THE RISE
OF THE
LEGAL PROFESSION
IN
AMERICA

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Volume 2
THE REVOLUTION AND THE
POST-REVOLUTIONARY ERA

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THE GENERAL IMPACT OF THE REVOLUTION ON THE LEGAL PROFESSION

BEFORE THE AMERICAN REVOLUTION," Joseph Story once observed, "from a variety of causes, which it is not difficult to enumerate, our progress in the law was slow, though not slower, perhaps, than in the other departments of science. The resources of the country were small, the population was scattered, the business of the courts was limited, the compensation for professional services was moderate, and the judges were not generally selected from those, who were learned in the law. . . . That there were learned men in the profession in those times, it is not necessary to deny. But the number was small. And from the nature of the business, which occupied the courts, the knowledge required for common use was neither very ample, nor very difficult. The very moderate law libraries, then to be found in the country, would completely establish this fact. . . . Great lawyers do not usually flourish under such auspices, and great judges still more rarely. Why should one accomplish himself in that learning, which is more of curiosity than use? which neither adds to fame nor wealth?

1 Parts of this chapter were published separately under the title "The Dilemma of the American Lawyer in the Post-Revolutionary Era," 35 Notre Dame Lawyer 48-56 (1959).
which is not publicly sought for or admired? which devotes life to pursuits and refinements, not belonging to our own age or country? The few manuscripts of adjudged cases, which now remain, confirm these remarks. If, here and there, a learned argument appears, it strikes us with surprise, rather from its rarity than from its extraordinary authority. In the whole series of our reports, there are very few cases, in which the ante-revolutionary law has either illustrated or settled an adjudication.2 Story fails to mention, however, that on the eve of the Revolution the legal profession in several of the American colonies,3 in the main, had achieved reasonable (and in some instances noteworthy) distinction and, at least in the larger urban centers along the seacoast, even some recognition, although it must be admitted that in the rough-and-ready back country, that is, among the rural population which was mostly in debt, the lawyer was still, and for some time to come would be, looked upon as a despicable and evil man. In any event, it is without significance that twenty-five of the fifty-six signers of the Declaration of Independence,4 thirty-one of the fifty-five members of the Constitutional Convention in Philadelphia, and ten of the twenty-five Senators and seventeen of the sixty-five Representatives in the First Congress were men who had been trained in the law but who were not necessarily practicing law.5

The American Revolution itself affected the legal profession in a variety of ways, both direct and indirect: first, the profession lost a considerable number of its most prominent members; second, a particularly bitter antipathy against the lawyers as a class—an antipathy which had always existed among certain segments of the colonial population—soon made itself felt in many sections of the country; third, a strong and at times unreasonable dislike of everything English, including the English common law, the English statutes, and the English way of administering justice, became widespread; and fourth, the lack of a distinct body of American law as well as the absence of American law reports and lawbooks for a while made the administration of justice and, concomitantly, the practice of law extremely difficult and haphazard. Thomas Jefferson's gloomy prediction that "from the conclusion of this war [sic., the Revolutionary War], we shall be going down hill"6 turned out to be only too accurate in regard to the immediate future of the young American legal profession.

Aside from the fact that not a few lawyers took an active part in the Revolution either as fighting men or as politicians who decided to stay in politics, the profession was sorely depleted by the loss of many of its most prominent members who chose to remain loyal to the British crown. These loyalists either left America (or at least the thirteen young states) or completely retired from practice, or were forcibly excluded from the profession by legislative acts or rulings of the courts. Thus, Massachusetts, for instance, in 1778 passed An Act to Prevent the Return to This State of Certain Persons Therein Named, and Others, Who Have Left This State, or Either of the United States, and Joined the Enemies Thereof.7 A year later, in 1779, it passed a further Act to

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2 Address Delivered before the Members of the Suffolk Bar, 1821 (1821), reprinted in part in Miller, The Legal Mind in America 67-75 (1962), especially at 67-68.

3 See also Chrost, "The Legal Profession in Colonial America," parts 1 and 2, 33 Notre Dame Lawyer 31-09 (1957), and ibid., 350-79 (1958); part 3, 34 ibid., 44-64 (1958).

4 Of these twenty-five lawyers no less than six had studied law in England, namely, Arthur Middleton, Thomas Hayward, Edward Rutledge, Thomas Lynch Pennsylvania. Pca attended the Inner Temple and the others were members of 98, 140, 168, 188 (1934). See also Hamilton, "Southern Members of the Inns of Court," in North Carolina Historical Review 281 (1933). Hamilton points out that the Southern members of the Inns of Court supplied five signers of the Declaration of Independence, twenty delegates to the Continental Congress, five members of the United States Congress, two Justices of the Supreme Court (one Chief Justice—John Rutledge), several state governors and Chief Justices of state supreme courts, and innumerable lesser officers.


6 Quoted in Sydnor, Gentlemen Freeholders: Political Practice in Washington's Virginia 9 (1952).

7 This Act listed by name the following lawyers (and attorneys): Timothy Ruggles, William Brattle, Sampson Salter Blowers, Andrew Cass(é)neu, Richard
Confiscate the Estates of Certain Notorious Conspirators against the Government and Liberties of the Inhabitants of the Late Province, the Massachusetts Bay. Both acts named a large number of lawyers who in this fashion were banished from the country and had their estates confiscated. In 1781 the Massachusetts Supreme Judicial Court also took action by the following rule: "Whereas it is provided that all Attorneys commonly practising in the Courts within this Commonwealth shall take the Oath prescribed by Law for Attorneys, and the Oath of Allegiance to this Commonwealth . . . in order . . . to exclude men who are enemies to their Country." In 1785, by An Act Regulating the Admission of Attorneys, it was provided that "no person shall be admitted an attorney in any Court in this Commonwealth, unless he is . . . well affected to the constitution and government of this Commonwealth."¹⁰

The state of New York, on October 9, 1779, passed an act requiring all attorneys, solicitors, and counselors at law to produce upon demand certificates or other evidence "of their attachment to the liberties and independence of America," under penalty of permanent suspension from practice. This particular act also revoked all licenses to practice law issued prior to April 21, 1777, subject to restoration under the condition that the lawyer could give a jury satisfactory proof that he had "conducted himself as a good and zealous friend to the American cause."¹¹ On November 20, 1781, a further statute was enacted providing for the administration of a test or loyalty oath, and forbidding all members of the legal profession who refused to take this oath to pursue the practice of law.¹² These stringent provisions, which admitted of much unfair abuse, remained in force until April 6, 1786.¹³

It has been estimated that in Massachusetts alone at least seventeen prominent lawyers, not counting judges, permanently fled the country: Jonathan Sewall, Timothy Ruggles, Benjamin Kent, Samuel Kent, Samuel Fitch, Jeremiah Dummer Rogers, Benjamin Gridley, Samuel Quincy, Andrew Cazneau (or Cazeneau), Samuel Sewall, Abel Willard, James Putnam, Samuel Porter, Daniel Leonard,¹⁴ Pelham Winslow, Jonathan Adams, Sampson Salter Blowers, Leonard...
and Rufus Chandler. Several other lawyers, among them Joseph Howley and John Worthington, assumed a position of neutrality in the general conflict and gave up the practice of law. William Sullivan described this situation vividly though not always accurately: "There were then [at the outbreak of the Revolution] in the whole Province [of Massachusetts] thirty-six barristers and twelve attorneys, practicing in the superior court. These, in common with other persons, were driven to the necessity of deciding published a series of weekly letters running from December 12, 1774, to April 3, 1775. His letters, which may be taken as the final statement of the Tory position, argued in a Hobbesian vein for the need of a strong central government and the undesirability of revolution. John Adams, who wrote replies under the pen name "Novanglus," rejected Leonard's position. Leonard was subsequently forced to withdraw to Halifax.

17 An Address to the Members of the Bar of Suffolk, Mass. 39 (1835). This address was delivered in March, 1814, at the "stated meeting" of the Suffolk bar.

18 At that time there were actually in Massachusetts forty-four barristers whose names can still be ascertained. Of these, twelve practiced in Boston (Suff. Dana, Andrew Caz(e)neau, Samuel Fitch, Benjamin Gridley, Samuel Swift, John Chipman, Daniel Farnham, John Lowell, William Pynchon, and Nathaniel Peaslee White; two in Plymouth—James Hovey and Pelham Winslow; three in Worcester, Bliss, Jonathan Adams, and John Worthington; two in Cambridge—Francis Ingersoll, and one in Newburyport (Jonathan Adams), Northampton (Joseph (Jeremiah D. Rogers), Taunton (Zephaniah Leonard), Amherst (Simeon Oakes Augier), Brookfield (Joshua Upham), and Middlesex (Jonathan Sewall)).

19 There were at least fourteen outstanding attorneys (none barristers) at the time, namely, Josiah Quincy, Theodor Sedgwick, Isacc Mansfield, David Ward Warren, Jr., Woodbridge Little, James Bowen, David Porter, Ebenezer

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ing, whether they would adhere to the royal cause, or take the fearful chance of assisting to rescue the country from its oppressors, and on failure of the common effort, to be treated as rebellious subjects. Of those who took the side of their country, sixteen survived the Revolution. Thirteen of ... [the others] were royalists, and left the country. Some who remained were neutral, so far as they could be, consistently with safety. Such effects had the Revolution on the members of the [Massachusetts] bar, that the list of 1779 comprised only ten barristers, and four attorneys, for the whole state; who were such before the Revolution.

In each of the other states, too, the profession was severely crippled by the loss of the loyalists. Connecticut, for instance, was deprived of the services of Amos Botsford, Joshua Chandler, Feyer Dibblee, Thomas Fitch, Nathan Frink, and Jared Ingersoll, Sr.; Georgia lost several members of the bar, among them Anthony Stokes. Maryland saw the retirement of George Chalmers, Daniel Dulany, and Charles Gordon. New Jersey, where many prominent lawyers were Tories, lost Ozias Ansley, Isaac Allen, John Brown Lawrence, David Ogden, Henry Waddell, Frederick Smyth, Cortlandt Skinner (the last royal attorney general), William Franklin, and William Taylor. Edmund Fanning, George Hooper, and Henry Eustace McCulloch retired from the North Carolina bar. Pennsylvania lost William Allen, Andrew Allen, Isaac Allen, Miers Fisher, Joseph Galloway, and Christian Huck.

The actual count is at least seventeen, and possibly more. See the text above.

20 The "anti-Revolutionary bar" of Massachusetts and New York furnished the admiralty and common law courts of New Brunswick, Nova Scotia, Canada, and the Bermudas with many of their most distinguished lawyers and judges. William Smith, the Chief Justice of New York (1769), served in the same office in Canada (1786-93). Daniel Bliss, Joshua Upham, Edward Winslow, Ward Chipman, Jonathan Sewall, Jonathan Bliss, and James Putnam were appointed to the bench in New Brunswick; Foster Hutchinson and Sampson Salters Blowers were on the bench in Nova Scotia. William Hutchinson became king's counsel in the Bahamas; Samuel Quincy, king's attorney in Antigua; Daniel Leonard, Chief Justice in the Bermudas; and Jonathan Stearns, attorney general of Nova Scotia. For details, see, generally, Sabine, The American Loyalists (1847), parasim. Sabine believes that the majority of the lawyers were Whigs, and that comparatively few lawyers adhered to the crown. This statement is not supported by the facts: the record shows that many of the eminent members of the bench and bar were loyalists, although by no means all of them.
New York, which probably had a larger portion of Tories than any of the other states, was deprived of the professional services and legal talents of Thomas Barclay, Crean Brush, Benjamin Hilton, John Tabor Kempe, Benjamin Kissam, George Duncan Ludlow, Lindley Murray, Isaac Ogden, William Smith, Jr., and Peter Van Schaack.21

As a matter of fact, so many lawyers in New York were unable to meet the "loyalty test" required in 1779 that the bar of the state Supreme Court had almost ceased to exist. The only lawyers still practicing before that court in 1779 were John Bay, Egbert Benson, John Sloss Hobart, John Jay, John Lansing, John McKesson, John Strang, Peter W. Yates, and Robert Yates. Hence, the same year, during the April term, a rule of court was made "that any Attorney of the respective inferior Courts of Common Pleas who is of Good Moral Character and who shall on due Examination be found by the Justices of this [Supreme] Court to be of sufficient ability and Competent learning to practice as an Attorney or Counsellor at Law of this Court may be admitted and licensed to practice as one, or both Capacities provided that such application and Examination be made before the end of next Term of force."22 But only four lawyers, it seems, availed themselves of this opportunity: Leonard Gansevoort, Sr., Leonard Gansevoort, Jr., James Matthew Vissher, and James G. Livingston.23

The hostile attitude displayed by the majority of the Philadelphia bar toward the "Rebels" is well described in a letter of Joseph Reed addressed to Jared Ingersoll in 1779: "All the lawyers of any considerable ability in Philadelphia . . . were against the popular side."24 Rhode Island saw the withdrawal of James Benson.25

21 Peter Van Schaack, who had revised the statutes of colonial New York, was excluded by the Act of 1779. He was readmitted, however, in April, 1786. See Van Schaack, Life 406, 402-403 (1842). After his readmission, Peter Van Schaack turned his attention to teaching law rather than to practicing law.

22 Minutes of the Supreme Court of Judicature of the State of New York, 1775-1776, 1777.

23 Only Leonard Gansevoort, Sr., and James Matthew Vissher successfully passed the examination required to practice before the Supreme Court, while Leonard Gansevoort, Jr., and James G. Livingston failed. In order to give Livingston another chance, the Supreme Court extended this rule for another term.


The rise of the legal profession

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James Honeyman, Robert Lightfoot, Matthew Robinson, and William B. Simpson. South Carolina was deprived of the services of Thomas Knox Gordon, William Gregory, Egerton Leigh, John Savage, James Simpson, and William Wragg,26 while John Randolph, John Warden, and other remarkable men retired from the Virginia bar. This brief list contains only a small fraction of the profession's members who, finding themselves in disagreement with the political aims of the revolutionists, were lost to the American bar. It would not be extravagant to estimate that 150 leading lawyers27 and another 200 lawyers of lesser standing left the country or retired from active practice. Perhaps one-fourth of the former colonial legal profession became political "refugees" on account of the Revolution which, it was pointed out, "left a huge gap in what had become a great body of lawyers."28

The position of the American legal profession was further compromised by the widespread and far-reaching economic dislocation, often bordering on depression, that followed in the wake of the Revolution. In some parts of the young republic the economy was in a chaotic state, and large segments of the population were restless and frequently disappointed with the results of the war. "At the time I commenced the study of law [in 1788]," Jeremiah Mason remarked, "was a period of intense depression and poverty throughout the country."29 As is so often the case after a protracted conflict, business in certain areas was thoroughly disrupted, and for a while even at a complete standstill, while unemployment and poverty added to the general restlessness. The British Navigation Acts as well as the prohibitory duties in effect cut off the once profitable West Indian trade. High prices and enormous public debts necessitating confiscatory taxation further jeopardized the country's already strained economy. The paper money issued by the government was worthless, and in many instances

25 Since the majority of the better South Carolina lawyers had been trained in the Ins of Court in London, where some of them developed a strong attachment to the crown, it must be assumed that many more of these so-called South Carolina Templars left the country or withdrew from the active practice of law.

26 "The giants of the law," according to Lorenzo Sabine, "were nearly all loyalists." Sabine, American Loyalists 52-53 (1847).


28 Clark, Memoir of Jeremiah Mason 17 (1917).
people simply refused to accept it. A paralyzing inability and in many instances a deliberate unwillingness to pay debts soon set in. The new federal government owed its soldiers large sums of money. People with real property were land-poor while those who had organized businesses were either unable or unwilling to meet their obligations. Loyalists or Tories, under the terms of the peace treaty, were reclaiming their estates, despite confiscatory legislation which frequently was ignored by the courts. Jefferson estimated that Virginia alone owed several million dollars to British merchants. During the war, of course, payment to Englishmen had been suspended by law, but the peace treaty contained a clause providing that bona fide debts could be collected. Popular feeling ran high on this issue, especially since the British claims threatened to absolv what little wealth was left. British merchants before the war had been extremely generous with credit, and the colonial planters and businessmen frequently had made it a practice to wipe out one debt by incurring another, often without bothering to keep books on these transactions. Now the old issue of debt to British creditors was revived, and the agents and lawyers of these creditors put in an appearance in the American courts to press their claims.

The prolonged rural depression which struck the eastern counties of Virginia soon after 1800 continued for about thirty years to wear away what little prosperity was left after the Revolution. This depression, which was especially acute at the close of the War of 1812, dealt the tidewater a blow from which it never fully recovered. It precipitated a major exodus of Virginians to the West. By 1830, it has been estimated, almost a third of those born in Virginia and Maryland around the turn of the century had crossed the Alleghenies in search of greater opportunities. The decline of the prosperity in the two Carolinas came somewhat later, after the opening of the Southwest. During the 1820's a depression of great severity struck South Carolina. The expansion of cotton culture into the more fertile virgin lands of the Southwest brought on a sharp decline in cotton prices. The merchants and shipowners of Charleston, South Carolina, soon began to feel the competition from Savannah, Georgia, and the river ports of Alabama, Mississippi, and New Orleans. This depression, equal in severity to the one which had laid waste to South Carolina at the close of the Revolution, caused widespread distress as well as a major migration from the coastal areas.

The general post-Revolutionary economic depression in the North was probably at its worst in the year 1785. The States had stopped issuing paper money for a short time, but this measure did not add any stability to the old notes. Money grew extremely scarce at a time when a real extension of credit was sorely needed to start up the national economy. Although commerce began to revive somewhat in 1786, it still suffered much from the commercial rivalry between the several states. In western Massachusetts the discontent arising from these economic conditions led to an organized uprising—known as Shays' Rebellion—which was directed against taxes and the collection of debts, and against the unpopular courts and lawyers who also came under strong attack in the so-called Whiskey Insurrection which in 1794 broke out in western Pennsylvania over the enforcement of a federal excise tax on domestic spirits. "The circumstances of the country," William Sullivan deplored, "from the peace of 1783, to the adoption of the Federal Constitution, were exceedingly oppressive. In such times, professional agency has a very direct relation to real or imaginary evils. This vice of the times, or the unwelcome operations of government, are referred to those whose duty it is to aid, in coercing the performance of contracts, or in furnishing a legal remedy for wrongs. Our profession was most reproachfully assailed." The antient riots in New York (1839-46) likewise demonstrated the general unpopularity of the legal profession and of the courts. While much of the widespread dissatisfaction with the early courts...

28 See, for instance, Ware v. Hylton, 3 U.S. (3 Dall.) 158 (1796).
30 Austin (Honestus), Observations on the Pernicious Practice of the Law 6 (1786). See note 55, Chapter I, below.
(and the lawyers) stemmed from the charges that they were “undemocratic.” There were also many and, indeed, often well-deserved complaints about the slowness with which these courts performed their duties. In time these complaints and charges effected extensive and far-reaching alterations or reforms in the judicial system of several states.

It must not be overlooked, however, that since colonial days and far into the nineteenth century (and beyond) there has always existed a chronic tension not only between creditor and debtor but also between predominantly “creditor areas” and “debtor areas” in this country. Obviously, the lawyer was most unpopular, not to say despised, in the “debtor areas,” while in the “creditor areas” he was, if not always respected, at least welcomed. Debtors, as might be expected, found the obvious symbols of all their calamities and burdens in the lawyers and the courts through which their creditors moved away from them. Hence, many efforts were made, usually supported by short-sighted (and short-lived) legislative acts, to close the courts by force and drive out the “abominable” lawyer.

Why should the community be hampered with such evils without endeavouring in some manner to remedy them,” queried a contemporary pamphleteer, “Why should any of this ‘order’ [of lawyers] pursue their destructive measures with impunity? As practitioners of the law, are they to be indulged with the privilege of involving every individual in ruin who appeals to the laws of this country?” The prevailing laws of strict foreclosure and imprisonment for debt, to be sure, created much individual hardship. There was no property exempt from seizure on execution except the clothes on the debtor’s back. The officer could take the bed on which the debtor slept, the last potato in his cellar, and the only cow or pig in his barn to satisfy the execution. There was no homestead exemption. Property at the execution sale brought nothing approaching its real value, and the debtor could only look on in despair while the sheriff sold the house over his head and the last mouthful of his provisions for the winter at a fifth of their real value, knowing at the end that he would be turned into the streets with his family. People then were more stern and uncompromising in asserting their legal rights than they are now, and if the proceeds of the sale did not bring the amount of the execution and costs, the debtor was straightway carried off to jail and kept there as long as his creditors would pay his board, or until the debt was discharged, or friends came to his relief. The prison records of Worcester County in Massachusetts for the years from 1784 to 1786 show that in 1784 seven persons were jailed for debt and four for all other offenses; in 1785, eighty-six for debt, six for nonpayment of taxes, and eleven for all other offenses; and in 1786, eighty for debt, four for nonpayment of taxes, and four for all other offenses.

Hence it is only natural that, in keeping with the popular tendency to confound cause and effect, the lawyers should be singled out as the real villains. The chief law business of this period, it will be noted, was the collection of debt, foreclosure, insolvencies, and recovery of property, not to mention the tedious drafting of deeds, titles, and other legal documents, the recording of these instruments, contract negotiations, formalities attending the payment of taxes, and the many (and at times unpleasant) dealings with embittered tenants—a type of professional activity which, aside from attracting inferior, unscrupulous and cantankerous men, has always been unpopular with the public at large. To make matters worse, not a few lawyers who acted as land agents often indulged in sharp practices bordering on dishonesty. Whenever the common man came into contact with the law, the law courts, the officers of the court, or the legal profession, whether this contact involved a dispute over a personal note, a squabble over farm boundaries, a tax collection, or a sheriff’s sale, his experience was not

For the charge that the courts were “undemocratic,” see, for instance, Carpenter, Judicial Tenure in the United States 168–69 (1918). William S. Carpenter also points out that the alleged “undemocratic” department of some of the courts was considered to be the result of long or lifetime judicial tenure (which indolent, or inefficient), as well as of the fact that they were appointed rather than elected by the people. Ibid., 168, 171.

Austin (Honestus), Observations 4 (1786).

“In the county of Worcester [Massachusetts], then containing a population of less than fifty thousand souls, there were two thousand actions [for debt] on the docket of its [Court of] Common Pleas.” Amory, Life of James Sullivan 186 (1899).

Smith, “Features of Shays’ Rebellion,” reprinted in 5 William and Mary Quarterly (3rd series) 77, 82 (1948).
likely to be a happy one. For he often got less satisfaction from this encounter than he had anticipated. Dependent upon the law but basically antagonistic to the alleged pretensions of the lawyers, he became greatly exasperated at "the slow trials, heavy costs..., frequent misuses of justice," and the often disappointing outcome of his recourse to law. Many people had contracted debts while they were serving in the Revolutionary Army. Timothy Bigelow, one of the most distinguished soldiers from Worcester, Massachusetts, spent the last years of his life in the Worcester County jail for debts incurred in support of his family while serving the cause of independence.

In addition, the prevailing system of lawyers' fees established by the various local bars or bar associations as well as the court costs and other legal expenses aroused much indignation. When some lawyers, because of their training and experience, began to assume an active and in some instances a commanding role in the political life of the country, they were frequently attacked and denounced with great vehemence. "Can we suppose the Republic to be free from danger," a contemporary commentator remarked, "while this 'order' [of lawyers] are admitted so abundantly as members of our Legislature?" The hostility to the lawyer to some degree might have been responsible for the delay of the adoption of the new federal Constitution and the several state constitutions. Some of the opposition to the proposed federal Constitution and to certain state constitutions which was voiced in the several state conventions or by public opinion during these crucial years probably stemmed from the fact that these "organic laws" were considered the "evil" work of scheming lawyers: "Beware of lawyers," warned the New York Daily Advertiser in its fierce agitation against the adoption of the New York state Constitution. "Of the men who framed the monarchical, tyrannical, diabolical system of slavery, the New Constitution, one half were lawyers. Of the men who represented, or rather misrepresented this city and county in the late convention of this state, to whose wicked arts we may chiefly attribute the adoption of the abominable system, seven out of nine were lawyers."42

The fact that in certain sections of the country only lawyers on the whole seemed to be busy and, occasionally, even prosperous, while nearly everyone else was idle or in dire economic straits, added to the general distrust and dislike of the legal profession. It was not always realized that lawyers invariably have to do a great many "cleanup jobs" during and immediately after an economic depression. This sort of business comes to some lawyers when other men are conspicuously not busy and not profiteering. "After the war...[they] were denounced as banditti, as mere robbers...The mere sight of a lawyer...was enough to call forth their anger on. The lawyers were denounced as banditti, as blood-suckers, as pick-pockets, as mill-bags, as smooth-tongued rogues...The mere sight of a lawyer...was enough to call forth an oath."43 Since the lawyers as a rule would do nothing without a retainer, they soon waxed relatively wealthy. The "order [of lawyers] are daily growing rich," one contemporary observer lamented, "while the community in general are as rapidly becoming impoverished."44 This prosperity, it goes without saying, marked them as fit subjects for the discontented and jealous to vent their anger on. The lawyers were denounced as banditti, as blood-suckers, as pick-pockets, as wind-bags, as smooth-tongued rogues...The mere sight of a lawyer...was enough to call forth an oath."45 Authors dealing with the economic and social conditions of the times agreed that there existed a violent universal prejudice against the legal profession as a class or "order." Lawyers were called "plants that will grow in any soil that is cultivated by the hands of others"—men who derive their fortunes from the misfortunes of people and "amass more wealth without labour, than the most opulent farmer, with all his toils...What a pity that our

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38 Fee, The Transition from Aristocracy to Democracy in New Jersey, 1789-1829 107 (1933).
39 For some samples of court costs and fees, see Smith, "Features," loc. cit., at 81.
40 In some instances lawyers who entered politics were openly denounced as "almost the sole dictators of public life." Their influence was called "improper and dangerous," and one man, from South Jersey, announced that he would not vote for any lawyer, "as these men were interested in fomenting disputes and belonged in a class with Tories, liars, drunkards and adulterers." Fee, Transition 107-108 (1933).
3 Austin (Honestus), Observations 8 (1786).
41 Austin (Honestus), Observations 5 (1786).
42 March 4, 1786. See also Fox, "New York Becomes a Democracy," 6 History of the People of the United States 2 (1927).
43 Kent, Address by James Kent before the Law Association of the City of New York (1826) 2 (1848, reprint).
44 Austin (Honestus), Observations 6 (1786).
45 1 McMaster, History of the People of the United States 304 (1927).
forefathers, who happily extinguished so many fatal customs... did not also prevent the introduction of a set of men so dangerous."47 Among the multiplicity of evils which we at present suffer, there are none more justly complained of than those which labour under by the many pernicious practices in the profession of the law.47 Public sentiment was also inflamed by radical elements who excoriated the common law of England as "rags of despotism"; and the judges, magistrates, and lawyers who followed the common law were denounced as "tyrants, sycophants, oppressors of the people and enemies of liberty."48

Contemporary journalism joined in this general condemnation of the profession. The New York papers, for instance, were filled with exhortations, written in the style of the hangman, beseeching all true patriots to beware of the sinister machinations of the lawyers—"men so audacious," according to the press, "that they venture, even in public, to wrest, turn, twist, and explain away the purport and meaning of our laws."49 These men, it was alleged, are the bane of society, and of all aristocracies, that of the lawyers is the worst.50 Another paper called upon the electors to refuse lawyers public office, and still another suggested the complete abolition of the legal profession. This animadversion against the rejected in New York, to throw open the profession to all persons New Hampshire insisted that the legal profession was the cause of all their misfortunes. It was maintained that the lawyers were

48 Crevecoeur, Letters from an American Farmer (Everyman's Library) 140 (1789).
47 Austin (Honestus), Observations 3 (1786).
49 1 McMaster, History 354 (1917).
50 Ibid. In 1835, De Tocqueville wrote: "The special information which they constitute a sort of privileged body in the scale of intelligence... In the wealthy, lawyers consequently form the highest political class and the most aristocracy, I should reply without hesitation, that it is not composed of the rich, the but..." 1 Democracy in America (part 1, chap. 16) 278 (Bradley ed., 1945).
he suggested that the legal profession be "annihilated,"56 that "no
Lawyers be admitted to speak in Court," and that "the 'order' [of
lawyers] be abolished, as being not only USELESS, but a DANG-
erous body to the Republic."57 Even members of the
profession itself, such as John Gardiner of Massachusetts, very much
to the annoyance and discomfort of their brethren, advanced a
number of proposals for a thorough reform of the bar.58 Gardiner
had developed a profound dislike of American lawyers while
studying and practicing law in England.59 Since his arrival in
Massachusetts he had made untiring efforts to reorganize the bar,
and especially to introduce simple and economic methods in the
administration of justice and the practice of law. Benjamin Austin,
who assured his readers that his observations "do not arise from
pique or resentment to the gentlemen of the [legal] profession... but
from a sincere regard to the interest and well being of the Com-
monwealth,"60 flatly demanded in his much-publicized writings
that a "State Advocate-General" should appear on behalf of per-
sons indicted for a crime,61 that parties were to appear in person or
represented by a friend regardless of whether the latter was an

had been collected from all the Jails on the continent." Letter of John Quincy
Society (2nd series) 65 (1886).
56 Austin (Honestus), Observations 6, 14, 16, 34 (1786). See also ibid., 15,
where Honestus proclaims: ... their [the lawyers'] annihilation has become
absolutely necessary."
57 Ibid., 6. Compare this statement with what one speaker had to say during
the debates of the Indiana Constitutional Convention of 1875: "Gentlemen of the
salutary reform. But let me say to these honorable gentlemen that this is a reform
for which the PEOPLE call—a reform that the people's INTEREST demand,
and those gentlemen will hear a voice from the people, ere long, which will tell
them in tones of muttering thunder, that 'the day of their power that be, are
Revision of the Constitution of the State of Indiana 1891 (1850).
58 Parsons, Memoir of Theophilus Parsons 161 (1829).
59 John Gardiner entered the University of Glasgow in 1755. He was admitted to the Inner Temple in 1763, and called to
the bar in 1765. In 1766 he was appointed attorney general of St. Christopher's
as an American citizen. See Jones, Intro to Court 4 (1924).
60 Austin (Honestus), Observations 7 (1786).
61 Ibid., 14.
63 Amory, James Sullivan 189 (1859).
64 "Diary of John Quincy Adams," 16 Proceedings of the Massachusetts
Historical Society (2nd series) 291, 343 (1902).
kindle a flame which will subsist long after they are forgotten. . . . [The poison has been so extensively communicated that its infection will not easily be stopped. A thousand lies in addition to those published in the papers have been spread all over the country to prejudice the people against the 'order,' as it has invidiously been called; and . . . the gentlemen of the profession have been treated with contemptuous neglect and with insulting abuse.]

In 1803, Charles Jared Ingersoll of Philadelphia, himself a prominent lawyer, reported that “[o]ur State rulers threaten to lop away that excrecence on civilization, the Bar.”

William Duane, a journalist in Philadelphia, ranted about the “farrago of finesse and intricacy” by which lawyers had degraded the law of the land. In a pamphlet which carried the formidable but fashionable title of *Samson against the Philistines or the Reformation of Lawsuits and Justice Made Cheap, Speedy and Brought Home to Every Man’s Door Agreeable to the Principles of the Ancient Trial by Jury before the Same Was Innovated by Judges and Lawyers*, published in 1805, Duane spoke about “the loose principles of persons of that profession [the legal profession]; their practice of defending right and wrong indifferently, for reward; their open enmity to the principles of free government, because they thrive; the tyranny which they display in the courts; and in too many cases the obvious . . . collusion which prevails among the members of the bench, the bar, and the officers of the court.”

He then suggested that these alleged abuses “demand more serious interference of the legislature, and the jealousy of the people,” especially since the lawyers “so manage justice as to engross the general property to themselves, through the medium of litigation; and the misfortune is, that to be able to effect this point, it is attended by loss of time, by delay, expense, ill blood, bad habits, lessons of fraud and temptation to villainy, crimes, punishments, loss of estate, character and soul, public burden, and even loss of national character.”

In brief, Duane essentially repeated here the statement attributed to Lord Brougham, who had defined the lawyer as “a learned gentleman who rescues your estate from your enemies and keeps it to himself.” “So long, therefore, as justice cannot be demanded,” Duane continued, “[except] by professional lawyers, so long will the knowledge of it [sell, the law] be the exclusive property of the profession.” To remedy all these evils, he proposed a series of radical reforms which, if fully carried out, ultimately would have resulted in the complete abolition of the legal profession: all trials were to be held before local or county tribunals in order to expedite the administration of justice, with practically no right to appeal; lawyers, if they were to be admitted at all, should be appointed and paid for by the government, and then only in order to assist the litigants; and a system of arbitration by laymen should replace, wherever feasible, the courts of law.

One contributor to the *Aurora*, a paper published by Duane in Philadelphia, maintained that “[t]he time of the court and the jury is wasted, to no other purpose than to display the ingenuity of the pleader.”

and a writer who signed himself “Sidney” had this to say of lawyers in general: “Already the citizens feel the weight

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72 *Ibid.*, 73. See also *ibid.*, 65, where Duane points out that the “absolute independence” of judges is due to “the artful management of the gentlemen of the law, to secure themselves seats of power and wealth . . . undisturbed by the tempests of liberty . . . The very men who planned it, planned their own aggrandizement . . . at the expense of all the rest of the society.” See also note 34, Chapter I, above.

73 *Ibid.*, 68. See also *ibid.*, 16, where Duane insists that the “professional mystery” which surrounds the common law “has contributed to the oppression and plunder of the people.” See also *ibid.*, 27, 31.


77 *Aurora*, October 20, 1804.
of their hands, from one extremity of the state to the other. . . .

[T]hey form an indissoluble bond of association and union. . . . Cemented by one common principle, and impelled by the same interests, they have completely realized the fabled idea of the Macedonian phalanx. . . . Like all other professions that of the law has its peculiar tendencies and vices. And in defence of truth and liberty I will hazard the observation, that their numbers, their wealth, learning, talents, and general information, joined to their knowledge and experience in business, have already placed them on the highest ground in the state, with such a commanding view of the promised land, as to afford them a well grounded hope of taking possession at some future day, of the country itself." 78 Another contributor to the Aurora lamented that "[a]f ter the establishment of our independence, we were endangered by the ambition of particular classes of men—the military soon after the peace of 1783—the clerical body—the body of speculators—and the lawyer's corps, have each severally aimed to obtain exclusive dominion over us. . . . The military conspirators, the mercantile body, the clergy, the speculators—have all failed to reduce us to the condition of vassals and villains . . . but we have yet to bring to a due sense of their equality with the rest of their fellow citizens a corps which from its particular character is at this time both formidable and dangerous to the public prosperity—I mean lawyer's corps." 79

An address to the Pennsylvania Legislature, published in the Aurora, cited the following complaints:

1. The expenses [of bringing an action] are so enormous, as to make lawsuits rather a contest of wealth, than an inquiry into, and establishment of justice. 2. The evasions are so numerous, and by technical forms so established that the plainest and most incontestable questions stand for years on the records of our courts. 3. Unmeaning forms and absurd modes are so multifarious that a man of the soundest sense, and best judgment, is disqualified from defending his own rights, except through the medium of a hired pleader. 80

Another source of the general opposition to the legal profes-

82 Ibid., 6.
83 Ibid., 21 ff.
84 Ibid., 7. See also Aumann, "The Influence of English and Civil Law Principles upon the American Legal System during the Critical Post-Revolutionary Period," 12 Cincinnati Law Review 289, 290ff. (1938).
The rise of the legal profession

The widespread and popular aversion to the legal profession assumed a variety of forms in the several states. During Shays' Rebellion in 1786 people actually demanded that all inferior courts and all lawyers be entirely eliminated. One Job Shattuck, at the head of an armed band of malcontents, took possession of the courthouse in Worcester, Massachusetts, and sent a threatening message to the judges declaring that "it is in the sense of the people that the courts should not sit." In Vermont and New Hampshire vociferous demands were made to suppress the legal profession completely, or at least to reduce the number of lawyers and, incidentally, to cut down substantially the usual legal fees. In Vermont, where the general populace was particularly vehement in its actions and denouncements, courthouses were set afire. In New Hampshire some people even advanced the ridiculous proposition that all courts be abolished. The Vermont legislature arrogated to itself the right to set aside or modify "unpopular" court decisions, or grant new trials over the heads of the courts. In New Jersey debtors nailed up the doors of the courthouses, and irate mobs attacked lawyers on the streets. In Rutland and Windsor (in Vermont) court sessions were broken up by Regulators who rushed into the courtroom brandishing muskets and swords. In Rhode Island lawyers were compelled by the legislature under penalty of disbarment to accept paper money at par value, although

One commentator remarked about Shays' Rebellion: "Nothing perhaps, but the firmness of the Senate of the State [of Massachusetts] preserved the whole system of ... government from being trampled under foot by the unprincipled Jack-Cades of that day." 19 North American Review 410 (1829).

The impeachment proceedings against Justice Samuel Chase are also pertinent. William Branch Giles of Virginia, the spokesman of the extreme Jeffersonian position, stated the real issue as follows: "...if the Judges of the Supreme Court should dare, AS THEY HAVE DONE, to declare an act of Congress to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them," 1 Memoir of John Quincy Adams 312 (Adams ed., 1874).

The impact of the Revolution

s previous act providing for compulsory payment of debts in paper money had been declared unconstitutional.90

All these deplorable incidents fully bear out Timothy Dwight's observation that "in a state of society recently begun, influence is chiefly gained by those, who directly seek it: and these in almost all instances are the ardent and bustling. Such men make bold pretenses to qualities which they do not possess; clamour everywhere about liberty, and rights; are patriots of course, and jealous of the encroachments of those in power; thrum over, incessantly, the importance of public economy; stigmatize every just and honorable public expenditure, arraign the integrity of those, whose wisdom is undisputed, and the wisdom of those, whose in-

90Trevett v. Weeden (1786). See, in general, 1 McMaster, History 331-41, especially at 332 and 338-39 (1927). The facts of this case were as follows: At Newport, Rhode Island, a butcher named John Weeden refused to accept at par value the paper money which one of his customers, John Trevett, tendered for the purchase of some meat. Trevett brought an action against Weeden under the Bank Act, one of the numerous legal tender acts of the period which compelled people to accept the paper money of the state at par value. This Act also provided that any violation of its provisions should be tried within three days, that there should be no jury, that three judges should constitute a quorum, and that the judges' decision should be final. A heavy penalty was attached to any refusal to accept this money. Since in Rhode Island the judges were subject to recall by the Assembly, there was every reason to believe that the Act would be rigorously enforced by the courts. The contest between Trevett and Weeden was actually a contest between the "pro-paper-money" farmers and the "anti-paper-money" merchants. Each side was represented by able counsel—Weeden had as his lawyers Henry Marchant and James Mitchell Varnum, two of the most prominent lawyers in Rhode Island. The general excitement aroused by this case was immense, and the arguments on both sides were conducted with great animation. In the heat of the trial two of the judges actually went so far as to declare the Bank Act unconstitutional and hence, null and void. This was one of the first cases in which an American state court assumed jurisdiction over the constitutionality of an act passed by the state legislature. The Assembly, dismayed by the decision, cited the judges to appear before it and assign the reason for the fact that they had "adjudged an act of the supreme legislature of this State to be unconstitutional and absolutely void." The Assembly also stated that "the said judgment is unprecedented in this State, and may tend to abolish the legislative power thereof." The defense of the court was made by David Howell, an Associate Justice of the Supreme Court of Rhode Island (from 1786 to 1787), delivered the opinion of the court, declaring the Bank Act unconstitutional and, hence, null and void. This was one of the first cases in which an American state court assumed jurisdiction over the constitutionality of an act passed by the state legislature. The Assembly, dismayed by the decision, cited the judges to appear before it and assign the reason for the fact that they had "adjudged an act of the supreme legislature of this State to be unconstitutional and absolutely void." The Assembly also stated that "the said judgment is unprecedented in this State, and may tend to abolish the legislative power thereof." The defense of the court was made by David Howell, who laid down the principle that the judges were not accountable to the Assembly, and that the right to trial by jury, denied under the Bank Act, was a fundamental right which the Assembly could not abolish. This incident, it will be noted, greatly contributed to the establishment of an independent judiciary in Rhode Island.
Amen~a, also seem to have become extremely hostile such a state of society. These things, uttered everywhere with peremptory confidence, principle and feelings, of him with whom they are conversing. The integrity cannot be questioned; and profess, universally, the very profess that the order of Lawyers be totally abolished; an alternative preferable to their continuing in their present mode. In almost every country town in Massachusetts and, for that matter, throughout New England, a knowledge of the law was held to be the best reason in the world why a candidate should be refused public office or membership in the state legislature. Benjamin Austin bluntly proclaimed that "[e]very one seems to be convinced, that if this 'order' of lawyers . . . are permitted to go on in their career, without some check from the Legislature, . . . the ruin of the Commonwealth is inevitable."

In Pennsylvania several statutes were passed to repress not only the legal profession but also the common law of England, including the existing system of courts. These statutes provided for lay referees in place of trained lawyer-judges, and for trials without intervention by counsel. Parties were to file informally a statement in court, and the adversary's rejoinder was likewise to be informal. In 1803 and 1804 the Pennsylvania legislature was swamped with petitions calling for radical reforms. The people of Lancaster County, for instance, complained "that a great portion of the time employed in the courts of quarter sessions are spent in the frivolous disputes of contentious people, to the prevention of a decision in civil actions." Governor Thomas McKean, a sensible man, warned the legislature against these popular demands. Addressing the Assembly on December 9, 1803, he conceded that the administration of justice in Pennsylvania was somewhat defective in that a Supreme Court manned by only four Justices could not possibly handle the recent increase in litigation. "The spirit of

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...
litigation,” he concluded, “the ruin of honest suitors, and the triumph of others equally culpable, can no longer be disingenuously ascribed to the machinations of a profession [sic!, the legal profession].”101 His warnings, however, went unheeded. As a matter of fact, the situation in Pennsylvania became so threatening that Charles Jared Ingersoll of Philadelphia informed his friends that “[a]ll the eminent lawyers [in Philadelphia] have their eyes on one city or another, to remove to in case of extremes.” He added that his own father, Jared Ingersoll, a barrister of the Middle Temple and one of the most distinguished Philadelphia lawyers in an age when the city boasted the finest legal talent in the country, planned to transfer his practice to New York.102

Despite this sullen hostility of the general populace toward the lawyers as a class, for a while the prestige as well as the influence of the legal profession steadily and stealthily increased. Along the Eastern seaboard the pronounced espirit de corps manifested by the various bar associations, the strictly supervised and uniform training of prospective lawyers, the many measures adopted to raise professional standards, and the unifying of the lawyers in strong denunciations of pettifoggers and rabble rousers, at least until about 1840, gave the young American bar an unsuspected strength in the face of much animadversion and obloquy. Highly effective in the gradual conquest of public opinion and the common mind was the consistent and clever barrage of self-serving propaganda which the lawyers levied in their own behalf. The ascendency of the legal profession to what De Tocqueville later was to describe as “the highest political class and the most cultivated portion of [American] society,” to no mean degree was due not only to the undisputed brilliance of the great lawyers and jurists of that time and to their increasing display of dazzling erudition in a country where true learning was at a premium but also to their propensity for advertising, often in a most brazen manner, their unrivaled merits.103

101 Ibid., 28-29. See also Newlin, The Life and Writings of Hugh Henry Brackenridge 247 (1931).
102 Meigs, Charles Jared Ingersoll 36 (1897).
103 Miller, The Legal Mind in America 41 (1965).
for justice.”¹⁰⁶ Five years later, in 1829, Joseph Story reminded the public that a true lawyer always had “a just conception of the dignity and importance of his vocation,” and that he would never “debase it by a low and narrow estimate of its prerequisites or its duties. Let him consider it, not as a mere means of subsistence, an affair of petty traffic and barter, a little round of manoeuvres and contrivances. . . . The profession has far higher aims and nobler purposes. In the ordinary course of business . . . sound learning, industry, and fidelity, are the principal requisites. . . . But there are some, and in the lives of most lawyers many occasions, which demand qualities of a higher, nay, of the highest order. Upon the actual administration of justice . . . must depend the welfare of the whole community. . . . The lawyer is placed . . . upon the outpost of defence, as a public sentinel, to watch the approach of danger, and to sound the alarm. . . . It is then the time for the highest efforts of genius, and learning, and eloquence, and moral courage at the Bar. . . . If he shrinks from his duty, he is branded as the betrayer of his trust. . . . If he succeeds, he may, indeed, achieve a glorious triumph for truth, and justice, and the law.”¹⁰⁷

When Joseph Story was delivering his lofty and somewhat stereotyped peroration on the excellence of the contemporary legal profession, he could not know that a new flood of vituperations and radical proposals was about to threaten the very existence of the American lawyer in the name of “Jacksonian democracy.” Undismayed by this renewed onslaught, the lawyers once more rallied to the defense of their profession. Timothy Walker of Cincinnati pointed out:

[T]he mass of our citizens . . . will be compelled to seek for a great deal [of law] in the heads of our lawyers. . . . [A]s a lawyer, I am bound to rejoice in those difficulties of acquisition, which render our profession so arduous, so exclusive, so indispensable, and, therefore, so respectable. . . . The province of a lawyer is to vindicate rights and redress wrongs, and it is a high and holy

¹⁰⁶ Kent, A Lecture, Introductory to a Course of Law Lectures in Columbia College, Delivered February 2, 1824 (1824), reprinted in part in Miller, Legal Mind 97-104, especially at 95-96 (1961).

¹⁰⁷ Story, Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829 (1829), reprinted in part in Miller, Legal Mind 177-89, especially at 179-81 (1962).

function. Men come to him in their hours of trouble. . . . The guilty . . . and the wronged, the knave and the dupe, alike consult him, and with the same unreserved confidence. . . . It is not given to man to see the human heart completely unveiled before him. But the lawyer perhaps comes more nearly to this, than any other. . . . [F]rom the days of the revolution down to the present time, no single class of the community has performed so much of the public service of the country, as the members of this profession, . . . a proof of the estimation in which the profession has been held. . . . I would hold up the legal profession, as an end in itself. . . . In fact, there is nothing higher. He who stands at the head of this profession, is on a level with the most elevated in the land. . . . I am well aware that there are prejudices against the [legal] profession. It is said to abound with pettifoggers, who pervert the law to the purposes of knavery; with quacks, who sacrifice their clients through their ignorance; and with needy hangers-on, who will foment lawsuits. . . . Lawyers are said to delight in tricks, stratagems, and chicanery; to argue as strenuously for the wrong as for the right, for the guilty as for the innocent; and to hire out their conscience, as well as their skill, to any client, who will pay the fee. . . . I, for one, am willing to admit their truth, to some extent. . . . We lay no claim to superhuman virtue. . . . If there were no dishonest or knavish clients, there would be no dishonest or knavish lawyers. Our profession . . . does but adapt itself to circumstances; and it depends upon the community, whether it shall be elevated or degraded; or rather, in what degree it shall incline one way or the other: for there is no bar, anywhere, which has not its ornaments, as well as blemishes; and these must be well known to the community. And we stand conspicuously before the public eye. . . . [T]here need be no deception or mistake about a lawyer’s standing [in his community]. If therefore clients will employ those who are unworthy, they do so with their eyes open, and have no right to find fault with the profession in general.¹⁰⁸

¹⁰⁸ Walker, Introductory Lecture on the Dignity of the Law as a Profession, Delivered at the Cincinnati College, November 4, 1837 (1838), reprinted in part in Miller, Legal Mind 140-57, especially at 148, 151, and 153-56 (1961). Timothy Walker was graduated from Harvard College in 1826, and attended the Harvard Law School, where he studied under Joseph Story. He migrated to Cincinnati in 1830 and was admitted to the bar there. In 1835 he founded a private law school in Cincinnati, which two years later became incorporated into Cincinnati College. See Chapter IV, below. Walker also edited the Western Law Journal.
In the earliest days of the republic, the practice of law and the many and varied opportunities it afforded during these troubled times still seemed to be one of the most honorable and, it may be added, one of the most promising and attractive professions open to young men of ambition and talent. The Revolution had created opportunities of expansion for some lawyers already established in the profession, as well as new careers for persons seeking a profession. One of the best chances for establishing a professional career fell to the patriotic lawyer. The general dislocation caused by the war increased litigation, while the fortunes of Revolution considerably reduced the number of available lawyers. Ample and rewarding opportunities offered themselves to enterprising young men of ability, particularly if they had gambled their own future on the success of the Revolution, and prosecuted both in the name of patriotism.

After the peace of 1783, a few gentlemen of the colonial school resumed their ancient practice; but the Bar was chiefly supplied by a number of ambitious and high-spirited young men, who had returned from the field of arms with honorable distinction, and by extraordinary application, they soon became qualified to commence their careers at the Bar [of New York] with distinguished reputation. Alexander Hamilton, for instance, prepared himself for the practice of law by intensive reading for a period of three months under the tutelage of Robert Trup.

At the July term of the New York Superior Court in 1782, he was admitted to practice as an attorney, and four months later was granted the additional license of a counselor. Despite this abbreviated preparation for the bar, Hamilton, because of his outstanding mental gifts, soon became a brilliant and successful lawyer. But there is another side to this story. Alexander Hamilton's less talented contemporaries, who had been admitted to practice after the same scanty preparation, on the whole proved to be little qualified for the profession. Much of the work which should have been done by responsible and experienced professional men was thus taken over by sharpers and pettifoggers; in fact, a large segment of the young American bar was made up of men who had but a sketchy acquaintance with the law and with the standards required of an honorable profession.

As early as 1768 the Essex bar in Massachusetts enacted a rule, later adopted by other Massachusetts county bars, that no person be admitted to the practice of law without the consent and recommendation of the bar. In particular, it was provided that every person, in order to be admitted as an attorney in the inferior courts, must have a college education and must have studied law with some lawyer for at least two years; and that any person, to be admitted as an attorney to the Superior Court, must have been an attorney of good standing in the inferior courts for at least two years. Any person wishing to become a barrister must have been an attorney in the Superior Court for at least two years. During the Revolution, as may well be expected, this particular rule was not always strictly enforced. Thus, Christopher Gore, subsequently an outstanding lawyer (and governor of Massachusetts), in 1778 was considered to have studied law according to the rules of the Suffolk bar since July, 1776, although his main activities were those of a patriot rather than of a law student. In 1779, Fisher Ames, although he was living in Dedham at the time, was considered as having been a "law student" under William Tudor in Boston since January 1, provided that at the expiration of three years from January 1, 1779, he was still in the office of Mr. Tudor. He was also ordered to submit in 1782 to an examination by the Suffolk bar "in the practical business of the bar." In 1783 a Richard Brook Roberts of South Carolina was admitted of the bar were poorly educated, and some of vulgar manners and indifferent morals.


Kent, Memoirs and Letters of James Kent, 1766-1847 (1848).

Schachner, Alexander Hamilton 145 (1946). In his private reading Hamilton had already become familiar with Blackstone, Grotius, and Pufendorf.

See Clark, Memoir of Jeremiah Maron 12 (1917): "Most of the members of the Suffolk bar, for instance, adopted this rule in 1771. See Record-Book of the Suffolk Bar, reprinted in 19 Proceedings of the Massachusetts Historical Society 149 (1881-82).


Ibid., 153, entry under December 3, 1779. See also ibid., 155, entry under October 9, 1781.
as a student in the office of Mr. Hichborn in Boston "with a deduc-
tion of one year from the usual term required by the rules for such
students," provided he could produce a certificate from a South
Carolina lawyer to the effect that he had studied law for at least
one year in this lawyer's office.117 In 1800, Massachusetts laid down
the rule that graduates from out-of-state colleges would have to
study for one year more than graduates from Harvard.118
The New Hampshire bar, in 1788 and again in 1805, adopted
some rules concerning the admission to legal study and to the bar.
These rules provided that a candidate for admission to a law office
must be duly qualified to be enrolled in Dartmouth College as a
first-year student. A non-college student was required to study in
a law office for at least five years, while a college graduate had
to take only three years of legal training within the state.119 Also,
no lawyer was to be admitted to the bar of the Superior Court of
New Hampshire until he had practiced for at least two years in the
Court of Common Pleas. In Vermont, under the statute of 1787,
the term of legal study was two years;120 and in Connecticut and
Rhode Island, two years were prescribed for college graduates and
three years for persons without college training.121 In Vermont,
as in Rhode Island, any candidate for admission to practice had to
have the approbation of the local bar.122
With the adoption of the New York Constitution of 1777,
the admission to practice was regulated by the provision that all
attorneys, solicitors, and counselors should be appointed and li-
censed by the court in which they intended to practice. By rule
of the state Supreme Court of 1797,123 it was further provided that
candidates for admission to practice must have served a regular
seven-year apprenticeship with a practicing lawyer, but a period
not exceeding four years devoted to classical studies (college) after
one had attained the age of fourteen years might be accepted as
partial fulfillment of the required seven-year period of clerkship.
After four years of practice (modified in 1804 to three years)124
as an attorney, or after four years of study under a professor or
counselor (also modified in 1804),125 a person might be admitted
as a counselor to practice before the Supreme Court.126 In 1829
the rules for admission were further amended to the effect that an
attorney should be admitted as counsel not as a matter of right
after four (or three) years, but only if he were found to be duly
qualified. In New Jersey a candidate for admission to the practice
of law had to be recommended by the judges of the Supreme Court
to the Governor who licensed him, provided the candidate had
served a clerkship of three years if a college graduate, or four years
if a nongraduate. He also had to pass an examination before a com-
mittee of three out of the twelve serjeants who composed the
uppermost level of the New Jersey legal profession.127
Pennsylvania, by rule of its Supreme Court in 1788, required
either four years of clerkship and one year of practice in the Court
of Common Pleas, or three years of study and two years of prac-
tice as well as an examination by two approved lawyers, or two
years of clerkship or two years of practice as well as an examina-
tion if the candidate had commenced his legal studies after he had
reached the age of twenty-one. In Delaware as well as in Maryland,
three years of law study were required. In Maryland these studies
had to be pursued under the supervision of a practicing lawyer or
judge, and the candidate had to submit to an examination by two
members of the bar. In Virginia only one year of law study was
prescribed, while in South Carolina the applicant had to pass an

117 Ibid., 157, entry under October —1783.
118 Apparently the Massachusetts lawyers, who were mostly graduates from
Harvard College, did not think too highly of the education offered in other
colleges.
119 Clark, Jeremiah Mason 23 (1917).
120 Ibid., 21.
121 The Connecticut rule, which dates back to the year 1795, was estab-
lished by custom, but became a rule of the Supreme Court in 1807.
122 See, in general, Reed, "Training for the Public Profession of the Law," 15
Bulletin of the Carnegie Foundation for the Advancement of Teaching 82-87
(1917).
123 N.Y. (Coleman Cases) 32-33 (1797).
124 2 N.Y. (Caines) 418 (1804).
125 Ibid. See also 1 Caines 239 (1803).
(1907). Similar rules governed the admission of solicitors in chancery, with the
additional provision that the candidate had to pass a satisfactory examination
before the Chancellor, Vice-Chancellor, or any other officer of the court appoin-
ted by the Chancellor.
127 New Jersey retained until 1839 the title and rank of serjeant. See
Chovest, "The Legal Profession in Colonial America," part 2, 33 Notre Dame
examination unless he had served four years as a clerk with a practicing lawyer.  

In New England and in some of the Mid-Atlantic states, therefore, the requirements for admission to the bar at least for a while were fairly stringent. But in other parts of the country, especially along the frontier, there hardly existed anything resembling standards. It appears, however, that for reasons which at best might be described as a mere formality, the majority of the "western" states insisted that anyone wishing to become a lawyer had to submit to an examination. How deplorably lax, in the main, these examinations could be in some states may be gathered from the following incident: In Kentucky a candidate was unable to give one single correct answer. Nevertheless, he was admitted on the ground stated officially by the court which acted as an examining board that "no one would employ him anyhow." The question of character fitness of another candidate was duly met by the statement of the court that he "had never fought a duel with deadly weapons either in the state or without the state with a citizen of the state [of Kentucky]." Andrew Jackson, at the age of twenty-one, after a legal apprenticeship of rollicking travels with an itinerant court and the haphazard tutelage of the convivial Colonel John Stokes, in 1788 was found by the court to be "a person of unblemished moral character, and competent . . . knowledge of the law." In California two "law students," who clerked in the same building, had applied for admission to the bar. One day a member of the Supreme Court of California called upon one of these students and announced that he had come to ascertain his professional qualifications. The whole examination consisted in the question: "Is the Legal Tender Act constitutional?" The student replied: "It is!" Whereupon the judge observed: "I have just examined your friend in the other office and he says that the Act is unconstitutional, but we need lawyers who are able to answer great constitutional questions so quickly, right or wrong. You are both admitted."  

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128 For details on admission to practice in the various states, see Chapter V, below.  
130 Ibid.  

The Impact of the Revolution

In some parts of the country the antagonistic sentiment against the lawyer became one of the chief obstacles to the development of a strong and well-organized judicial system during the early period of American history. In many states the aversion to the lawyer went so far that almost anyone but a trained lawyer was regarded as a fit person to sit on the bench. Thus it came about that even the higher and in some instances the highest state courts were manned by people who probably excelled in their patriotic or "democratic" zeal, but had little or no training in the law. In New Hampshire, during the Revolution, Meshech Weare, a theologian and a person of many "extralegal" accomplishments, was Chief Justice of the Superior Court, and Matthew Thornton, 
THE RISE OF THE LEGAL PROFESSION

one of his associates, was a physician and, perhaps, a "metaphysician" of sorts, as well as the author of an unpublished essay, "Paradise Lost or the Origin of the Evil Called Sin Examined." While hearing a case, Thornton had the annoying habit of meditating on some lofty transcendental subject or of perusing a book on philosophy or theology, disdainfully to listen to the arguments of counsel. When once an exasperated lawyer complained of Thornton's undisguised indifference to what went on in his courtroom, the latter, with gentle composure, for a moment laid down the book he was studying and reassured counsel with the bland remark: "When you have anything to offer pertinent to the case on trial, the Court will be happy to hear you. Meantime I may as well resume my reading."

During the same period, Nathaniel Peabody and Jonathan Blanchard discharged the duties of attorney general for New Hampshire, although neither of them had any legal background. In 1782, Samuel Livermore became Chief Justice of New Hampshire. According to tradition, he "was as independent of conventionality as any living being could be. . . . He attached no importance to precedents, and to quote any would invite his anger. . . . Even when gross inconsistency marked his decisions . . . he was not disturbed, but merely replied that 'Every tub must stand on its own bottom.' He frequently cautioned the jury against 'paying too much attention to the niceties of the law to the prejudice of justice.' He was firm in his determination not to go back into the past in quest of authorities; so he laid down the inflexible rule that all reports of a date prior to the Declaration of Independence might be cited in his court, nor, however, as authorities, but as enlightening."135 Jeremiah Mason recalled that Livermore had "no law

Hampshire (1804), passim; Plumer, The Life of William Plumer 152 (1857). It should be noted that other states, too, made frequent use of lay judges. In Rhode Island, for instance, a blacksmith was judge of the highest state tribunal from 1814 to 1818; and from 1819 to 1826 the Chief Justice was a farmer. See also, in general, Dawson, A History of Lay Judges (1960).

134 Bell, Bench and Bar 28-30 (1842).

135 Quoted in ibid.


learning himself . . . [and] did not like to be pestered with it at his courts. . . . [L]aw books were laughed out of court."137 In 1790, Livermore was succeeded as Chief Justice by Josiah Bartlett, a physician. Simeon Olcott, who held the office from 1795 to 1801, "was more distinguished for the uprightness of his intentions than for his knowledge of the law . . . [and] he frequently made the law to suit the case."138 Hugh Henry Brackenridge, an Associate Justice of the Supreme Court of Pennsylvania, according to Horace Binney, "despised the law, because he was utterly ignorant of it, and affected to value himself solely upon his genius and taste for literature. . . . He once said to me . . . 'Talk of your Cokes and Littletons, I had rather have one spark of the ethereal fire of Milton than all the learning of all the Cokes and Littletons that ever lived.' . . . He hated Judge [Jasper] Yeates [a good judge, and a first-rate Pennsylvania lawyer] to absolute loathing. If Chief Justice [William] Tilghman [likewise an outstanding lawyer] had not sat between them, I think that Brackenridge would sometimes . . . have spit in Yeates' face, from mere detestation. . . . For Yeates was vastly his superior in everything that deserves praise among men. . . . It is not certain that Brackenridge was at all times sane, and he would have been just as good a judge as he was if he had been crazy outright."139

In New York, John Sloss Hobart, an Associate Justice of the Supreme Court, was not a lawyer, and the conditions prevailing at this court prior to 1804, the year James Kent became Chief Justice, were described as "very inefficient and unsatisfactory. . . . The cases that came before the court were slightly examined both at the bar and on the bench. . . . [T]alent and legal learning . . . had not been applied in that thorough, laborious and businesslike way so necessary to give strength and character to the court and to the law."140 The early courts of Vermont, we are told, "were badly

137 Clark, Jeremiah Mason 18 (1917).

138 Plumer, Life 151-52 (1877).

139 Binney, The Life of Horace Binney 40 (1903). See also the remark of Chancellor Kent: "The judges of the Supreme Court of New York (Morris, Yates and Lansing) were very illiterate as lawyers." Kent, Address of James Kent before the Law Association of the City of New York 6 (1836). "Our judges were not remarkable for law learning." Ibid., 2.
organized and usually filled with incompetent men." 141 In New Jersey, Isaac Smith, a physician by training, and Samuel Tucker, who had no particular training at all, were members of the Supreme Court. 142 In Rhode Island, Tristam Burges, primarily an orator and professor of oratory, was Chief Justice from 1817 to 1818, and James Fenner, a person little qualified to perform judicial duties, and Charles Brayton, a blacksmith by trade, were Associate Justices of the Supreme Court. Between 1819 and 1826, Isaac Wilbour, a farmer, held the position of Chief Justice. Samuel Randall, a professor of oratory, was Chief Justice from 1817 to 1832, was admitted to the bar two years after his retirement from the bench. 143 Jeremiah Mason recollects that Lot Hall, a Justice of the Supreme Court of Vermont, was "a man of ordinary natural talents, little learning, and much industry." 144 John Louis Taylor, the first Chief Justice of North Carolina, had only a smattering of a college education. He read law "without preceptor or guide," and he was admitted to the bar at the age of nineteen. 145

A judicial utterance which is perhaps most characteristic of this period was made by John Dudley, a trader and farmer by profession, who, between 1785 and 1797, was also an Associate Justice of the Supreme Court of New Hampshire: 146 "Gentlemen," he addressed the jury, "you have heard what has been said in this case by the lawyers, the rascals! ... The talk of law. Why, gentlemen, it is not law that we want, but justice! They would govern us by the common law of England. Common-sense is a much safer guide. ... A clear head and an honest heart are worth more than all the law of the lawyers. There was one good thing said at the bar. It was from Shakspeare [sic!], an English player, I believe. ... It is our duty to do justice between the parties, not by any quirks of the law out of Coke or Blackstone,—books that I never read and never will." 147 William Plumer, speaking from personal experience, insisted that Dudley "had not only no legal education, but little learning of any kind." 148 The action of a New Hampshire court which interrupted the reading from an English lawbook because the court allegedly understood "the principles of justice as well as the old wigged justices of the dark ages did," 149 perhaps illustrates best the spirit that permeated certain early American courts. Some of the judges in New Hampshire were not only prone to disregard the known principles of the law, but were inclined in some instances to meet out a very uncertain product of their own: "So much, indeed, was the result [of a lawsuit] supposed to depend upon the favor or aversion of the court, that presents from suitors to the judges were not uncommon, nor, perhaps, unexpected." 150 The bar, confronted with such an unprofessional bench, needless to say, was frequently compelled to adapt itself to these conditions, very much to the detriment of its own professional standards and accomplishments.

It should be borne in mind that the first state governments were largely characterized by what has been called "legislative supremacy."

141 Corning, "Highest Courts," loc. cit., 471. Plumer, Life 155-56 (1857). See also "Note" in 40 American Law Review 435-37 (1906). Compare this statement with what one of the delegates to the Indiana Constitutional Convention of 1850 said: "I have been a lawyer for some years, and I have no hesitation in telling gentlemen that I never studied Latin; and I will tell them further, that any man who studies Latin for the purpose of making himself a lawyer, is a fool for his pains." 2 Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 156 (1850). Justice Miller is reported to have pointed out that the prime factor in shaping the law in our western states was ignorance. The first judges, he insists, "did not know enough to do the wrong thing, so they did the right thing." Pound, The Formative Era of American Law 11 (1938). During the debates of the Indiana Constitutional Convention of 1850, a speaker quoted a judge as having said: "During the fifteen years that I practiced law, I can say with safety, that not one-half of the suits with which I was familiar, were decided upon their merits, or upon principles of substantial justice." 2 Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 158 (1850). 


144 Plumer, Life 150-56 (1857).

145 Plumer, Life 150-56 (1857).


147 Plumer, Life 150 (1857).
acy.” The will of the people in many instances was considered omnipotent, and the legislature was simply looked upon as the chief organ of this omnipotent popular will. Hence many of the earlier state legislatures did not hesitate to interfere with the traditional functions of the courts. They enacted statutes reversing judgments of the courts in particular cases, and they attempted to admit to probate wills previously rejected by the courts on good legal grounds; and they sought to dictate the details of administration of particular estates. By special laws they validated particular invalid marriages, and they attempted to exempt a particular wrongdoer from liability for a particular wrong for which his neighbors would be held liable by the general law as administered by the courts. They suspended the statute of limitations for a particular litigant in one case, and for particular and specified litigants they dispensed with the statutory requirements for bringing suit for divorce. Subordination of the courts to the “appellate jurisdiction” of the legislature (or the governor), as a matter of fact, was not uncommon in the early history of the United States. In some instances the judiciary was considered simply “a subordinate department of the government.” Under the doctrine of legislative supremacy or legislative sovereignty, the courts frequently held that any attempt on their part to review the validity of a legislative enactment would be simply the assumption of arbitrary power not warranted by law. Apparently no one supposed that “an act of the legislature, however repugnant to the Constitution, could be adjudged void and set aside by the judiciary.”

In colonial days, it will be remembered, appellate jurisdiction rested with the king and council. When the first state constitutions were adopted, courts of last resort were established to assume this function. But in some states appellate jurisdiction was vested in the legislature or governor. This practice prevailed in New York until 1846, and in Rhode Island until 1857. In New the executive had been creatures of the crown, the legislative assemblies, as the champions of the people’s interests, had assumed the initiative in the gathering drive for independence. Hence it is not surprising that the early state constitutions should grant the legislature sweeping and, frequently, too sweeping powers “to make all laws which shall be deemed necessary.” As often as not, such broad grants of power simply swept away the formal separation of powers among legislature, judiciary, and executive. Moreover, the legislature rather than the courts seemed to express more adequately the deeply ingrained localism in early American politics—the notion that the natural unit representing the sovereign people was the local assembly which, therefore, should have practically unlimited powers.

159 Chipman, Memoir of Thomas Chittenden 102 (1849).
161 Paine v. Ely, 4 Chipman (Vt.) 14 (1789).
162 Chipman, Memoir (1849).
163 Until 1835 the state of Georgia did not have a Supreme Court. The people of Georgia apparently feared the power of lawyers and judges who, it was alleged, would be beyond popular control (and popular whim) if fortified by a supreme court. When in 1835 the Constitution of Georgia was amended, provisions were made for a Supreme Judicial Court. But not until ten years later was the legislation necessary to put this court into operation enacted.
164 See, in general, Matthews, American State Government 330 (1924); Browne, “The New York Court of Appeals,” 1 The New York Law Journal 277, 279 (1890); Eaton, “The Development of the Judicial System in Rhode Island,” 2 Yale Law Journal 148, 153 (1905). When the legislature could not be induced by the people to interfere with the courts, frequently violent action was taken against the courts as, for instance, in Shays’ Rebellion in Massachusetts, the Whiskey Insurrection in Pennsylvania, and the antient disorders in eastern New York.
165 See Browne, “New York Court of Appeals,” loc. cit.
166 See Eaton, “Development of the Judicial System,” loc. cit.: “After the constitution the more usual course for the assembly was, not to hear the petition,