar Association, 27 N.J.L.J. 338n (1904). Weart incorrectly refers to the judge as “Feltin Poche.”
Within a few days Baldwin began to collect opinions from friends on the question. He worked swiftly but planned carefully, and as a consequence the program had from the start the support of some of the most prominent members of the American bar. Baldwin himself was only thirty-seven at the time, and although he was the prime mover behind the organization of the American Bar Association, he associated older and better-known lawyers with the foundation from the very start.

Encouraged by the reception he received, Baldwin brought the question before the annual meeting of the Connecticut State Bar Association the following January. This Association was quite willing to lend its name to the enterprise as long as Baldwin was willing to do the work. A committee was named, with Baldwin as secretary, and a circular letter was sent out to prominent lawyers throughout the country, inviting them to an organizational meeting at Saratoga Springs, New York, the following August. The sponsors of the letter were fourteen well-known legal figures.

During the summer of 1878 Baldwin prepared for the organizational meeting by writing a draft of constitutions for the association. This was later to be accepted almost without change. The purposes of the organization were stated in a preamble: “To advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar.” Baldwin’s contribution did not end with the drafting of the constitutions. He became a member of the Executive Committee of the nascent organization, where he remained for ten years. In 1890 Baldwin was elected president of the Association, and continued active, in one form or another, until his death in 1927.

The Motives of the Founders: Evolution of a Theory

For the most part, the founding fathers of the American Bar Association were politically active public figures and legal educators. This latter fact is an important one in terms of the reasons for the foundation of the Association. These men, thoroughly schooled in the law as a learned profession, had a highly developed professional consciousness that was quite foreign to the mentality of the vast majority of practitioners.

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13 Anthony Higgins to Simeon E. Baldwin, 16 October 1877; William Hamersley to S.E.B., 20 February 1878. Simeon E. Baldwin Papers, Yale University Library.
15 Baldwin, op. cit. supra note 12, at 693.
16 1 REP ABA 30-32 (1878) gives the complete constitution.
17 Purely as a subject for biography, Baldwin is an interesting figure. His record of civic, legal, and political activity is amazing. He served as president of at least seven professional or scholarly organizations, including the American Historical Association (1905) and the American Political Science Association (1910). At Yale Law School, under his direction, graduate legal education was begun in America. A Republican most of his life, he became a muggump in 1884. After a number of years as associate judge of Connecticut’s highest court, he served two years as chief judge. Then, at seventy, when compulsory retirement forced him off the bench, he ran for governor and was elected as a Democrat. He served until 1915, even though continuing his course at Yale, as he had done while on the bench. He retired from Yale Law School in 1920, and died seven years later, at eighty-seven years of age.
For the first years of the Association’s existence, the effective management of affairs was in the hands of this small group of men. Dean James Grafton Rogers summed up the authority of the inner circle by saying: “They met on the hotel porch after lunch and planned what the Association was to do. They decided who was to be invited as orator next year, and they usually elected the orator to be president the succeeding year.”19 It might be well to show some of the personal contacts shared among these leaders of the American bar who met thus each year in Saratoga Springs.

Dean Rogers mentions the members of the inner circle as having been, besides Baldwin, Luke Poland of Vermont, James Broadhead of Missouri, Edward Phelps of Vermont, Randolph Tucker of Virginia, Henry Hitchcock of Missouri, George Wright of Iowa, John H. B. Latrobe of Maryland, Francis Rawle of Pennsylvania, Carleton Hunt of Louisiana, Benjamin Bristow of New York, Thomas Semmes of Louisiana, Alexander Lawton of Georgia, and William Allen Butler of New York.20

Most of the members of the inner circle were prominent in public life. Baldwin was not yet forty when the Association was begun, but within a few years he entered onto his amazing political career. Judge Poland was a member of his state’s highest court, and later served as Minister to Austria-Hungary. Broadhead and Hitchcock, prominent in Missouri affairs, are together credited with having kept that state from secession in 1861. Bristow was Secretary of the Treasury until 1876, and was well known for exposing the Whiskey Ring. His wide following is indicated by his strength at the 1876 Republican convention, where he lost the presidential nomination only on the seventh ballot. Poland had been one of Bristow’s supporters at this convention. George Wright had recently been in the U.S. Senate. Alexander Lawton, former Quartermaster-General of the Confederacy, was a leading southern figure.21

At the same time the inner circle included leaders in legal education. Baldwin’s name is notable here, since he had already begun his long and influential association with the Yale Law School. A few years later Edward Phelps was to join him on its faculty. Senator Wright had been the founder of the law school of the University of Iowa, and Henry Hitchcock had founded the law school of Washington University of St. Louis. Thomas Semmes was on the Tulane University law faculty, and Carleton Hunt was dean of the University of Louisiana Law School during this period.

It is not difficult to see that under this early leadership the Association should develop as a selective bar association. It would be unfair to attribute this to snobbery; the exclusiveness of the Association in the early days stemmed much more from the genuine concern of the elite of the bar for the state of the profession. It was recognized that raising of standards had to be done by a group which itself had high standards, and which excluded lawyers who did

19 ROGERS, AMERICAN BAR LEADERS ix (Chicago, A.B.A. 1932).
21 Thirteen of the fourteen are noted in the DICTIONARY OF AMERICAN BIOGRAPHY, only Congressman Tucker not being included.
not measure up. The low estate of the bar in 1878 made it impossible that a nonselective bar association could be the agent of improvement, and the A.B.A. consistently led the fight for higher standards of legal education.

Some contemporary students of the political process have overlooked this ethical and professional concern in the formation of the American Bar Association. They tend to explain the foundation of the Association as a reaction against the currents of political reform in the 1870's. By a process of implication and inference the suggestion that the Association was not divorced from the laissez-faire social philosophy of its day has grown into the conclusion, sometimes stated as a hard fact, that the Association was established as a reactionary tool with which to attack the embryonic liberalism of the day.

The American Bar Association was indeed born into the age of laissez-faire conservatism. A later section of this article will explore the extent to which this doctrine was espoused by the leaders of the A.B.A. The Association, however, did not cause it; it was no more its champion than were many other social forces that were far more potent in the post-Reconstruction period.

The contention that the American Bar Association was a powerful force for laissez-faire politics began with the work of the late Benjamin Twiss, who stated that the bar of the latter half of the Nineteenth Century served to translate the concepts of laissez-faire economics and its attendant political theory into forms acceptable to the courts. Professor Edward S. Corwin, who had directed Twiss' dissertation and later edited it for posthumous publication, repeated the same idea much more forcefully in his preface to the book:

Dr. Twiss shows that the development of American Constitutional Law during the period from 1875 to 1935 was ... the work primarily of a small group of lawyers whose clients were the great financial and business concerns — in short, of the aristocracy of the American Bar, the founders and principal figures of the American Bar Association.

While this might be a supportable thesis during part of the long period mentioned here, especially in the 1890's, the founders of the Association certainly do not fit the description. As far as A.B.A. figures are concerned, one must wait for men of the stamp of James Coolidge Carter and Joseph Choate to find commanding constitutional lawyers who had the power to instruct the courts in such a dominant fashion.

The year before the publication of Twiss' work, in a series of lectures at the Claremont Colleges, Corwin applied this theory even more specifically to the foundation of the American Bar Association, stating flatly that "organized as it was in the wake of the decision in Munn v. Illinois ... the Association soon became a sort of juristic sewing circle for mutual education in the

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22 Reed, Training for the Public Profession of the Law 215-17 (New York, Carnegie Foundation for the Advancement of Teaching 1921).
23 Sunderland, History of the American Bar Association 72-75 ([New York, Survey of the Legal Profession] 1933) briefly outlines the work of the Association in this regard during the early period.
24 Twiss, Lawyers against Government (unpublished Ph.D. thesis, Princeton University, 1938). In 1942 this was published by Princeton University Press as Twiss, Lawyers and the Constitution. It is substantially unchanged, but the footnotes and bibliography were not printed.
25 Twiss, Lawyers and the Constitution, x (1942).
gospel of *Laissez-Faire*.” Twiss’ research is given as authority for this statement.\(^26\) The implication that the Association’s founding was connected somehow with the distaste of conservative leaders for the Granger Decisions has not been lost on succeeding writers in this subject. Although Twiss himself used A.B.A. sources (largely speeches at the annual meetings) to support his points, he was careful to say that while they showed evidence of *laissez-faire* philosophy, there was also evidence that this was not the universally held position in the Association.\(^27\) Professor Arnold Paul, writing more recently, points out that “from the standpoint of representativeness, however, conclusions drawn from the segment of professional opinion analyzed by Twiss are apt to be misleading.”\(^28\)

Professor Corwin, nevertheless, was quite specific in associating the foundation of the Association with the Granger Decision in a series of lectures at Louisiana State University: “Its birthplace was Chicago, a fact reflecting the animus of some of its founders toward the ‘barbarous’ decision in *Munn v. Illinois.*”\(^29\) Corwin’s error of fact concerning the place of foundation is doubtless due to the fact that the headquarters of the Association have been in Chicago since 1927. Until that time, the secretaries had maintained their offices in Baltimore. Corwin goes on, however, at the same point, to name twenty-four prominent members of the Association as examples of his statement, but only one of these—Edward Phelps—could be considered a founder of the American Bar Association. Some others, such as Louis D. Brandeis, would certainly be difficult to associate with the viewpoint expressed.

It was only a step, therefore, from Corwin’s statements to the more recent one of Professor C. Herman Pritchett. Citing Corwin’s Claremont lectures as authority, Pritchett gives an even more outright expression of the thesis in saying that “the Association was founded in Chicago in 1878, and a principal purpose of its organization was to fight the ‘barbarous’ decision of *Munn v. Illinois.*”\(^30\)

Professors Alpheus T. Mason and William Beaney, in a recent casebook, state that the A.B.A. “stood with John Stuart Mill for individualism, agreed with Darwin’s view of the inevitability of human struggle, and accepted Herbert Spencer’s evolutionary theory of politics.” That some of the leaders of the bar, organized and otherwise, subscribed to these principles is without question; a later section of this article will explore the degree to which this was true in the American Bar Association. To conclude from this, however, that the A.B.A., from its inception, “was embarked on a deliberate and persistent campaign of education designed to reverse the (Supreme) Court’s broad conception of legislative power” is to ascribe to the Association an influence which it simply

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\(^{26}\) *Corwin, Constitutional Revolution, Ltd.* 85. (Claremont, Claremont Colleges 1941).

\(^{27}\) *Twiss, Lawyers and the Constitution* 177 (Princeton, Princeton University Press 1942).

\(^{28}\) *Paul, Conservative Crisis and the Rule of Law* 4th (Ithaca, Cornell University Press, 1960). Paul, studying the period 1887-1895, finds that “the general hardening of conservative attitudes” began only in 1892. (76-81).

\(^{29}\) *Corwin, Liberty Against Government* 137-38 (Baton Rouge, Louisiana State University Press 1948).

did not possess. Furthermore, there is no evidence that the “campaign” consisted in more than a few speeches to the Association’s annual meetings. The American Bar Association, through its early years, never passed a resolution attacking progressive legislation, never engaged in criticism of the Supreme Court for any of its decisions, and never engaged in any legislative activity concerned with social questions.

Speaking from personal recollections, his father having been a founding member of the Association, Dean Roscoe Pound stated emphatically to the present author that “as to the proposition that the American Bar Association was organized in reaction against the Granger Cases I am satisfied nothing could be more mistaken.” Elsewhere Dean Pound emphasizes the reprofesionalization of the bar almost exclusively in his analysis of the bar association movement. Other historians of the American legal profession take this view as well, notably Professor J. Willard Hurst, who remarks that “Simeon E. Baldwin’s conviction that legal education and bar admission standards must be improved was a prime factor in the founding of the Association.”

The Association during the Saratoga Era

Saratoga Springs, New York, where the Association’s annual meetings were held regularly until 1902, was a famous resort and also a favored vacation spot for southern lawyers. It was a natural place for a national meeting of the type Simeon Baldwin envisioned in 1877, and its advantages continued to attract the Association back again and again. In fact, the spirit of relaxed vacation became the real spirit of the American Bar Association during the “Saratoga Era,” as it has been called. The A.B.A. during this time made almost no attempt to join local and state bar associations to itself, and its activities were few. Philip Wickser, long-time apostle of bar federation, termed this period one of “placid self-esteem during which the theory of insulation was supreme.” When the Association, in 1884, debated the question of the codification of substantive law, an issue ardently supported by David Dudley Field of New York, it decided to postpone the debate until the following year because of its importance. The Albany Law Journal reflected the feeling of many in the legal community when it said of the decision by the Association: “When, in Heaven’s name, was anything else of importance ever brought before it?”

Although the Albany Law Journal’s acid comment was somewhat unfair, the Association’s accomplishments were few. It was responsible for the drafting and submission of the bill which eventually created the federal circuit courts,
and it gave a great impetus to legal education. This second question was intimately tied to the overriding motive for the foundation of the Association, the reprofessionalization of the bar. In the years up to 1900, it is the recurring theme at the annual meetings. Several of the reports of the Committee on Legal Education are outstanding statements on the contemporary situation. The consistent policy of this committee and its successor, the Section on Legal Education (1893), was the encouragement of formal legal education, either with or without law-office training.\(^{38}\)

It is interesting to note that even these few concerns are not primarily those of the first ten years. The Circuit Courts bill was enacted by Congress in 1896; the Section on Legal Education, which notably increased activity in this area, was begun in 1893. Even in regard to quite minor issues, the activities are mostly post-1890. This trend coincides with the decline of the little inner circle which had directed the Association during the first ten years, and coincides as well with the rise to prominence of *laissez-faire* philosophy in the deliberations of the Association.

It was only natural that as more and more lawyers joined the American Bar Association and interest in its work increased, these men would become restive under the direction of the inner circle. They were less content to have programs and officers given to them, and they wanted to take part in the Association's affairs and government. After 1890, only two presidents were chosen from among the inner circle, and only one of its members was elected to the Executive Committee. Although the group continued as active members until the end of the Saratoga Era, its dominance diminished. By the turn of the century, only Baldwin, Rawle, and Hunt were still alive. It must be said to Baldwin's credit that he saw this trend and welcomed it. He resigned from the Executive Committee in 1888 to encourage wider participation in the leading offices of the Association.

The most striking thing about the formative first years of the Association was its insularity. Thus, what Max Radin called "the technical insufficiencies of the law" were the main concern of the elite of the bar during this time. The social and economic changes of the times seemed to have little deep implication for them, and although they were no more conservative than the majority of American leaders, the duty of the lawyer was thought to be the protection of his clients, a concern for the condition of the bar, and little else. Radin remarks succinctly: "that lawyers as a class—or a definite body of men—could or should exercise a group influence on the community, was a rather novel idea." To some, it was more, it was an "impertinence."\(^ {39}\)

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\(^{38}\) See especially the reports at 4 Rep ABA 237-301 (1881) and 14 Rep ABA 301-360 (1891).

parent dichotomy here, but it does seem to have concerned the leaders of the bar.

The lawyers, even the educated ones who constituted the American Bar Association, were hardly concerned with *laissez-faire* as an intellectual doctrine. Insofar as they philosophized about it, it was by way of rationalizing policy. It was then, more an attitude and an approach to public questions. It was not without substance, to be sure, but substance was subordinated to its practical consequences.

To the lawyer of the late-Nineteenth Century, *laissez-faire* implied a sort of inherent goodness attached to private initiative as opposed to public authority. The lawyer believed that the good of the country was served through the massive combines that were building up American industrial empires. He considered the role of government as hardly more than that of a moderator of affairs which saw to it that the progress of industrial capital was not interfered with or unduly retarded. Conservative thought presumed that a natural law of social progress existed which in itself was capable of bringing the greatest happiness to the greatest number. The conservative mind saw, therefore, only error in the regulation of economic or social factors, since interference by government would upset the natural course of social evolution. Indebted intellectually to *Social Statics* of Herbert Spencer, this element of conservative thought insisted upon the freedom of social and economic forces to achieve a natural harmony in which the best interests of all would be guaranteed.

This carried with it the corollary that in the progress of society there exists a natural tendency toward freedom. The individual’s right to freedom from government restraint or protection was regarded as an inherent, God-given principle. At no point did the conservative thinkers deny that individual rights implied social obligations, but the logic of their position emphasized the conclusion that the interests of society were best cared for when the individual was left free to participate in the evolutionary development of society. The Darwinian concept of “survival of the fittest,” while not often expressed so brutally, was an essential part of the conservative rationale. It was held that the truly great individual would assert himself despite difficulties, and if, unfortunately, he belonged to a nationality or race less socially or politically developed than others, it was not within the province of government to amend this.40

These were the dominant ideas among educated men, not only in the law, but also in the universities and political life. If the Bench and Bar seem to have had a disproportionate influence in the development of conservative thought in the perspective of history, it is less that the philosophical implications of *laissez-faire* were searched out in the courts than that the lawyers and judges were in a pre-eminent position to put these notions into concrete formulas, and to make even the United States Constitution a force for conservatism. The period from the end of the Civil War to the turn of the Century was one in which judicial leadership asserted itself to an unprecedented degree, and a

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40 *Spencer, Social Statics, or the Conditions Essential to Human Happiness Specified* (New York, Appleton, 1865). See especially Chapters IV and V.
conservative bar brought questions of national policy before a conservative bench. The result could hardly have been surprising.\(^4\)

The power and pervasiveness of the "Gospel of Wealth," as preached by Andrew Carnegie and other disciples of Spencer, was such that even the opponents of laissez-faire policies shared this evolutionary idea. Those who fought the industrial giants—the Knights of Labor, the Grangers, Populists, and Bryanists—were not opposed to the Gospel of Wealth on principle. What they wanted was to share in its advantages.\(^4\)

The American Bar Association had been formed on the belief that only a selective association would be capable of raising the tone of the profession. Consequently, the membership consisted of the better-educated lawyers, and generally the more successful. Among such a group of men, given the temper of the times, it would have been most unusual if conservative thought had not dominated. As Twiss has pointed out, the leaders of the bar represented the great industrial complexes and often fought social legislation in the courts. After 1890, these men were increasingly from among the prominent members of the A.B.A.\(^3\)

During the first years of the Association's history, laissez-faire attitudes were largely present only as the personal predilections of the leading figures. When Simeon Baldwin's biographer says of him that "if Baldwin can be called a liberal at all, it is only in the nineteenth-century sense," he might have been speaking of the clique as a whole.\(^4\) Evidence of this philosophy appears not merely sporadically but constantly in the speeches and reports of the formative years. Throughout the Saratoga Era, conservatism became more articulate and pronounced. It did not, however, obscure the major interest of the Association—the problem of the state of the profession. And, perhaps more significant, it did not eventuate in political or legislative activity.

At the 1879 annual meeting, George Mercer, member of the General Council for Georgia, delivered an address entitled "The Relationship of Law and National Spirit." The lawyer's function in society, he insisted, is the maintenance of a proper national spirit. If this could be realized, asserted Mercer, no one need fear any challenges to the existing social order. The lawyer must understand first of all that "it is impossible to introduce and maintain good legal institutions among a people whose spirit is debased and unprepared to receive them." If legal institutions at a high level do exist, the lawyer must expect that the best of them "will decline and perish if subjected to the influence of a vitiated national spirit." Finally, "the prevalence of a proper national spirit will temper the worst institutions, and may ultimately subvert them."\(^4\)

\(^{42}\) McCoy, American Political Philosophy after 1865, 21 Thought 249 (1946) is a provocative discussion of this proposition. See also Carnegie, Wealth, 148 North American Review 655 (1889).
\(^{43}\) Twiss, op. cit. supra note 25, Chap. VII.
\(^{45}\) 2 Rep ABA 143, 145, 148, 150 (1879).
President James O. Broadhead, in his address to the same meeting, pointed out further consequences of the neglect of this national spirit:

Efforts at social reform, political convulsions and domestic insurrection agitate the sea of public sentiment until the tempestuous waves threaten to sweep away, and do often sweep away, the barriers which protect individual right. The call was a clear one—the bar must man the barriers, keeping efforts toward social reform at a minimum.

Lest any of the members at the meeting failed to get the precise point, Judge Edward Phelps put it plainly enough for all to understand in a memorable speech: “We are charged with the safekeeping of the Constitution itself.” Convinced as they were that the U.S. Constitution embodied the laissez-faire principles, the conservative thinkers never considered that their position might be as partisan as that of the social reformers who argued the constitutionality of social legislation. On the opinions of the great Chief Justice John Marshall, Phelps asserted that “we can find no more trace in any line of those great judgments, that would indicate the political sentiments or bias of the Chief Justice, than if we were to study his opinions upon charter parties, or policies of insurance.” Who else but the lawyers should take special responsibility for the preservation of the Constitution? “It is they who make it; it is through them that it must take effect... The question is, how far party differences shall go? Where shall they set out, where shall they terminate? Shall they invade the province of the fundamental law?” The answer to these questions, according to Judge Phelps, must be a ringing “No!” Rhetorically he asked:

Should the lawyers of this country meet as on a common ground, in respect to all questions arising upon the national constitution, dealing with them as questions of jurisprudence and not of party, setting their feet upon and hands against all efforts to transgress the true limits of the constitution, or to make it at all the subject of political discussion?

Indeed, Judge Phelps maintained, the Constitution was too sacred to be defiled by the intrusion of political motivations in its interpretation. Following this chimerical view, he believed, as did the majority of his listeners, that because laissez-faire indicated the natural order of society, it was synonymous with the principles of the Constitution. He finished with a paraphrase of the words of God to Moses from the burning bush: “Put off thy party shoes from off thy feet, for the place on which thou standest is holy ground.” Many of the members present were reduced to tears at this evangelistic invocation of their ideals.

The following year, the mystical element in the formation of the Constitution was underlined by Cortlandt Parker, who likened the Constitution to “the planetary system, which came forth evolved through forces whose working was never perceptible, and was shaped by Almighty hands into order and beauty and power.” Four years later, Andrew Allison described to the

46 “Presidential Address,” 2 Rep ABA 51, 70 (1879).
48 Weart, op. cit. supra note 11, at 292.
annual meeting the erosion of the older constitutional doctrines which, he held, had all but nullified the protection of the ruling in the Dartmouth College Case. "Fortunately," he argued, "there is an inner Republic, formed of the Bench and Bar, to whose wisdom, moderation, and patriotism, the issues joined are first submitted."

It is on the basis of these statements and others like them that some authorities have accused the American Bar Association of conducting a concerted campaign to inculcate the spirit of *laissez-faire* into constitutional theory. Although there were voices of dissent, conservatism was a growing force in the Association. To infer from this, however, that the Association engaged in a conscious and "persistent campaign to get the Supreme Court's attitude of tolerance [in the Granger Cases] . . . replaced by Cooley's doctrine that in effect property was a divine right" is a gross exaggeration of the Association's influence as well as its unanimity. The theory that "the impact of the American Bar Association's propaganda campaign on the changing personnel of the Court" caused a shift in judicial position that produced the rejection of the doctrine of the Granger Cases, as Mason and Leach insist, is not borne out by the closest reading of the *Reports*.o

The error lies in the presumption that somehow the members of the Bar Association were the agency by which *laissez-faire* assumed dominance in American constitutional thought. Yet only three Supreme Court Justices were members of the A.B.A. in this period, and of these (Justices George Shiras, Stanley Matthews, and Henry Brown) only one showed any interest in Association affairs.o Of the prominent lawyers of the period, a number were members of the Association, but only some of these were active. Corporation lawyers and advocates of the stamp of James Coolidge Carter and Joseph Choate were not active until after 1890. The original founders of the Association and the members of the inner circle of the early years were not attorneys for the great financial interests. It is simply unwarranted to speak of a causal connection between the Supreme Court's acceptance of *laissez-faire* doctrines and the influence of the American Bar Association.58

*The Dominance of Laissez-Faire*

By 1894 much had changed in the American Bar Association. The first fifteen presidents included twelve of the original inner circle; their eleven successors included but one. Beyond this, the presidents in this second group were men of quite a different character. Many of them had made their reputations as vigorous advocates. The few law-school professors among them

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52 Justice Brown spoke at the annual meetings of 1889 and 1893. He was an A.B.A. member from 1882 to 1900, and served as Vice-President for Michigan, 1882-1886. Neither Matthews nor Shiras attended the meeting in 1878 which elected them to membership, and there is no record of either attending any meetings. Matthews remained a member until 1888, and Shiras until his death in 1902.
53 Paul, op. cit. supra note 28, notes that dissent and confusion marked the legal profession much more than has previously been thought.
were no longer pioneers in that field, as Baldwin, Hitchcock, and Wright had been.

The man who best epitomizes the transformation was the president for the year 1894: Thomas McIntyre Cooley — professor, jurist, and above all constitutional theorist. Cooley is regarded by many as the most influential writer on the Constitution in the Nineteenth Century. His *Constitutional Limitations*, first published in 1868, was kept in print for half a century, and became a conservative bible to be quoted in the courts and cited time and again in briefs in major constitutional cases. In the words of Benjamin Twiss, Cooley’s work, as it affected the Due Process Clause of the Fourteenth Amendment, “almost singlehanded caused the shift of emphasis from personal to property rights. Thus he prepared the way for the broad interpretation of the Fourteenth Amendment which so colored constitutional development in the ensuing thirty or forty years.”

Cooley’s theories received a ready audience in the A.B.A. during these years. In 1897 James M. Woolworth gave his presidential address on “The Development of the Law of Contracts.” Presuming an historical natural law determining constitutional theory, he pointed out to the members of the Association that it was only in the late Nineteenth Century that the full property rights guaranteed by the Constitution had been realized. Woolworth noted that the courts had recently refused in several cases to interfere with railroad rate-fixing. At one time, he asserted, these matters were considered unfit to be regulated by contract because they were regarded as being concerned with the public interest. The action of the courts in giving these up to “individual competency and freedom” was cited as “another illustration of the natural law.”

The lawyers often felt a hostile fear in the face of legislatures dominated by the spirit of reform and change. In 1897, Governor John W. Griggs of New Jersey expressed this in a speech to the Association on “Lawmaking.” He cited his own record during the past state assembly session, in which he had vetoed thirty per cent of the laws submitted for his signature. Governor Griggs blamed excessive legislative action on perverse public opinion:

> Render unto Caesar the things that are Caesar’s is the divine approval which the Christian world has come to regard the law of the land as possessed of a divine sanction. Law, as thus conceived, is not a thing to be changed with every whim of popular opinion.

In the election of 1896, although William McKinley had been chosen President of the United States, the Populist Party had elected twenty-five members to the House of Representatives and six Senators. Even the national Congress seemed suspect to some of the conservatives after that result. Was it any wonder, then, that the lawyers should look to the courts, where their influence meant something, to preserve their political and economic ideals? When, a year before

55 TWISS, *op. cit. supra* note 27, at 26. All of Chapter II of Twiss’ thesis is on this work and Cooley’s influence upon constitutional development.
56 19 Rep ABA 287, 300, 305 (1896).
57 20 Rep ABA 257, 259 (1897).
58 HICKS, *The Populist Revolt* 377 (Minneapolis, University of Minnesota Press 1931).
his death, Benjamin Bristow associated himself with Joseph Choate on the brief in the Income Tax Case, he regarded this as one of the greatest services he had ever performed. Choate, delivering his famous "March of Communism" speech to the Supreme Court, stated feelingly, and no doubt truthfully, "I have felt the responsibility of this case as I have never felt one before." One of the reasons for the success of the conservatives before the courts was their great sense of mission. This responsibility for the Constitution "correctly construed" was shared by the bench which heard them and made their case doubly easy. Throughout the period of the rise and eventual dominance of laissez-faire attitudes in the American Bar Association, however, criticism from within the Association was outspoken.

**Voices of Dissent**

Disagreement with the prevailing notions of the conservatives arose quite early in the American Bar Association. In 1881 Clarkson Potter, although accepting much of the conservative rationale, was willing to admit that the ideas of strict and liberal construction of the Constitution were matters that changed with the times. He abhorred the attempts to institutionalize conservative ideas through constitutional construction rather than congressional action, and implied that he thought the whole matter a political, and not a legal, concern. Two years later when Robert Street opposed "judge-made law" to the point of maintaining that the Supreme Court did not have the power of judicial review, the debate revealed striking differences of opinion among the members of the A.B.A. Some spoke in glowing terms of the Court, others were sharply critical of "the fetish worship of the bench."

Arnold Paul, in his recent study of the development of conservative thought during this period, cites three addresses given in 1887 as examples of the progressive point of view in the profession. Two of these were delivered before the American Bar Association, and the third, by a member of the A.B.A. Executive Board, before the Ohio State Bar Association. The most striking of these speeches was that of James K. Edsall, who, as Attorney General of Illinois, had argued the *Munn* Case before the Supreme Court, and won it. Holding that the authority to make contracts was merely an incidental power of government, Edsall insisted that the states could not divest themselves by contract of their power to enact legislation. He contended against the conservatives that "neither the state nor the National Constitution should be so construed or administered as to work the destruction of the very governments they were ordained to establish and make perpetual."

Charles Bonney, a member of the Association's Executive Committee,
concerned himself with proposals for ameliorating labor difficulties. He called for federal government regulation "to protect the weak against the strong," and proposed a system of collective bargaining, mediation, and (if these failed), compulsory arbitration.64

The third of these addresses, that of Simeon Baldwin, is of somewhat greater significance in the light of his importance in the Association. He had resigned from the Executive Committee in 1887, but in the year following the speech cited here, he was elected President of the Association.

Baldwin recounted the growth of popular democracy. He conceded that the "new power of property" had given the wealthy too much public consideration, but he felt in addition that individual rights had never been better protected. Baldwin cited with approval such government activities as regulation of hours of labor, social insurance, and safety inspections.65 Both Baldwin and Bonney very probably would have subscribed to Edsall's propositions.

Besides these three examples cited as notable by Professor Paul, there were, of course, others. In 1885 Richard Venable spoke to the annual meeting, and stirred little debate when he averred that "states' rights" were largely a matter of interests. Pointing out a tendency toward centralization in government, he commented, "I see no occasion for making ourselves unhappy over this state of things, more than I do for mourning over evolution."66 As early as 1880 Benjamin Bristow had approved the establishment of state rate regulations for railroads in a speech to the Association.67

Despite these expressions of dissent from the laissez-faire notions of the period, it is clear that the members of the Association much preferred Judge Phelps' view of society to Attorney General Edsall's. Yet, they were not willing to go so far as to use the Association as a spokesman for their ideas on questions of public policy. Regarded by its members primarily as a professional group, the A.B.A. could not bring itself to a commitment on political questions. When, for example, in 1881, the Secretary suggested forming a Committee on Constitutional Law, the debate on the proposal covered a hundred pages of the annual report. The general feeling was that such a committee did not have a place in the Association. Henry Hitchcock of Missouri warned that "there is a possibility of opening the door for action on our part, which must necessarily be ineffectual, and will probably render us liable to the charge of usurping an authority which we do not possess."68 Thomas Semmes merely observed fearfully that "it might lead us off into a discussion of the constitution."69 After being ordered held over until the following year, the proposition was never taken up again.

If, as we have noted above, the arguments of the laissez-faire conservatives became more strident and even dominant after 1894, the voices of dissent

64 Bonney, op. cit. supra note 62, at 168. It should be remembered that the Haymarket riots had taken place the year before.
65 12 Rep ABA 249 (1889).
67 "Presidential Address," 3 Rep ABA 81, 95 (1880).
68 4 Rep ABA 5-102, 17 (1881).
69 Id. at 13.
became all the more outspoken. The issues joined seem to be much more specific and less theoretical than in the earlier period.

Two of the great conservative victories of 1895 were the Income Tax Case, cited above, and the Debs Case both of which helped show the temper of the A.B.A. moderates. Although Joseph Choate and Benjamin Bristow were active before the Supreme Court against the income tax, Judge Simeon Baldwin, then sitting on the Connecticut Supreme Court, publicly supported the tax shortly before its challenge in the federal courts.

The Debs Case was slightly different. His attorney before the Supreme Court was Stephen S. Gregory, a prominent member of the American Bar Association. Gregory was later to be president of the Association and first editor of the American Bar Association Journal. At the 1894 annual meeting, the conduct of the Debs Case was sharply criticized in an address by Charles C. Allen. Allen attacked the use of injunction as a sort of broadside executive proclamation, issued against “ten thousand strikers and all the world besides.” He argued that imprisonment following upon the contempt order was nothing but denial of trial by jury, and a dangerous precedent against civil liberties. It took thirty-five pages to report the debate on Allen’s paper, and only one of the thirteen participants can be said to have supported him. Two others joined in limited criticism of the use of the injunction, one of these being Woodrow Wilson, who felt that the injunctions were impolitic and would have been unnecessary except for the attitude of Governor John Altgeld.

In 1897, speaking at the same annual meeting as Governor Griggs, Eugene Wambaugh gave a long list of government activities that had developed in recent years. Wambaugh, far from disapproving, suggested that “it seems clear that the growth of governmental functions has been wise and necessary.” The trend he noted was not an abandonment of the “natural liberty” which was the concept of the Founding Fathers of the Constitution, Wambaugh asserted, but merely “a change in relative emphasis.” Finally, he pointed out:

> For centuries two intents have guided the law, whether statutory or judge-made: the intent to guard individual liberty and the intent to secure the public welfare. There is no reason to believe that either of these two deep-seated intents will be uprooted. There is no reason to believe that the time will ever come when an enumeration of the functions constituting the actual scope of government will cease to furnish a fair answer to the apprehensions of the pessimist and to the demands of the revolutionist.

While this hardly qualifies as a repudiation of laissez-faire, it nonetheless shows some rather surprising departures from the prevailing interpretation of it. The common good of society and the good of the individual are regarded as co-equal intents of the law to be brought into balance. What is perhaps of greater interest is the offhand way in which Wambaugh mentions judge-made law as something to be taken for granted. The majority of the bar of that period

70 In re Debs, 158 U.S. 564 (1895).
71 JACKSON, op. cit. supra note 44, at 144.
72 “Injunction and Organized Labor,” 17 Rep ABA 299, 325 (1894). The debate is found at 15-51, Wilson’s remarks at 44.
considered the concept that judges could “make” law as an attack upon basic legal principles. To them the law was discovered as enshrined in the Constitution. The judges' interpretation of the law found in the Constitution or in the Common Law did not create anything new, it merely applied what already existed.

By the turn of the Century, a group of lawyers who were skeptical of the laissez-faire doctrines of the Association’s leading members decided to speak up. In 1903 the Committee on Commercial Law entered a report on monopoly and industrial combinations that flatly contradicted every cherished belief of the conservative bar. Its wording was unequivocal in denunciation of the evils that it described, and its proposed solutions could have been lifted from a Socialist Party platform of the period. The shock of the report was added to by the fact that it was signed by some of the highly respected members of the Association. Walter Logan, chairman of the Committee, was on the A.B.A. General Council, Henry Budd was Vice-President for Pennsylvania, and John Morris of Indiana was on that state's local council. The other members of the Committee were Gardiner Lathrop and George Whitelock, who later served (1909-1920) as Secretary of the Association.

Although the report of the Commercial Law Committee did not delve into questions of economic and political theory, the implications were obvious enough to everyone present. It began with the statement that industrial combinations had changed the nature of commerce. “We shall have to substitute a jurisprudence of commercial restriction in place of a jurisprudence of commercial competition.” It was argued that regulation had already gone beyond the speculative stage, but was not effective, and that the federal government had to take remedial action. To prove the insufficiency of existing legislation, the report cited the recent Northern Securities Case, with which some prominent members of the Association had been involved.

The courts may order a distribution of securities held by the Northern Securities Company as much as they will, and the securities will be distributed in accordance with the decree of the court, but within twenty-four hours after their distribution they will find their way back into a mammoth safe with a mammoth maw in a certain building corner of Wall and Broad Streets, New York.

Fundamentally, the Committee thought that it was defending the spirit of competition and asserting the rights of the individual. It condemned monopoly as socialistic, but went on to say that the laws of supply and demand were no longer able to limit the growth of contemporary industrial combinations.

If the analysis was unacceptable to most of the members of the A.B.A., the proposed solution must have been even more objectionable. “If there must be an industrial despot, it seems clear that it is better that it should be the state itself than the state’s creature.” And, putting it more bluntly, “the only possible competitor for a billion dollar trust is a hundred billion dollar state.”

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74 26 REP ABA 429, 433 (1903).
75 Northern Securities Company v. United States, 193 U.S. 197 (1904).
76 26 REP ABA 433, 440, 446 (1903).
The Committee suggested three possible solutions, all of which were more likely to anger the conservative lawyers than to offer a practical answer to the problems. The first was to tax the monopolies to death with a confiscatory tax that would end profits. The second, for instances in which competition did not exist, was to require the controlling monopoly to offer its services or products at a fifty per cent discount in prices. Finally, the Committee advocated that the government enter industry as a producer in order to restore the balance of competition.\(^77\)

The Committee's report marked the end of an era in the American Bar Association. The 1903 report was itself dealt with rather summarily. After a sharp debate, the Committee was instructed to report to the 1904 annual meeting with practical solutions to the problems they had presented. In the debate itself, three members of the Association were most outspoken in criticism of the views expressed in the report. Charles Manderson entered an "emphatic, earnest, and indignant protest against this attempt to make of the American Bar Association a political hustings." W. U. Hensel moved that the Committee be discharged of any further discussion of the question of monopoly, and Frederic Judson, later a president of the American Political Science Association, had caused the Committee to be instructed to return with recommendations in legislative form.\(^78\) With annual appointment of all committee members by the President of the Association, it was an easy matter to end the conflict by appointing these three men to the Committee on Commercial Law to replace Budd, Lathrop, and Morris. In 1904, to no one's surprise, the Committee reported that no practical action was possible, since only the states could effectively deal with the question of monopoly.\(^79\)

From this time on the conservative ideology was massively challenged time and again in the American Bar Association. While the first twenty-five years of the Association's history coincides with the acceptance of *laissez-faire* as a constitutional doctrine by the Supreme Court, neither the lawyers who argued this position so effectively nor the justices who accepted their rationale needed the A.B.A. to accomplish the transformation. The A.B.A. contributed only two things: a meeting ground for the members of the bar and a great number of speeches extolling individualism, personal liberty, and the human struggle.

Yet, the theoretical role of the American Bar Association cannot be overlooked. By bringing together some of the most prominent lawyers of the time, the Association made it possible for these men to share and disseminate their views. As the *Reports* of the annual meetings reveal in both speeches and debate, these views were largely the prevailing ones of *laissez-faire* economics and politics. The paucity of dissent in these early years only serves to point up the prevailing attitudes.

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77 26 Rep ABA 444-445 (1903).
78 26 Rep ABA 15, 40, 53 (1903).
79 27 Rep ABA 391 (1904).