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The New York City Corporation Counsel and the development of municipal law, 1801–1898. (Volumes I and II)

Gilbert, Judith A., Ph.D.

City University of New York, 1995

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THE NEW YORK CITY CORPORATION COUNSEL AND THE DEVELOPMENT OF MUNICIPAL LAW, 1801-1898

by

JUDITH A. GILBERT

VOLUME I

A dissertation submitted to the Graduate Faculty in History in partial fulfillment of the requirements for the degree of Doctor of Philosophy. The City University of New York.

1995

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CHAPTER I

INTRODUCTION

There are as many ways of looking at the city as there are observers trying to understand it. The geographer, the economist, the political scientist, the sociologist, and the anthropologist each sees a different city. The same collection of people and buildings seen through their eyes becomes variously, in the words of Lewis Mumford, "a geographic plexus, an economic organization, an institutional process, a theater of social action, and an aesthetic symbol of collective unity."[1] To find answers to their questions, urban historians have learned to use economics, geography, political science, sociology, anthropology, and other disciplines. Yet, intimidated by its mystifying language and the clannishness of the profession, urban historian have seldom ventured into a particularly useful field--that of the law.

What the city is and what it can and cannot do has been defined over time by the law. The modern urbanite takes the present state of the city for granted. He

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[1]Lewis Mumford, The Culture of Cities (New York: Harcourt, Brace and Company, 1938), p. 480.

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expects the municipality to provide streets for his automobile, police and fire protection for his safety, schools for his children, water for his shower, curbside pickup for his garbage, a park for his jogging--and a tax bill at the end of the year. Yet the city did not always provide these and many other services; it had to develop a legal capacity to do so. On the other hand, it once did many things it no longer has the legal capacity to do; the modern urbanite does not expect his city to exclude "strangers and petty chapmen," to fix the price of bread, or to drag him from midnight sleep to walk a "rattle watch."

The role of the law in the development of the American city is crucial both to understanding how it arrived at its present state and to projecting its future direction. Just as geography, economics, sociology, and other disciplines have their own perspectives on the city, so does the law. The lawyer sees the city in a highly specialized way--as a municipal corporation. To him, the city is a person, albeit an abstract, invisible one. It is difficult to pin down exactly what it means to be a corporation--the definition of "corporation" in Black's Law Dictionary runs on for four pages--but Chief Justice John Marshall captured its essence over a century and a half ago in Dartmouth College v. Woodward:

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> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence . . . . Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual.[2]

The concept of the city as a corporation is a particularly useful legal fiction. Because of it, the city can deal handily with real estate; it can buy, sell, lease, and hold property like any other person. It can make contracts, and these contracts will be binding because it has the same standing in court as a "real" person. Acting through an attorney, it can go to court and file complaints, seek injunctions, pursue judgments, sue and be sued just as any other litigant. Moreover, it can manage its own affairs, to the extent allowed by the state, by making its own bylaws and ordinances.

At its most basic level the concept of the city as a corporation is a convenience, enabling its many people to act as one and to do things that would be awkward as so many individuals. Perhaps the people of a city, for example, decide they would like to buy land and build a park for their children. The project would quickly bog down if

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[2]Trustees of Dartmouth College v. Woodward, 4 Wheaton (17 U.S.) 517 (1819). Marshall drew on Edward Coke's classic Case of Sutton's Hospital (1613), 10 Coke Reports 23a, at 29b, 32b.

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all the residents had to approve every detail and sign every piece of paper. It makes more sense to delegate authority to a few officials who can act in the name of the whole city and treat thousands of individual transactions like one. But being a corporation involves more than simply letting trustees handle communal affairs; the significance of the concept goes beyond this level of convenience. What makes the idea a truly powerful one is that the corporation brings to the city a unique ability to transcend time and the changing composition of its membership. It recognizes the city's historical dimension; the metropolis, rather than being rooted in the people and buildings existing in a present moment, extends back into the past and projects itself forward into the future. Under the guise of the municipal corporation the city, in Edward Coke's words, lives on, "invisible and immortal."[3] In 1765, in his Commentaries on the Laws of England, William Blackstone compared the corporation to a river:

> . . .for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.[4]

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[3]Sutton's Hospital, 10 Coke Reports 23a, at 32b.

[4]Sir William Blackstone's four-volume Commentaries on the Laws of England was first published by the Clarendon Press at Oxford between 1765-69); the quotation is at vol. 4, p. 468 in the 7th Clarendon edition (1775).

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On a practical level, it is this concept that empowers the officers of municipal government to act with confidence on behalf of the city. Without it, even something as simple as a park project would present great legal awkwardness. Who, for instance, would own the park that the city bought? Would the fee be in all those who were citizens when title passed, entangling ownership in probate as each willed a share to his heirs? If municipal officials borrowed money to build the park, could the lender count on the debt's being binding on the next administration? If the swings and slides were never delivered, could a new mayor and council enforce a contract made by the old? In the absence of a corporate identity, the city would be hobbled by what Chief Justice John Marshall called "the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances."[5] With it the city acquires the legal attributes that empower it to act through time for all its citizens--unity, continuous legal identity, and perpetual succession.[6]

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[5]Dartmouth v. Woodward, 4 Wheaton 636 (1819).

[6]Stuart Kyd, in A Treatise on the Law of Corporations, 2 vols. (London: Butterworth, 1793-94), vol. 1, pp. 3-13, argues that these attributes, while characteristic of the corporation, are not unique to it. However, his claim that English villages, counties, hundreds, and parishes achieved the same results without incorporation is not altogether convincing; for instance, the example of the use of a board of trustees to accomplish perpetual succession illustrates the very awkwardness Marshall had in mind. In general, the corporation is such a useful concept that American judges have found it convenient to treat aggregate groups as corporations whether they are in fact or not. These include not only "quasi-corporations" such as villages, towns, counties, school districts, drainage districts, fire districts,

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On a more abstract level, this same concept has profound implications for the city. Writing in the eighteenth century, Blackstone had in mind an essentially static municipal corporation whose individual inhabitants, but little else about it, changed over time; he chose for comparison the Thames River, flowing on its ceaseless course past ancient banks. When the treatise writer John Dillon paraphrased Blackstone for American lawyers of the 1870's, he changed the analogy to the Mississippi River.[7] The change was perhaps more apt than Dillon himself realized, for the American city was not so much the Thames as it was the river of his Iowa boyhood, that rambunctious river, as Mark Twain bragged, "whose alluvial banks cave and change constantly, whose snags are always hunting up new quarters, whose sandbars are never at rest, whose channels are forever dodging and shirking."[8] Tremendous changes were

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and the like, but occasionally even states and the United States government. See Eugene McQuillin, The Law of Municipal Corporations, 3rd Ed. [by Charles R. P. Keating] (Wilmette, Ill.: Callaghan & Company, 1987), secs. 2.03, 2.12, 2.16.

[7]John F. Dillon, The Law of Municipal Corporations, 4 vols., 2nd ed. (New York: James Cockcroft & Co., 1873), vol. 1, p. 92.

[8]Samuel Langhorne Clemens [Mark Twain], Life on the Mississippi (New York: Harper & Brothers Publishers, 1883), p. 86. Dillon and Clemens were contemporaries who grew up in small river towns along the upper Mississippi; a description of Dillon's boyhood in Davenport, Iowa, could have been lifted from a biography of Twain's in Hannibal, Missouri: "The little Dillon boy . . . was down at the river front to see the steamer arrive, an event of no little importance" [Harry Hubbard, "John F. Dillon: Fourteenth President of Association," American Bar Association Journal vol. 14 (February 1928), p. 77].

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sweeping down on urban America--an exploding population, a flood of rural and foreign immigrants, commercial and industrial development on a staggering scale, new technologies in construction, transportation, and communication. The changes brought benefits to the city, but also gave rise to crime, poverty, dirt, disease, crowding, noise, traffic congestion, water shortages, fires, and other undesirable side effects. Struggling to cope with these problems, the city had both to transform itself but at the same time maintain its identity. Twain was dismayed to find engineers eagerly redefining his river with jetties, levees, and dredges; observers like Dillon, with mixed emotions, found judges and lawyers redefining the city's legal status and opening new channels for its powers. The city, like the river, lived on because it had an identity transcending time and change--in the case of the city, the municipal corporation. The city saved itself by redefining the person it was; in the parlance of legal historians, it "invented" a new law of municipal corporations.[9]

In this process New York City played a leading part. Even today New York City is considered "a kind of early-

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[9]The concept of the "invention" of municipal law has been developed in its fullest by Hendrik Hartog in Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870 (Chapel Hill: The University of North Carolina Press, 1983).

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warning zone for urban problems that overtake other American cities."[10] It was even more so in the nineteenth century, for while other American cities had problems with rapid urbanization, New York typically had them "first and worst" and with few precedents to guide its leaders. In fact, it was often the experience of New York that established precedent for other cities. With problems pressing on them and the citizenry clamoring for action, the mayor and aldermen grappled with one crisis after another, trying first one solution and then another until they hit on something that seemed to work. Often their efforts brought them into unexplored legal territory, where there was no body of law to guide them. There was in fact nothing resembling modern municipal law until nineteenth century American cities, with New York in the lead, invented it. It was formed case by case, often from New York State Supreme Court decisions on litigation rising from New York City. Courts in other states often found these decisions persuasive in deciding their own cases--citing, for example, Mayor v. Bailey as a precedent in 153 decisions--so that what had happened in New York City began to determine what was possible in Chicago, Cleveland, and St. Louis.[11]

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[10]New York Newsday, 22 October 1989, p. 51 [interview with Peter Salins, senior fellow at Manhattan Institute for Policy Research].

[11]Search of Mayor v. Bailey, 3 Hill 531 (1843) and 2 Denio 433 (1845), in Shepard's New York Court of Appeals Citiations, Part 6 (1987), Pp. 909, 946-47.

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By the 1870's there was so much case law on cities that Dillon was able to draw it all together as a new body of law--"the law of municipal corporations."[12]

"Commentators such as Dillon did not always like what the New York courts did, but they had to recognize that New York decisions established much of the conceptual framework of municipal corporation law," notes legal historian Hendrik Hartog. "Cases involving the corporation of the city of New York as a litigant became leading cases, cited throughout the country as authoritative statements of the nature of local governments generally."[13]

The city's advocate in this process was its corporation counsel, an officer who by the end of the century commanded a Law Department that was larger than any legal firm in the world.[14] When the Mayor and Aldermen weighed courses of action, he tried to anticipate the legal consequences and counseled them with both informal and written opinions. When officers of municipal government had legal questions, he advised them; when their actions landed them in court, he represented them. In the landmark cases that made the

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[12]Dillon, Municipal Corporations, 2nd ed. Examples of the New York influence can be seen in cases cited throughout the work; see, in particular, case notes for secs. 40, 306, 735, and 892.

[13]Hartog, Public Property and Private Power, p. 224.

[14]"World's Largest Law Office Here," New York Times, 3 May 1903, sec. 2, p. 9. Not until after the New Deal did it become surpassed in size by the U. S. Department of Justice.

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new law of municipal corporations, he represented the urban interest. If New York state judges were the architects of the new municipal law, he was its chief engineer.

Legal historians have traditionally focused on appellate judges and their decisions because of the assumption that the common law is "judge-made." That is, judges explain in their decisions why they have ruled for one side or the other in the case before them, and in time other judges borrow these reasons to explain their own rulings in similar cases. State appellate courts furnish what are called the "leading cases" in common law, the decisions that are not only binding on inferior courts within the state but persuasive precedents for judges in other states. Followed long enough, these decisions become legal doctrine and make their way into treatises and textbooks. It is only natural, therefore, that scholars should have concentrated their attention on these judges and their decisions that "make" the law.[15]

But to do so is to ignore what legal historian Lawrence Friedman calls "the input side" of the law and to deal with law as an abstract mental exercise taking place in the

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[15]For a fuller explanation of the American legal process, see Bernard F. Cataldo and others, Introduction to Law and the Legal Process, 3rd ed. (New York: John Wiley & Sons, 1980), pp. 1-15, 66-97. Appellate judges may, of course, overturn earlier decisions of their own court, but even they they do not disregard precedent as much as re-interpret it; typically, in such reversals they explain their reasoning at length and, when possible, buttress it with citations to cases other than the one being overturned.

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minds of judges. "Doctrines do not come from thin air," argues Friedman. "Intellectual debate does not make case-law; cases are controversies, and they presuppose conflicts, not to mention people and groups who take steps to set the legal process in motion."[16] Nowhere is this truer than in relation to the development of municipal law. The new municipal law rose from the streets of the city itself, from urban problems and urban conflicts, and from the city's response to them. The judges "invented" this law in the sense of reasoning through to new theories to fit new conditions, but they did not invent the cases from which the law was made nor the conflicts that brought the cases to court. They were unable to rule on an issue until it came before them in the form of a case, and their thinking was shaped by the arguments and briefs of counsel. The aphorism that "law is the adoption by the judge of what is proposed at the bar"[17] goes perhaps too far, but in reaching their decisions New York judges gave close attention to the arguments of the corporation counsel or one of his assistants. By the end of the nineteenth century it was generally recognized that the most noted experts in municipal law were to be found not on the bench or even in

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[16]Lawrence M. Friedman, The Legal System: A Social Science Perspective (New York: Russell Sage Foundation, 1975), p. 2.

[17]Aphorism from Simeon E. Baldwin, quoted in Benjamin Twiss, Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court (New York: Russell & Russell, Inc., 1962; orig. 1942), facing p. 1.

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the law schools but, by virtue of experience, in the office of the New York City corporation counsel.[18]

Appellate judges were at one end of a long chain of events, each link of which played a part in developing the law. Law might be made very early on simply by doing nothing; authority given the city by charter, for instance, was sometimes frittered away by failure to assert it. The Common Council made law when it passed ordinances enlarging the city's sphere of action and exposing it to litigation. City officers and employees, from department heads to the pick-and-shovel brigade, made law when they carried new policy into the streets of the city. Mayors made law each time time they decided whether to pursue a case or settle it, whether to accept a lower court ruling or appeal it. And looking over all their shoulders, the corporation counsel--with his responsibility for conducting all the city's legal business--was involved in the whole chain of events.

For that reason alone his office provides a particularly useful overlook for following the development of municipal law in New York City. But there is an even

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[18]A number of assistants in the office were leading experts in specialized fields of the law: David J. Dean (municipal corporations), Francis I. Wellman (personal injury), William J. O'Sullivan, M.D. (environmental law), William P. Prentice (housing and building regulation), Francis L. Stetson (corporation law), and Theodore Connoly (appeals). For the reputation of the office within the profession, see Arthur C. Butts, "A Great Law Office," The American Lawyer, vol. 15 (June 1906), pp. 247-49.

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more powerful reason to examine the process from the perspective of the corporation counsel's office. In the words of a recent holder of the office, Frederick A. O. Schwarz, Jr., the office stands "at the juncture of law and policy."[19] Indeed, as legal historian Willard Hurst argues, there is no way to understand law in isolation from policy, no true distinction between the two. Law, in his view, is not a thing separate and complete in itself but a product of the functions of all legal agencies--legislative, executive, administrative, and judicial--and of their interplay with voters and nonvoters, lobbyists and interest groups, politicians and political parties.[20]

In the midst of all these has been the corporation counsel. As his monopoly of all the City's legal business began to be recognized in the nineteenth century, he dealt with all branches of the municipal government, working closely with the mayor, the aldermen, and the heads of departments. But in addition, he was a politician himself, owing his position as much to the clubhouse or the mayor's favor as to his standing in the local bar. He was often chosen for purely political reasons--for being a Tammany stalwart, for instance, or a prominent Irishman. The Law Department became a convenient place where party bosses

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[19]New York City Law Department, Annual Report (1985-86), p. 30.

[20]James Willard Hurst, Law and Social Order in the United States (Ithaca: Cornell University Press, 1977), p. 25.

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could park the rising or falling politician--a plum for the retired judge needing a few more years on the public payroll, or, for the younger man, a stepping stone to higher public office or partnership in a prestigious law firm. The office of corporation counsel was at the center of New York City's complex web of politics and power. Its incumbents were typically on intimate terms with key individuals on all levels of government, in political clubs, in private law firms, in corporate boardrooms, in civic and social clubs.

This mingling of politics and business with the city's law practice had pitfalls for the unwary; corruption, or even the suspicion of corruption, could put the corporation counsel under a cloud. But more often his insider status gave him an edge in promoting the city's objectives. He could open doors that otherwise would have been closed to the city, take shortcuts through informal channels of power when he ran aground in official ones. He knew how to get things done and when not even to bother trying, the virtue of patience and the value of favors. He straddled the political system and the legal system and worked in both to bring law into being. But in doing so, he did even more. The function of law, Hurst asserts "is not only to apply existing policy but to bring public policy into being."[21]

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[21]Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915 (Cambridge: Harvard University Press, 1964), p. xi.

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It is in this sense of the law that the corporation counsel is most worth watching. He has been at the center of the effort to bring a new urban policy into being, winning for the city the legal capacity to meet the rapidly changing needs of the new metropolis.

The development of his office and the development of municipal law can hardly be separated, at least insofar as the law's origins in New York City are concerned. Consequently, this study follows both more or less in tandem, interspersing material about the office's institutional history with material about its role in shaping new law. It is divided into three parts, corresponding to the main stages in the evolution of the office. The first part describes its development as a separate office of city government between 1784 and 1849 and examines its role in the major legal controversies of this period. The second part deals with the founding of the Law Department in 1849 and its administration for the next quarter-century by an elected corporation counsel, assessing along the way the damage done both to the office and to the law itself by the Tweed Ring and others. The third part picks up the story in 1875, by which time the corporation counsel had become a mayoral appointee; it describes the rehabilitation of the office under a "reform" administration, its subsequent organization into a large bureaucratic office, and its

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increasing policy-making role. The study ends with the adoption of the Great Charter of 1898, with New York City ranking as the greatest city in America and the corporation counsel one of its most influential officials.

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CHAPTER II

FROM RECORDER TO CORPORATION COUNSEL, 1800-07

The idea of having a separate officer devoted exclusively to the city's legal affairs--a "counsel to the corporation," or, more familiarly, "corporation counsel"--was a new one in nineteenth century New York City. Up to that time the city's legal affairs had been handled by an official called the recorder, an officer who dated back to colonial days and who filled a number of functions in municipal government, among them the role of corporation counsel. The separation of the office of corporation counsel from the recordership happened more by default than by design, coming about almost unnoticed in the course of a larger political upheaval in 1801. To understand the role of the early corporation counsel, one must understand both its origins in the earlier office and the circumstances by which it became an independent office.

The recorder was a unique official who has no modern counterpart but who was at the time second in power and prestige only to the mayor himself.[1] He belonged to a

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[1]An estimation accorded him by Sidney I. Pomerantz, New York, An American City: 1783-1803, (Port Washington, N.Y.: Ira J. Friedman, Inc., 1965; orig. 1938), p. 42.

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centuries-old tradition of English municipal government which had been transplanted more or less intact by the Dongan Charter of 1686--an "undifferentiated" administration in which the same set of officers (the mayor, the recorder, and the aldermen) served simultaneously in legislative, executive, and judicial capacities. That is, as members of the Common Council they enacted ordinances and served on executive committees, and at the same time sat as judges in the city's busiest civil and criminal courts.[2]

The recorder occupied a special place in this government. From his title it might be supposed that he was someone like a city clerk, responsible for entering the acts and proceedings of the corporation into an official public record, but in fact the name of the office comes from two obsolete meanings of the word "record": to learn by heart or commit to memory, and to call to mind or remember.[3] One of the legacies of medieval English borough

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[2]The term "undifferentiated administration" is borrowed from Jeffrey Wood Hoyt, Abuse of Power: New York City and the Formation of Municipal Law, 1846-1866 (Ph.D. diss., University of Virginia, 1983), p. 43. Arthur Everett Peterson, in his New York as an Eighteenth Century Municipality: Part I, Prior to 1731 (New York: Columbia University Press, 1917), calls it an "administrative-legislative-judicial magistracy" (pp. 9-10). For the lack, in general, of any separation of powers in colonial municipal government, see also Ernest S. Griffith, A History of American City Government: The Colonial Period (New York: 1938), pp. 99-125.

[3]Literally, from the Latin re (again) + cor, cord (heart). See James A. H. Murray, ed., The Oxford English Dictionary (Oxford: The Clarendon Press, 1961), vol. 8, p. 268.

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government, the recorder was (in the words of the Oxford English Dictionary) "a person with legal knowledge appointed by the mayor and aldermen to 'record' or keep in mind the proceedings of their courts and the customs of the city."[4] But the recorder was more than just a passive rememberer. He was responsible for drawing on this knowledge and advising the mayor and aldermen how to apply it to matters at hand; the opinions he rendered were, in fact, legally binding on them.[5]

The New York City recorder was patterned after the recorder of London, whose office had been instituted in 1419.[6] Like his counterpart back in the mother country, the New York City recorder sat in the Common Council as a voting member, advising the mayor and aldermen and serving on their administrative committees. He also sat with them in the Mayor's Court and the criminal Court of Sessions, acting both as judge and as adviser. In addition, he served as a stand-in for the mayor, handling certain of his

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[4]Ibid. As a colonial official, the New York City recorder was appointed by the provincial governor rather than by the mayor and aldermen.

[5]Ibid. See also Henry Thomas Riley, trans., Liber Albus: The White Book of the City of London. Compiled A.D. 1419 by John Carpenter, Common Clerk, and Richard Whitington, Mayor (London: Richard Griffin and Company, 1861), pp. 38, 268. For the place of the recorder in later English borough government, see Sidney James Webb and Beatrice Webb, The Manor and the Borough (London: Longmans, Green & Co, 1906), p. 323.

[6]Riley, Liber Albus, pp. 38, 268.

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duties when requested and filling in for him when he was absent. It was not unusual for the recorder to summon the Common Council, preside over its meetings, hold sessions of court, administer oaths, greet visiting dignitaries, and represent the city in ceremonial occasions. And although the charter was silent on the subject, it was customary for him to handle the city's legal affairs as well. That is, he managed the city's cases, drew up deeds and contracts, searched titles, negotiated sales and leases, wrote bills and ordinances, and gave legal advice to other officers.[7]

The office continued after the Revolution, with the only formal change being that its holder (serving "at pleasure" rather than for a fixed term of years) was appointed by the state Council of Appointment rather than, as previously, by the governor himself.[8] But if the office had not changed, the circumstances under which it operated did as the city grew from about 22,000 residents before the war to more than 60,000 by 1800. Like the mayor and aldermen, the recorder found new demands placed on his time, particularly in court. The Mayor's Court, which had originally met every Tuesday, expanded its sittings to

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[7]Peterson, New York Prior to 1731, pp. 14-15, and George W. Edwards, New York as an Eighteenth Century Municipality, 1731-1776 (New York: Columbia University Press, 1917), pp. 25-27.

[8]For a history of the Council of Appointment, see Hugh M. Flick, "The Council of Appointment," New York History, vol. 15 (1934), pp. 262-98.

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three days in 1787 and then to five in 1800, and the criminal courts lengthened their calendars as well.[9] As residents began demanding more services from their city government, meetings of the Common Council grew longer and dealt with more matters, and its administrative committees began functioning almost as executive departments of city government.[10] Finding it increasingly difficult to handle all their traditional duties, by the end of the eighteenth century the recorder and the city's other officials began to specialize and to carve out special niches for themselves. The mayor began spending less time in court and more on administrative matters, and the aldermen quit attending Mayor's Court and concentrated on the Common Council. With more judicial work falling on him as a result, the recorder began skipping meetings of the Common Council and spending more time in court.[11]

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[9]Pomerantz, New York, pp. 55, 308-10.

[10]The real problem was not so much the meetings themselves (which were held only one day a week, generally in the evening) but the inordinate amount of time spent during the week on committee business. Members of these committees dealt with an incredible amount of administrative minutiae--everything from acting as prime contractor in building the new City Hall [Minutes of the Common Council of the City of New York 21 vols. (New York, 1917-30), vol. 3, pp. 166-68] to arranging for two butchers to exchange stalls in the market [ibid., p. 195] to mediating complaints that sea vessels were not leaving enough room at the piers for river boats [ibid., p. 233]. The minutes are hereafter cited Common Council, Minutes.

[11]Although the process of differentiation would not be completed until the middle of the nineteenth century [Hoyt, Abuse of Power, pp. 42-61], it was already well underway by end of the eighteenth. In 1797 by their own request the aldermen were excused by state law from sitting in the Mayor's Court [New York, Laws (1797), ch. 8] and practically never did so again, although they did not lose the right to do

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Exactly what was happening to the role of corporation counsel is difficult to determine, but judging from the minutes of the Common Council it was beginning to change as well. To an extent the first three post-Revolutionary recorders--Richard Varick, Samuel Jones, and James Kent--continued to tend to the city's legal affairs much as their predecessors had. Varick, for instance, took part in a revision of the local slave code, drafted a law regulating the sale and cartage of hay, and sued squatters whom the Common Council detected making "great encroachments" on the Fresh Water Pond.[12] Jones drafted a law regulating the use of stoves in workshops, conducted several ejectment suits, and defended the corporation against a claim by Edward Livingston for a part of the Battery.[13] Kent sued Daniel Dunbar for intruding on the city's waterfront and advised aldermanic committees dealing with regulations for the Almshouse, a new water supply, and school legislation.[14]

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so until in 1853 [Ibid. (1853), ch. 217, sec. 6]. For the diminishing judicial role of the mayor and aldermen and the increasing role of the recorder, see Charles P. Daly, "A History of the Court of Common Pleas," preface to 1 E. D. Smith (N.Y. Common Pleas) Reports, p. lxxviii. For the decreased presence of the recorder in meetings of the Common Council, see the entries for absences in Common Council, Minutes, Index, for Varick, p. 1334; Jones, p. 697; Kent, p. 708, and Harison, p. 598.

[12]Ibid., vol. 1, pp. 31, 181, 337.

[13]Ibid., pp. 449-500, 732, and vol. 2, p. 112.

[14]Ibid., pp. 365, 343, 347, 401.

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At the same time, however, these recorders allowed an increasing amount of the city's legal work to go to a variety of other lawyers, either to private attorneys or to other officers of city government. Instead of drafting all the city's legal documents themselves, for instance, they let the city clerk, lawyer Robert Benson, share in the work and collect the fees involved.[15] They acquiesced in the appointment by the Common Council of a new officer called the "attorney to the corporation," who took over the time-consuming duty of prosecuting violators of the city's ordinances.[16] And they (or the Common Council, with their permission) increasingly retained outside counsel to handle a wide variety of legal matters for the city. When Varick was recorder, for instance, the aldermen sought the opinions of Alexander Hamilton and Samuel Jones on a boundary dispute with Peter van Zandt, and when Brooklyn tried to tax the city's ferry landing they authorized Varick to "take such Measures and employ such Council [sic] as may be necessary for defending the Rights of this Corporation."[17] Similarly, when Jones was recorder the Common Council con-

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[15]See, for instance, ibid., vol. 1, pp. 547, 548, 647 [contracts]; 549, 656, 660, 671-72 [grants of water lots]; vol 2, pp. 408, 151 [leases]. The lawyer's fee for preparing such documents was customarily paid by the recipients.

[16]This office was created in] and filled by John Cozine until his death in 1798 [ibid., vol. 2, p. 510.

[17]Ibid., pp. 381, 238.

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sulted Egbert Benson and Richard Harison in an election dispute, retained John Cozine to conduct a breach of covenant suit, and authorized Jones "with such counsel as he may employ" to challenge an encroachment on Burling's Slip.[18]

For the most part, these recorders were not particularly interested in the general practice of law--conveyancing, drafting contracts, searching land titles, general trial work, and the like--but were instead what was called at the time "chamber counsel." That is, they were office lawyers who provided legal advice, frequently of a type requiring specialized research and written as a formal opinion, both to lay clients and to other lawyers. In addition to giving advice on the substance of the law, they also provided guidance to other lawyers in negotiating the subtle intricacies of common law pleading--a bewildering thicket of such ancient forms of action as assumpsit, trespass, trover, replevin, and the like.[19] The end prod-

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[18]Ibid., pp. 631, 291, 762.

[19]For an explanation, in layman's language, of this system, see Charles Rembar, The Law of the Land: The Evolution of Our Legal System (New York: Harper & Row, Publishers, 1989; orig. Simon and Schuster, 1980), pp. 224-48. A more technical explication is given by William E. Nelson in his Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (Cambridge: Harvard University Press, 1975), pp. 69-88. Nelson's work concentrates on Massachusetts; for an examination of pleading in New York, which was somewhat more resistent to change, see Herbert A. Johnson, "Civil Procedure in John Jay's New York," American Journal of Legal History, vol. 11 (Jan. 1967), pp. 69-80. Some idea of the task facing the practicioner can be gained from an examination of a contemporary manual by George Gaines, Practical Forms of the Supreme Court, Taken from Tidd's Appendix of the Forms of the Court of King's Bench, in

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uct of centuries of English court procedure, it was, in the words of a satiric poem of the day, a species of law characterized by

> Stuttering abbreviations mystic,
> In sign and token cabalistic,
> Latin surcharged with Norman French,
> Returnable to Common Bench;
> A mixture, which like that of Babel,
> The Shrieve to construe [is] not able.[20]

Like their colonial predecessors, the post-Revolutionary recorders were masters of this arcane branch of knowledge and responsible for guiding their lay brethren in government through its snares. They were, in fact, some of the leading legal minds of their time; Varick and Jones were chosen to examine the old colonial statutes and to identify and re-write the ones worth saving as laws of the

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Personal Actions, and Adapted to the Supreme Court of the State of New York (New York: Alsop, Brannon & Alsop, 1808).

[20][John Anstey], The Pleader's Guide, A Didactic Poem, in Two Books, Containing the Conduct of a Suit at Law, With the Arguments of Counsellor Bother'um and Counsellor Bore'um, in an Action Betwixt John-a-Gull and John-a-Gudgeon, for Assault and Battery, at a Late Contested Election (Philadelphia: Samuel Akerman, 1803; "first American, from the London Edition"], p. 37. Pleading, which had as its aim the refining of a case into one single definable legal question, served another purpose as well. In dealing with a client who could not negotiate the system without him, a lawyer was tempted, as Anstey put it [p. 22],

> . . . with serious face,
> To puzzle and perplex his Case,
> Then give his Purse a gentle squeeze,
> And taste the flavour of his fees.

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state,[21] and Kent (only thirty-four at the time of his appointment) was already deep in the study that would later bear fruit as his Commentaries on American Law.[22]

Fortunately for the city, these recorders were at a stage in their careers where they did not have to concern themselves greatly with pursuing a general practice. Varick and Jones were wealthy enough to take on only what legal work appealed to them and to devote most of their time to public service.[23] Kent, while far from wealthy, had by this time a decent income from counsel fees and a position in chancery court, and regarded his appointment of recorder as a means of abandoning his law office altogether. "This was very gratifying to me, because it

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[21]A codification not separately published but carried out as a series of acts passed by the 1787 legislature; see Arthur W. MacMahon, The Statutory Sources of New York City Government (New York: Columbia University Press, 1923), p. 4, n. 1.

[22]James Kent, Commentaries on American Law (New York: O. Halstead, 1826-30), 4 vols. This work--one of the most influential in American law--is the end result of a lifelong study of jurisprudence, and some of its strands can be traced back to a series of law lectures delivered at Columbia College in 1795 [James Kent, Dissertations: Being the Preliminary Part of a Course of Law Lectures (New York: George Forman, 1795)].

[23]Varick hardly practiced law at all, devoting most of his time to public office (he was mayor from 1789 to 1801) and to real estate speculations (he was one of the founders of Jersey City). For a biographical sketch, see The National Cyclopaedia of American Biography (New York: James T. White & Company, 1906), vol. 13, pp. 471-72. Jones, a nephew of colonial recorder Thomas Jones, came from landed Long Island gentry and, through his mother, inherited a sizable portion of Manhattan's Haring farm. See ibid., vol. 11, p. 489, and John H. Jones, The Jones Family of Long Island (New York: Tobias A. Wright, 1907), pp. 102-09.

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was a judicial office," he wrote later, "and I thought it would relieve me from the drudgery of practice, and give me a way of displaying what I knew, and of being useful entirely to my taste."[24]

The next recorder, Richard Harison, did not see things that way at all. Employing a succession of clerks and partners, he had one of the busiest and most successful general law practices in the city and took on the whole range of legal matters concerning New Yorkers--commercial law, contracts, insurance, real estate, inheritance, admiralty, corporation law, and criminal matters.[25] He was, in fact, one of the lawyers to whom the other recorders had regularly farmed out their work, and one of the

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[24]From an autobiographical sketch furnished to Thomas Washington in 1828, printed in Katherine Schuyler Baxter, A Godchild of Washington: A Picture of the Past (London: F. Tennyson Neely, Publisher, 1897), pp. 382-91, at 388-39. See also William Kent, ed., Memoirs and Letters of James Kent, LL.D. (Boston: Little, Brown, and Company, 1898), pp. 82-83, and for a scholarly biography John T. Horton's James Kent: A Study in Conservatism, 1763-1847 (New York: D. Appleton-Century Company, 1939).

[25]For the scope of his practice, see "Letter Books" and "Opinions" in Richard Harison Papers, New-York Historical Society, and for his life in general, David McAdam and others, History of the Bench and Bar of New York (New York: New York History Company, 1897-99), vol. 1, p. 353. Kent ranked him with Alexander Hamilton as a leading innovator in the law, asserting (in a declaration that must be taken as hyperbole) that "our jurisprudence was a blank when Hamilton and Harison first began by their forensic discussions to introduce principles and to pour light and learning upon the science of the law" [William Kent, Memoirs and Letters of James Kent, p. 59.

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things that attracted him to the post was that he could take on the city as yet another client.[26] Harison's official commission from governor John Jay appointed him recorder "[t]ogether with all fees, salaries, privileges, benefits, rights, perquisites, profits and advantages"--among them, presumably, a claim to the city's law business.[27] But he soon discovered that it was no longer certain that the recorder was to be deemed ex officio corporation counsel. It had been a matter of custom rather than law, part of those duties which, in the words of the Dongan charter, everyone assumed "appertained or belonged" to the office.[28] By the time Harison took office, his predecessors' lack of interest in asserting their right to the city's legal business had weakened the force of this custom.

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[26]For his retainers as outside counsel, see Common Council, Minutes, Vol. I, Pp. 681, 692, 735, and Vol. II, Pp. 15, 17, 47, 263-65. Unlike his predecessors, Harison seems to have had his practice organized so that he could easily absorb the city's legal business. At the time of his appointment, he had taken on his son George as a partner, and later entered a loose partnership with Caleb Riggs; he also had a series of bright young clerks to whom he delegated much of his routine legal work. For glimpses into this side of his practice, see Gouverneur Morris to Harison, Aug. 6, 1888, and Harison's letter to "Dear Sister," Nov. 11, 1894, both in Harison papers, box 1.

[27]The parchment commission, to which is attached a medallion hanging from a red ribbon, is in the Harison papers, box 2.

[28]Rather than list the recorder's duties in detail, the charter authorized him to "doe and Execute" all things which "appertain or belong" to the office, the unstated assumption being that everyone knew what those were. See Dongan Charter, in Seymann, Charters, p. 286.

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Harison began by taking two actions that, although unanticipated at the time, would have far-reaching consequences. Like many careful lawyers, he had become punctilious about securing from his clients a general warrant of attorney authorizing him to act on their behalf. "Regularly both Plaintiff & Defendant ought to give Warrants of Attorney to their Attornies, which each should enter upon his Register & Dogget [sic]," Alexander Hamilton noted in his own office manual. "It is often neglected to take Warrants of Attorney, but it is rather dangerous for the Want of them would be Error & abate the Action upon a special Demurrer."[29] Yet Harison's predecessors had not asked for such warrants, perhaps on the assumption that the recordership carried with it implicit authority to act as legal representative of the corporation. The fact that they were sometimes given warrants to act in specific matters may have troubled Harison, being practically a declaration that they had no such general authority.[30] At

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[29]"Regularly both Plaintiff & Defendant ought to give Warrants of Attorney to their Attornies, which each should enter upon his Register & Dogget . . . It is often neglected to take Warrants of Attorney, but it is rather dangerous for the Want of them would be Error & abate the Action upon a special Demurrer," noted Hamilton, in a "practice manual" made for his own use and printed in Julius Goebel, Jr., ed., The Law Practice of Alexander Hamilton: Documents and Commentary, 5 vols. (New York: Columbia University Press, 1964-81), vol. 2, pp. 55-135, at 79.

[30]When Jones was directed to file suit against intruders on corporate ground in the rear of the Almshouse, for instance, the Common Council passed a resolution "that a Warrant of Atty from this Corporation to him be made out accordingly" [Common Council, Minutes, vol. 1, p. 663.

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any rate, Harison applied for, and got, a resolution from the Common Council granting him a formal and general retainer as the city's lawyer:

> Ordered that a letter, constituting Richard Harison Esq Attorney and Council [sic] of this Corporation be made and that the Common Seal be affixed thereto.[31]

A year later, the Common Council renewed Harison's retainer and also authorized him to employ assistant counsel.[32] Neither resolution, however, specified what he was expected to do or what, if anything, he would be paid by the city. Up to this time the recorder had not been a salaried official but had been allowed certain fees--called "taxed costs"--for his services both as a judge in the city's courts and as a lawyer. Assessed (or "taxed") as a charge against the recipient of a service or the loser in a court case, these fees were set by state law for all judges and lawyers, and covered a wide range of legal and judicial services. As a judge, for instance, the recorder was allowed two shillings for declaring a guardianship, three for allowing bail, five for ruling on a motion, and so

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[31]Common Council, Minutes, vol. II, p. 427. This was, it should be noted, a general retainer and not one limited to a specific matter; compare with the "warrant of attorney" given to recorder Jones to recover disputed city property behind the Bridewell [ibid., vol. 1, p. 663] and to Kent to eject Daniel Dunbar from the city's waterfront lands [ibid., vol. 2, p. 365].

[32]Ibid., P. 528.

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forth; as an attorney he was allowed two shillings for serving a paper, nine for drawing a brief, ten for arguing a motion, and varying amounts for other services. The city itself was seldom out of pocket for any of the charges involving litigation (unless, of course, the city was a party to the suit itself, and lost) or for the "non-suit" costs due the recorder--drafting deeds or contracts, for instance, which were "taxed" not against the city but against the recipients.[33]

Because these fees were rather modest, the city's more successful lawyers were accustomed to imposing additional charges on their clients, generally as "retaining fees" or for "counsel work" not listed in the schedule of taxed costs. Harison himself charged his clients $10 or $15 for an office visit, $150 for acting as a referee on a legal matter, and from $25 to $250 for general counsel work.[34] Much of the legal work he found himself expected to perform as recorder was of this latter sort--attending meetings, advising officials, identifying potential legal problems

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[33]New York, Laws (1789), ch. 25; later amended by ibid. (1840), ch. 386, and repealed by ibid. (1849), ch. 438, sec. 303. For an explanation of the system (a survivor of English legal custom), see Goebel, Law Practice of Alexander Hamilton, vol. 2, Pp. 4-10, and Justice Samuel Nelson's discussion in "Appendix III," 1 Blatchford (U.S. Circuit Court, 2nd Circuit) 652-55.

[34]Harison to John Patrick, Aug. 19, 1800 (answering his client's assertion that the fee paid for the original office visit was for subsequent services as well) and to Stephen Luesh, June 18, 1894 (offering to forego costs in light of other payments), both in Harison Papers, Letterbooks, vol. 1.

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and devising solutions, proposing and drafting legislation, writing formal opinions, and the like. Because the schedule for taxed costs covered none of these services, there was no provision by the city for paying the recorder for providing them; presumably he would find his taxed costs in other matters ample enough to provide these services without charge. This had worked well enough when most of the recorder's legal work had been traditional services covered by the fee schedule, but now that much of it was not, it was only fair that other compensation be arranged.

When Harison had received only $25 for counsel work after nine months in office, he made his unhappiness discreetly known, and in December of 1798 the Common Council appointed a committee to consider instituting a "suitable annual Allowance to the Recorder for his various Services."[35] After some months of intermittent negotiations with Harison, the committee reported back with an agreement. The report has to be considered in its entirety, both for what it is and what it is not:

> The Committee appointed to consider and report what will be a proper Compensation to the Recorder of this City for Services performed & hereafter to be performed Report that they are of Opinion in case the Recorder give Council [sic] to the Corporation on all legal Questions in which their Interest may be affected & investigate & state the Facts which may be requisite

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[35]Common Council, Minutes, vol. 2, pp. 480, 491.

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> for the purpose. That he commence prosecute & defend all Suits in which the Corporation may be concerned without any Charge (except for disbursements) and report a State of the Case thereof to the Board if required: And that he examine and correct all Contracts & Grants made by the Corporation And prepare all such Bye Laws and correct the old ones when it shall be deemed necessary, with all such Laws as the Board may apply for to the Legislature . . . That as a consideration for such Services he be allowed five hundred Dollars per Annum commencing the first day of Sept last.[36]

In effect, Harison and the Common Council had agreed on an annual retainer for his services as counsel; he would continue to receive such taxed costs as were due him, but now he would also be paid a salary for his counsel work as well. This agreement, adopted by a resolution of the Common Council on June 24, 1799, was not a comprehensive definition, at long last, of what the recorder's duties were. It did not mention the most basic and time-consuming part of the office, sitting as a judge in court and as a voting member of the Common Council. What it did was to recognize his role as the city's lawyer and to offer him a salary for it--but, it should be noted, in language that might be construed as recognizing that this role was an optional one. The resolution does not say that the

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[36] Ibid., Pp. 555-57. Considering that he also continued to receive his "taxed costs," $500 was a reasonable salary for doing part-time legal work for the city--the equivalent in modern money of about $5,500. See Table A-2 in John J. McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States (Worster, Mass.: American Antiquarian Society, 1992), pp. 323-32 [hereafter cited as McCusker, How Much Is That In Real Money?].

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recorder "shall" do anything, only that "in case" he did certain things--gave legal advice to municipal officials, managed the city's cases, handled its contracts, and drafted bills and ordinances--he would be paid a salary for doing so.

By granting a formal retainer and then passing this resolution, the Common Council inadvertently set the stage for separating the office of corporation counsel from the recordership. And it was not long before a series of political events occurred that precipitated that separation.

In 1800 the new Jeffersonian Republican party captured the New York state legislature and began taking over the Federalist Council of Appointment. With the election of governor George Clinton in 1801 the Republicans won complete control, and with his nephew De Witt Clinton in charge the Council of Appointment began sweeping Federalists from all the local offices it filled across the state appointment. In New York City this amounted to almost every officer above the rank of alderman: the mayor, the recorder, the sheriff, the city clerk, the surrogate, and lesser officers all the way down to the level of notary public.[37] Varick, who had served as mayor since 1789, was

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[37]For effect of the 1800-01 elections on New York City, see Willis Fletcher Johnson and Ray B. Smith, Political and Governmental History of the State of New York, 2 vols. (Syracuse: The Syracuse Press, Inc., 1922), vol. 1, pp. 210-20, and Pomerantz, New York, pp. 131-33.

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dismissed and replaced by Edward Livingston, and on August 26, 1801, Harison was removed from his post as recorder.[38]

There was no shortage of highly qualified Republican candidates, but on August 31 the Council of Appointment named John Bartow Prevost to the post. Prevost's only qualification for the office seemed--to the Federalists at least--to be that he was Aaron Burr's stepson at a time when the Republicans owed Burr a favor or two. He had been admitted to the bar some eleven years earlier and had practiced only sporadically since then. After working in Burr's office for a few years, he had gone to Paris as a secretary to James Monroe in 1794. Since returning in 1797, he had been unable to establish a practice of his own and had rejoined Burr as an associate. But in March of 1801 Burr closed his practice to go to Washington as vice-president, and since then Prevost had been beseeching party leaders for some sort of appointment, circulating a letter from Monroe commending him as "a worthy young man rather in distress."[39] His appointment as recorder solved a number of problems: Prevost got a job, Monroe was let off the

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[38]Common Council, Minutes, vol. 3, pp. 19,22, and "Supersedeas to Richard Harison, Esq., Recorder," in Harison Papers, box 2.

[39]Letter of recommendation, Monroe to James Madison, March 12, 1801, in Robert J. Brugger, ed., The Papers of James Madison: Secretary of State Series (Charlottesville: University Press of Virginia, 1986), vol. 1, p. 14. For Prevost's career and his relationship with Burr, see Mary-Jo Kline, ed., Political Correspondence and Public Papers of Aaron Burr, 2 vols. (Princton: Princeton University Press, 1983), vol. 1, pp. lxiv, lxvi, 180, 182 (n. 4), 223, 302, 503-04, 612.

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hook, and the state Republicans discharged a part of the debt they owed Burr. Appointing Prevost as recorder was a shrewd move by the Clinton wing of the party, a grand gesture that was personally gratifying to Burr but that did not add appreciably to his power in the state.[40]

The Federalists--who, despite the Republican sweep of the statewide elections, remained in control of New York City--were not particularly happy with having Aaron Burr's stepson foisted on them as recorder. The contrast between him and the erudite Harison quickly became apparent, both politically and professionally. In the November municipal elections the Republicans, who until then had never carried more than two wards, claimed victory in four of the city's seven wards. The Federalists disputed the results (which were due, ironically, to a species of chicanery--"fagot voting"--they had themselves pioneered)[41], and they demanded a scrutiny of the election by the Common Council. Prevost took an avid part in the hearings and, predictably

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[40]It was, after all, a local appointment that had minimal impact on state politics; besides, unknown to Burr, Prevost had already begun aligning himself politically with the Clinton faction. For Prevost's shifting political loyalties, see Craig Hanyan, De Witt Clinton: Years of Molding, 1769-1807, Ph.D. dissertation, Harvard University, 1964, p. 197, and for the machinations behind his appointment (much of which has necessarily to be inferred), see Howard Lee McBain, De Witt Clinton and the Origin of the Spoils System in New York (New York: Columbia University Press, 1907), pp. 104-05, 130-37.

[41]From the French fagot, a bundle (literally, of sticks). To qualify nonresidents for voting in a given ward, the party issued a deed listing them as joint owners of a lot in it.

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enough, voted the straight party line on almost every question.[42] Although this annoyed the Federalists, his vote initially made very little difference; they had a comfortable enough majority with or without the recorder. But in December the new board (or, technically speaking, individuals claiming to be the new board) took office, and at one point the margin between the two sides narrowed to a single vote. At that point, on the most crucial question of the hearings the new mayor, Edward Livingston, rose and--defying over a century of accepted procedure in the chamber--cast his vote as mayor. With that vote, the board was deadlocked at 8 to 8, and all its business brought to a halt.[43]

The mayor had never voted in a meeting of the Common Council, except in those rare instances when he was called on to break a tie, and it was always assumed that there was an inviolable rule to this effect. It was precisely this sort of situation the recorder was intended to handle--to remember the customs of the city and to hold the mayor and aldermen to them--but in this case Prevost was completely at a loss. What was the rule? Was it mandatory? Must he

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[42]Common Council, Minutes, pp. 65-71, 74, 79-83. For an account of the disputed election and an explanation of fagot voting, see Pomerantz, An American City, pp. 134-37.

[43]Ibid., pp. 75-83.

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invoke it against his own party?[44] In the end, he did nothing. The Federalists did not ask his opinion, the Republicans did not need it, and he did not volunteer it. In fact, the only piece of advice he offered during the whole proceedings was to suggest, at one point, that the board refer a question to outside counsel.[45]

For over three months--from December 14, 1801, to March 18, 1802--the city was plunged into constitutional crisis, with the Common Council unable to constitute itself and conduct the city's business. The whole of municipal government was paralyzed, the only services being those provided piecemeal by citizen volunteers. The controversy moved into state Supreme Court, where--even expedited by the presiding judge--it inched forward at the glacial pace characteristic of common law pleading.

Although presumably out of office, Harison played a highly visible part in the controversy, and his performance underscored for the aldermen the contrast between him and Prevost. Harison represented the Federalist candidates as

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[44]This rule was one of many "customs of the city" not set forth in its written charter. Was it, then, law? The difference between law and custom is a fine one, and this case was right on the line. Black's Law Dictionary defines custom as "[a] usage or practice of the people, which by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law [italics mine] with respect to the place or subject-matter to which it relates" [p. 461]. Under such a definition, the mayor was clearly in error and should have been corrected by the recorder.

[45]Ibid., p. 82.

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their personal counsel in the hearings, holding forth (according to one account) with all the oratorical majesty of "Cicero . . . risen from his grave, arrayed in all the pomp and fascination."[46] When the dispute moved into court, he moved with it as counsel for the Federalists, defending them in a complicated suit brought in the name of the People by the new Republican district attorney, Richard Riker. Twenty-eight years old and fresh out of a clerkship, Riker had come into office as part of the August "sweep" and was feverishly preparing to argue his first big case. When the case came to trial on February 14, however, Harison carried his law books into court, laid them open for the judge's inspection, and pointed out that Riker had brought his action in the wrong form.[47]

Specifically, Riker had erred in bringing a request for a writ of mandamus instead of "an information in the nature of quo warranto." The distinction between the two was strictly one of form--a mandamus (literally, "we command") would have ordered the Common Council to swear in the Republican aldermen, and a quo warranto ("by what warrant") would have ordered the Federalist aldermen to prove by what right they occupied their offices--but in common law plead-

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[46]A appraisal tendered, oddly enough, by a political opponent; see American Citizen, Nov. 30, 1801, p. 2.

[47]The case, People ex rel. Arcularius v. Mayor, 3 Johnson 79, is reported in gossipy detail in the New York Evening Post, Feb. 15, 1802, p. 3.

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ing, form was everything. As Charles Rembar has written, "[i]f the wrong form of action was selected, or the allegations were stated in a way that did not fit the form, and defendant then demurred--that was it, forever, though on the facts which could be proved rather than the facts as pleaded plaintiff should have won."[48] For Riker, the case was over before it had started. The Federalists had won, and now comprised a majority in the new Common Council.[49]

Although Harison had represented the Federalist aldermen as individuals and not as officers of the city, it was a distinction that scarcely mattered to the Federalist members of the Common Council. As far as they were concerned, in the hearings he had shown himself to be more "their" counsel than Prevost, and in the court case he had once again demonstrated the sort of legal acumen needed in the city's chief law officer. No one, of course, can be sure exactly what was going on in the minds of the members of the Common Council, but at some point they reached an

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[48]Rembar, The Law of the Land, p. 226.

[49]Pomerantz, in writing An American City, looked in vain for a "final disposition, if any, of the case" [p. 137, n. 112], not realizing that this ruling on form was the final disposition; he attributed the resumption of the Common Council to a political compromise [pp. 136-37]. After this ignominious beginning, Riker went on to a distinguished career as a lawyer and jurist. He served as recorder from 1815 to 1838, and was memorialized in McAdam's Bench and Bar as "an excellent magistrate . . . a gentleman of the old school, of the curled and rolled Corinthian order" [pp. 462-63].

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unspoken agreement to continue using him as counsel of the corporation no matter who was recorder.

It is impossible to determine exactly when this tacit understanding was reached. It is difficult, in fact, to tell for the next few months exactly who--Prevost or Harison--was doing what, for by this time much of the corporation's business was conducted by the Common Council's administrative committees and does not show up in the minutes of the meetings of the whole board. During 1802 there are only fragmentary references to legal business, and more of thse relate to Prevost than to Harison. Prevost answered a question about the state law on hawkers and peddlers, accepted a deed from Trinity Church, examined an ordinance for the prevention of fires in stables, and served on several committees dealing with legal matters.[50] Harison is not mentioned at all in the minutes until December, when he submitted a formal written opinion on the validity of the city's fire and building ordinances.[51] Apparently, however, he was doing much more than had made its way into the minutes, for the resolution asking for

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[50]Common Council, Minutes, vol. 3, pp. 86 [state law], 115 [deed], 147 [fires], 86 [committee examining local laws], 97 [health committee], 146 [committee to report ordinance on selling firewood], and 157 [committee considering alterations in charter].

[51]Ibid., pp. 165-66.

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this opinion referred to him as "the Counsel of this board."[52]

The question is, Was he a salaried officer of the corporation, or had he simply been retained as outside counsel in this particular matter? The answer appears some two months later with the entry into the minutes of a warrant for $500 in payment of "his salary as standing Counsel of this board to 1 Septr 1802."[53] The fact that he was paid a year's salary "to" September 1, 1802, is the plainest possible evidence that the members of the board had continued to employ him as counsel to the corporation despite his removal as recorder. And they continued to pay him this salary and to refer to him (both in these warrants and in their instructions to him) as the "Counsel of the Board" until he left office in December of 1807.[54] And Harison's manner of leaving makes it plain that it was considered an office and not simply a retainer of outside counsel; the minutes note that he resigned "his Office as Counsel of the Board," and that the Common Council then "duly elected" a successor.[55]

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[52]Ibid., p. 164.

[53]Ibid., p. 210. The fact this salary was not paid until March 24, 1803, has no particular significance; such tardiness was nothing unusual for the Common Council.

[54]See warrants in ibid., pp. 512, 616, 720; vol. 4, pp. 96, 198, 282, 370, 569, and 687.

[55]Ibid., vol. 4, pp. 679, 711.

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Moreover, from the entries in the minutes--admittedly, fragmentary--it is clear that during these years Harison was performing the duties expected of a corporation counsel. For instance, he explained the city's responsibilities in administering the estates of intestates, examined the city's title to lands in the vicinity of the "Collect," wrote ordinances authorizing the construction of sewers, drafted bills and memorials for the legislature, conducted ejectment suits, and wrote a large number of formal opinions.[56] In these opinions he dealt with a number of complicated legal questions: among others, the city's authority to pass fire and building regulations, the powers of the commissioners of excise, the status of a former slave child, the city's jurisdiction over a ferry landing in New Jersey, and the tax status of the Harlem River toll bridge.[57] Moreover, the board delegated enormous amounts discretion to Harison as its counsel. For the 1803 legislative session, for example, its members instructed him to draft "such acts as shall be in his opinion necessary" for the better government of the city

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[56]Ibid., vol. 3, pp. 208 [estates]; 252-53 [title]; 272, 369-71 [sewers], 397-99 [bills and memorials], and vol. 4, pp. 58, 90 [ejectments]. There were, in addition, many others; see entries for "Official actions, opinions, and reports" under his name in ibid., "Index," p. 598.

[57]Ibid., vol. 3, pp. 165-66 [regulations]; 205-09 [estates]; 301-02 [excise]; 351-52 [slave]; 520-21 [ferry], and vol. 4, pp. 421-22 [bridge].

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and, in an 1805 dispute over ownership of several parcels at Kip's Bay, authorized him "to make such arrangements in the premises as he may deem just, and most conducive to the public interest."[58]

One can only speculate about what the recorder thought of all this, but there is no evidence that Prevost ever objected to it as a usurpation of his authority. He never raised the question during his attendance in the Common Council, and indeed it probably never occurred to him that there was a question. If the members of the Common Council routinely referred legal matters to the "Counsel of the Board," why should he question whether such an officer existed? In a sense Harison became corporation counsel by slipping through the cracks in Prevost's knowledge of local law. Whether there was or was not a corporation counsel was the sort of thing Varick, Jones, Kent, or Harison would have known instantly--but not Prevost. And had it occurred to him to have asked, it would not have been easy to find the answer. There were no published volumes of the Council minutes, no corporation manual, no "Green Book" of city offices. and--more to the point--only two aldermen still serving in 1803 who had been in office in 1799 and might

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[58]Ibid., vol. 3, p. 399, and vol. 4, p. 90.

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have remembered the board's intent in passing the resolution retaining Harison as "counsel and attorney."[59]

Besides, Prevost had enough work without looking for more. His attendance as a judge in Mayor's Court kept him busy and provided him a steady income in the form of fees; he was paid "taxed costs" each time he took bail, allowed a writ, took proof of a deed or mortgage, imposed a guardianship, took a fine, attended chamber on a motion, examined a witness, signed a judgment, or did practically anything else on the bench.[60] Considering that he had no office out of which to practice (Burr having shut it down), Prevost was better off concentrating on this lucrative court business instead of soliciting the city's legal work. Besides, he was only marking time while he and his stepfather lobbied the Jefferson administration for what he had wanted in the first place, a federal appointment. Whether he made a conscious decision to do so or not, he concentrated on his work in court and let the office of counsel stay with Harison.

Prevost resigned in August of 1804 to become a territorial judge in Louisiana, and in November governor Morgan Lewis appointed another Republican, Maturin Living-

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[59]Federalist John Bogert and Republican Mangle Minthorne; from a comparison of Common Council, Minutes, vol. 2, pp. 487, and vol. 3, p. 169.

[60]New York, Laws (1789), ch. 25.

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ston, to his place.[61] Livingston quickly found himself too busy in the Mayor's Court even to think of pursuing the city's legal work. De Witt Clinton had become mayor and, in an effort to devote his full time to acting as the city's chief executive, had abandoned the Mayor's Court entirely; for all practical purposes, it marked the end of the mayor's presence in civil court, not just for Clinton but for later mayors as well.[62] As the sole judge of the city's busiest court, Livingston had no interest in looking for more work--if, for that matter, the members of the Common Council had been inclined to offer it.

Although the Republicans had seized control of the Common Council in the November elections, Livingston could expect no favors from them. For one thing, his connection with Lewis made him an outsider in the local party, which was dominated by the governor's chief foe, mayor De Witt Clinton.[63] For another, Livingston was a throroughly dis-

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[61]Ibid., vol. 3, pp. 597, 629. Burr asked Jefferson for a share of the patronage for the new Louisiana Territory, and was given appointments for his stepson, his wife's brother-in-law, and a friend. "This generosity staggered belief," writes Holmes Alexander, in his Aaron Burr: The Proud Pretender (New York: Harper and Brothers, 1937), p. 228. Prevost moved to New Orleans, where he later became marginally involved in the infamous "Burr Conspiracy."

[62]Alden Chester, ed., Legal and Judicial History of New York, 3 vols. (New York: National Americana Society, 1911), vol. 1, p. 356.

[63]For a detailed account of municipal elections and the political composition of each administration in the first half of the nineteenth century, see "Political History of New York," pp. 446-523, in Manual of the Corporation of the City of New-York (1854) [hereinafter cited as Manual of the Corporation, and commonly known as "Valentine's Manual"]. For the feud between the Lewisites and the Clintonites, see ibid., pp. 452-56.

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agreeable person--purportedly "unpopular in his manners, deficient in a knowledge of law, without industry, and given to pleasure rather than business"--and had few champions in municipal government, or anywhere else for that matter.[64] He had gained the recordership by virtue of the fact that he was the governor's son-in-law and was, like Prevost, "rather in distress."[65] In addition to being in financial straits at the time, he was busy defending his good name against James Cheetham, who was gleefully circulating the details of how he had been caught red-handed cheating at cards at a fancy ball--purportedly by secreting himself behind his brother's opponent and signalling "by signs, motions, and gesticulations" which cards he was holding.[66]

For all these reasons, Livingston posed no threat to Harison's continued employment as corporation counsel.

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[64]De Alva S. Alexander, A Political History of the State of New York (New York: Holt, 1906), pp. 147-48.

[65]Livingston's wife Margaret was more a "real" Livingston [i.e., a niece of Chancellor Robert R. Livingston] than he was; he was a descendant of a far less distinguished branch of the family. See George Dangerfield, Chancellor Robert R. Livingston of New York, 1746-1813 (New York: Harcourt, Brace and Company, 1960), p. 349.

[66]Livingston denied the accusation and sued (in the end, successfully) James Cheetham for publishing it--at the cost, however, of keeping the story alive for four years and making himself look ridiculous. The episode is recounted in detail in a pamphlet, The Trial of Maturin Livingston Against James Cheetham for a Libel (New York: S. Gould, 1807).

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Nor, for some years, did anyone else. The Republican majority of the Common Council held a widely publicized "confidential" meeting in January of 1805 and voted unanimously to oust a long list of Federalist officeholders. Although Harison's name was reportedly on the list, nothing came of it and he escaped the subsequent bloodletting. Harison stayed on through another Republican board in 1806 and a Federalist one in 1807, and resigned only after a Republican landslide in the fall of that year made his removal inevitable.[67]

Through the force of his personality and his reputation as a lawyer, Harison brought into being a new office of city government--the office of corporation counsel. By any fair reading of the record, it is clear that he was indeed the counsel to the corporation from 1801 to 1807; he is, in fact, indexed as such in the printed minutes of the Common Council.[68] Yet the ruse which allowed him to continue in office was so successful that it obscured his service from notice until then--and, even afterward, continued to do so unless one paid particularly close attention. In 1907 (some ten years before the minutes became available in

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[67]"Political History of New York," pp. 451-56, and Common Council, Minutes, vol. 4, p. 679.

[68]Common Council, Minutes, Index, p. 304. The index reflects the judgment of a team of eminent scholars under the direction of Arthur E. Peterson, who edited and published the manuscript minutes between 1917 and 1930.

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printed form) the New York City Law Department published a short history of the office and, aside from listing Harison among the recorders, makes no mention of him at all. Harison had, ironically, been forgotten by the very office he had founded.[69]

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[69]John H. Greener, A History of the Office of the Corporation Counsel and the Law Department of the City of New York (New York: New York City Law Department, 1907), p. 14.

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CHAPTER III

ESTABLISHING THE OFFICE, 1807-49

With the resignation of Harison in November of 1807, the office of corporation counsel entered perilous times. Harison was succeeded by Republican James Woods, a lawyer who was competent enough but hardly of the stature of his predecessor. In fact, little is known about Woods, who died young and left little mark on the events of his day; he was admitted to the bar only ten years before his appointment as corporation counsel and died three years after leaving office.[1] Yet his record in office shows him to have been an highly competent lawyer, and he continued to do the same sort of work as Harison and to draw the same salary. He drafted legislative bills and memorials, handled deeds and contracts, answered questions about the

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[1]Woods appears in none of the biographical works I consulted for this study and is mentioned only in passing in Goebel, Law Practice of Alexander Hamilton, vol. 1, p. 227, as having been admitted to the bar. His law office is listed in the New York City directories for 1807-12, and a check of Abstracts of Wills for New York County (Division of Local History and Genealogy, New York Public Library), shows that his will was probated on Nov. 13, 1812 [vol. 2, p.]. His service as a Republican election inspector is mentioned in Common Council, Minutes, vol. 3, p. 488 [office].

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administration of estates, examined titles, and gave both routine legal advice and formal written opinions.[2]

Unfortunately, Woods did not possess the aura of authority that Harison projected so confidently, and during his time in office other officers of city government began to poach on his territory. Of these the most unabashed was the corporation attorney, Samuel Cowdrey, whose office had originally been instituted in 1786 as a means of collecting penalties due the corporation for violations of its ordinances.[3] There is no indication that the Common Council had intended its holder to engage in any other legal work for the city, but Cowdrey (who served, with one brief interruption, from 1804 to 1809) tried from time to time to do so. Harison tolerated a certain amount of his "help," and Woods even more--so much so that after he took office it soon became hard to tell who was in charge, himself or Cowdrey. At times the aldermen consulted the two jointly; both were directed to draft a bill authorizing an extension of Bridge Street, for instance, and both signed an opinion regarding the estate of a deceased foreigner. On the question of whether a lessee still had to pay the corporation when his lands were tied up in a lawsuit against the city,

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[2]For examples, see Common Council, Minutes, vol. 5, pp. 37 [bills]; 111, 130, 300, 510 [deeds]; 80, 130, 137 [estates]; 321-31, 460-61 [titles]; 80, 398-99, 495, 509, 736 [advice and opinions].

[3]Ibid., vol. 1, 196.

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the board was given a choice between Cowdrey's opinion that he did not and Woods' opinion that he did.[4]

In addition, a new standing committee of the Common Council--the Law Committee, whose membership was drawn, naturally enough, from the lawyers on the board--had begun to stick its own oar into the city's legal affairs. One of several standing committees set up in 1805 to handle administrative concerns, it had originally been intended for a narrow purpose: to draft and revise resolutions, ordinances, and legislative bills. As in the case of the corporation attorney, however, this narrow purpose was soon broadened beyond all recognition, and like the board's other executive committees the Law Committee began to function virtually as a department of city government.[5]

In 1809 the Federalists returned to power in the Common Council pledged to cut the costs of municipal government. It occurred to them that between the corporation attorney and the Law Committee, surely the city's legal needs could be covered without paying $500 a year to another lawyer. Five hundred dollars may not seem like much money, but it was a substantial amount for what was, after all, only part-time legal work--the equivalent of around $5,000 in

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[4]Ibid., pp. 71-72, 80, 206, 221.

[5]For its development from 1805 to 1809, see ibid., vol. 4, pp. 106-07, 309, 662; vol. 5, pp. 373, 775.

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today's money.[6] Consequently, on December 11 the board passed a resolution declaring that "a Counsel to this Board is not required and therefore that the Office of Counsellor be and the same is hereby abolished." Immediately following was another resolution that "the Committee on Laws and Ordinances be considered as the Committee for the unfinished business of this Board and that they from time to time report thereon."[7]

For the next two years the Law Committee conducted the legal business of the city, with the assistance of the corporation attorney. The committee reported ordinances for inspecting bread, banning masked balls, forbidding disorderly assemblies, and numerous other matters. It prepared deeds, leases, and contracts, and mediated problems arising from them. It oversaw the city's litigation, usually assigning cases to the corporation attorney but occasionally retaining outside counsel and even, in one instance, the recorder.[8] At times these suits became so tangled it was difficult for the committee or anyone else

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[6]A figure derived from conversion table A-2, pp. 323-32, in John J. McCusker, How Much is That is Real Money?, pp. 297-373]. Such comparisons are never exact (see discussion in ibid., pp. 297-321) but McCusker's table, based on the Consumer Price Index, is the best available measure.

[7]Ibid., vol. 5, p. 780. From the context it is apparent that the reference is to law business.

[8]Ibid., vol. 6, pp. 11-15, 23-24, 286 [ordinances]; 537, 554, 557-58, 649, 653, 724 [leases]; 103-04, 125, 347, 527, 545, 557-58, 674, 700-01 [lawsuits].

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to figure out who was counsel for the city in any given matter. A suit alleging patent infringement on the design of a dredge had been the subject of a tug-of-war between Harison and Cowdrey in 1806, and when Harison left office in 1807 Cowdrey seized control of it; by the time the committee got involved with it, Cowdrey had engaged two other lawyers as associate counsel, the Common Council had fired them, and the U. S. Circuit Court was trying to figure out whom to serve with process. The Law Committee finally took matters in its own hands and settled out of court for $2,000.[9]

Inevitably one member of a committee usually winds up doing most of the work, and for the Law Committee it was Peter Hawes. Hawes did so much of it that the aldermen and other officials began routinely referring matters to "Mr. Hawes as Counsel."[10] Hawes handled complicated matters involving the New Jersey ferry, negotiated an adjustment with owners whose lots were to be cut by new streets, and prepared practically all corporate leases.[11] It was not long before Hawes began to tire of providing free legal

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[9]The so-called "Colver" or "Mud Drudge" case; see ibid., vol. 4, pp. 267, 282, 316, 401, 478, 542, 553, 750-51; vol. 5, pp. 9, 62-63, 69, 542, 648-59; vol. 6, pp 129-30, 527-28,, 540, 545, 559, 581. Counsel for the plaintiff had been offering to negotiate a compromise since August 1807.

[10]See, for instance, ibid., vol. 6, p. 554, 649, 725.

[11]Ibid., pp. 537, 554, 557-58, 649, 700-01, 725, and vol. 7, p. 8.

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services to the city and not long before the aldermen began to reconsider the wisdom of dispensing with a corporation counsel.

In May of 1811, and again in June, alderman Richard P. Lawrence broached the subject of restoring the office; his suggestion was tabled both times, but was taken up again when a new board came into office after the fall elections. On January 6, 1812, the board appointed a committee to consider "the propriety of appointing a Gentleman learned in the law to act as Council [sic] of the Corporation." The same committee, providentially for Hawes, was instructed to "report the compensation proper to be allowed to Mr Hawes for services rendered to the Board upon several matters referred to him for legal advice."[12]

On January 20 the board adopted the resolution offered by the committee, which had decided to combine in one both person both the corporation counsel and the attorney to the corporation:

> Resolved that a fit and discreet person of the Degree of Counsellor at Law in the Supreme Court of this State be appointed Counsel and Attorney to this Corporation, whose duty it shall be to advocate prosecute and defend all suits at Law and in Equity on behalf of the Corporation and to advise the Members upon legal subjects

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[12]Ibid., vol. 7, pp. 595, 641, 798. Ironically, had the corporation counsel been performing many of these same services--the preparation of leases, for instance--he would have been paid "taxed costs" by the recipients, and the city would not have owed anything. Acting as a member of the Common Council and not as its attorney, however, Hawes could make no such claim for taxed costs.

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> in which the Corporation may be interested. And to draw all such Deeds, Conveyances and Contracts, Laws and Ordinances, and other papers for the said Corporation as shall from time to time be directed. And for all Suits which he shall prosecute or defend for the said Corporation he shall receive the usual taxable costs in such cases, And for all other services to be by him performed the further sum of Five Hundred Dollars per annum.[13]

With this resolution the city formally severed the office of corporation counsel from the office of recorder and established it essentially as it exists today. It was a major step forward--the city now had a separate officer devoted exclusively to its legal affairs--but in another sense it was a step backward. Although the role of corporation counsel had been only a sideline for the recorder, as the holder of an ancient and powerful office he had been able to command respect and deference from the other officers of city government and, to an extent, to compel his advice on them. The corporation counsel had no comparable aura of authority. Each incumbent had to start from scratch, with nothing to fall back on except his own professional reputation and whatever political connections had put him in office.

The first holder of the newly established office was more than equal to the task. David S. Jones was the son of recorder Samuel Jones and heir to a comfortable share of the family's real estate fortune. Described by an admirer

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[13] Ibid., vol. 7, pp. 9-10.

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as "one of God Almighty's Gentlemen," he moved in the same social circles as the Jays, the Duers, and the Hones, and was famed as an elegant dresser and "a knightly, gallant worshipper of the ladies."[14] An honors graduate of Columbia College, he had studied law in his father's office and, along with his brother Samuel Jones, Jr.,[15] was carrying on the family tradition of combining law with public service. At thirty-four, he had already earned a reputation as one of city's most brilliant "chamber counsel"--although, paradoxically, his appearance in a trial was generally enough to clear the courtroom of spectators, his speaking style once being the subject of a bit of anonymously-circulated courtroom doggerel:

> When David Jones begins his tones
> He's like a nurse upon a rocker;
> I would the bones of David Jones
> Had gone to Davy Jones's locker.[16]

Jones served as corporation counsel from January 1812 to May 1816 and restored the office to practically the same

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[14]Memorial of the Late Honorable David S.Jones (New York: Stanford & Swords, 1849), pp. 5, 10. See also McAdam, Bench and Bar, vol. 1, p. 375.

[15]Recorder, 1823-24; chief justice of the new Superior Court of New York City, 1828-47.

[16]Charles Edwards, Pleasantries about Courts and Lawyers (New York: Privately printed, 1867), p. 123.

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stature it had under Harison. He dealt with a wide range of legal problems--the suppression of immorality, the extension of the city's fire limits, the illegal landing of immigrants, tax collections, protecting the assets of alcoholics and insane persons, the regulation of various occupations, the prohibition of fireworks, the support of former slaves, and many matters.[17] He conducted ejectment suits, represented the city in a federal case involving the regulation of gunpowder, and litigated a number of property disputes.[18] He also handled an enormous amount of paperwork--leases, conveyances, eminent domain permits--and handled a growing number of street openings.[19] And, although it scarcely shows up in the minutes, in his capacity as attorney to the corporation he was also engaged in collecting fines for violations of the city's ordinances.[20]

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[17]See Common Council, Minutes, vol. 7, pp. 16, 47, 65, 82-83 [immorality]; 19 [fire limits]; 23-24, 34, 47, 52-53, and others [immigrants]; 39, 492-93 [taxes]; 47 [assets]; 68, 83, 138, 195, 196. 239 and others [occupations], 195 [fireworks], and 386 [slaves]. For others, see the numerous entries under his name in the index, pp. 694-96.

[18]Ibid., vol. 7, pp. 605-66 [ejectments]; vol. 8, p. 153, and vol. 10, pp. 457-58 [gunpowder]; vol. 7, pp. 59, 66, 129 [Maiden Lane controversy]; 124 [Inclenberg lots]; 379-80 [buildings on street land], and vol. 8, pp. 241-42 [Brooklyn tidal land].

[19]Too numerous, in fact, to list here; see respective headings under his name in ibid., Index, pp. 794-96.

[20]Aside from fines for the illegal landing of passengers, such penalties were rarely reported in the minutes, and then generally when someone requested remission for some reason; see ibid., vol. 7, pp. 7, 27-28, 123, 339, 476.

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In 1816 the Democratic party (lineal descendant of Jeffersonian Republicanism) came thundering into control of municipal government and dismissed Jones, along with all other Federalist appointees under its control. For all practical purposes, it was the end of the Federalists as a force in municipal politics, and for the next several years the real political contest was between factions within the Democratic party. The Democrats, primarily in the guise of the Tammany Society, ruled City Hall and chose the corporation counsel from their own ranks.[21]

The first Democratic corporation counsel was typical of an changing fashion in public service--the waning of the old "aristocratic tradition" of government service as the province of the wealthy and privileged and the corresponding rise of a new professional class of politicians.[22] If David Jones exemplified the former, his successor Ogden Edwards typified the latter. Edwards was descended from the Puritan divine Jonathan Edwards ("Sinners in the Hands of an Angry God") and had been reared in genteel poverty in Connecticut. Like many ambitious New Englanders of his

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[21]"Political History of New York," in Manual of the Corporation (1854), pp. 460-72. For developments in Tammany during the first half of the eighteenth century, see Jerome Mushkat, Tammany: The Evolution of a Political Machine, 1789-1865 (Syracuse: Syracuse University Press, 1971).

[22]The classic statement of this change is Dixon Ryan Fox's The Decline of Aristocracy in the Politics of New York, 1801-1840 (New York: Harper Torchbooks, 1965; orig. 1917).

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generation, he applied himself to the study of law and migrated to the nearest large urban center (in his case, New York City) to set up practice.

Unfortunately, he was only one of many who had been seized of the same notion and who, without any family or business connections, were starving for clients. In hopes of drumming up business, Edwards joined the Tammany Society and more or less by accident wandered into a full-time career as a professional officeholder. His practice never did get off the ground, but he manged to jump from one salaried post to another--from surrogate[23] to corporation counsel to circuit judge--and to spend almost his entire adult life in paid public service. Along the way he made some strategic switches in his loyalties: from Democrat to Whig, for instance, and from poor New England boy to (in the words of one broadside) "Judge Edwards, the tool of the Aristocracy, against the People!"[24]

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[23]In New York and certain other jurisdictions, the judicial officer in charge of probate matters. See Black's Law Dictionary, 4th ed., p. 1614. Because of its fees, the surrogate's court has always been a chief prize in New York City politics; see Wallace S. Sayre and Herbert Kaufman, Governing New York City: Politics in the Metropolis (New York: W. W. Norton & Company, 1965; orig. 1959), pp. 457-68, and p. 541, n. 1.

[24]The broadside, quoted in Sean Wilentz, Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850 (New York: Oxford University Press, 1984), p. 291, memorializes his decision in an 1836 case finding a group of workers guilty of conspiracy for having formed a labor union. For Edwards' life, see McAdam, Bench and Bar, vol. 1, pp. 318-19; Alden Chester, Courts and Lawyers of New York, 3 vols. (New York: The American Historical Society, 1925), vol. 2, p. 944, and Brooks, History of the Court of Common Pleas, p. 65.

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In his term as corporation counsel Edwards was even busier, in some respects, than Jones; there are, for instance, 158 separate entries in the minutes for conveyances he prepared for the board.[25] In addition to countless ordinances, he drafted legislative bills covering a variety of concerns--improving Fulton Market, providing fire cisterns, equalizing electoral wards, regulating the quality of flour, creating new lower courts, preventing epidemics, opening a Fever Hospital, providing a school for the children of Almshouse residents, and other matters.[26] He was relieved of a considerable burden, however, because when he entered office the Common Council reinstated the office of corporation attorney and gave him the responsibility for "penalty suits"--those involving violations of city ordinances or of certain state laws which assigned penalties to the city.[27]

Edwards served until May of 1823, when he was rewarded for faithful political service with appointment as one of the new circuit judges of the state supreme court, a posi-

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[25]Common Council, Minutes, Index, p. 398. One entry, of course, might refer to any number of conveyances.

[26]Ibid., vol. 8, pp. 660, 678 [market]; 739 [cisterns]; vol. 9, p. 51 [wards]; vol. 10, p. 140 [flour]; 285 [courts]; vol. 11, p. 511 [epidemics]; vol. 12, p. 679 [hospital], and 734 [school]. For a list of ordinances, see ibid., Index, pp. 398-99.

[27]The resolution is badly written and could be--but apparently was not--construed to give all lawsuits to the corporation attorney. See ibid., vol. 8, p. 531.

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tion he kept for the next twenty years. He was succeeded in office by Michael Ulshoeffer, another Tammany politician who (like Edwards) had courted the favor of the anti-Clinton faction.[28] Ulshoeffer represented something new in city politics, the emergence of the ethnic voting bloc. The son of a Hessian soldier who had come to New York in 1777 and had stayed, Ulshoeffer rose rapidly in the party because of his ability to deliver the votes of his fellow German-Americans, who comprised the largest "foreign" element in the city at the time. Thanks to his connections with that community, he was made a sachem at the age of 25 and by the time he was 28 had served five terms in the legislature. That is not to say, however, that he was not also a highly proficient lawyer; he had clerked in one of the city's leading law offices--that of Thomas Smith--and had established a successful practice with a specialty in commercial law. In 1820 he went head-to-head with James Kent (then serving as chancellor) in a controversy about revision of the state constitution, and was generally credited with having bested him. In his history of New York state politics, Jabez Hammond (who had opposed Ulshoeffer bitterly in the legislature) picked him as one

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[28]Clintonian Jabez Hammond, author of The History of Political Parties in the State of New York (Albany: Van Benthuysen, 1842), identified Edwards, Ulshoeffer, and Peter Sharpe as the city's "principal and most zealous" opponents of Clinton; quoted in Brooks, History of the Court of Common Pleas, p. 65.

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of a small group of rising young men he considered unexcelled for "skill in argument, pungency of wit, and clear, sound, logical powers of mind."[29]

Ulshoeffer had been appointed corporation attorney in 1821 and was serving in that office when Edwards resigned in May of 1823. The Common Council, which had been toying with the idea of uniting the two offices again, asked him to stay on as corporation attorney and to serve as "acting" corporation counsel. It was not until January of 1825 that the board formally appointed him as corporation counsel and passed a resolution making the two offices one; then in November the members rescinded the resolution, keeping Ulshoeffer as corporation counsel and appointing another person to the attorney's post. The board's stated reasons for combining the two offices are difficult to follow; the best guess is that it was an attempt to even out the disparate pay of the two positions. For whatever reason it was undertaken, however, the experiment did not last long, and after 1825 the two remained separate offices.[30]

Ulshoeffer stayed in office until 1829 and turned out a great amount of legal work--conveyances, legislative bills,

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[29]Quoted in ibid., pp. 64-65.

[30]Common Council, Minutes, vol. 13, p. 69; vol. 14, pp. 290, 302-03, and vol. 15, p. 42. Simply put, the corporation attorney seemed to be getting paid more than he was worth and the corporation counsel less; see ibid., vol. 14, pp. 302-03. For a detailed and unusually frank report by Ulshoeffer on the compensation of the two offices, see ibid., vol. 13, pp. 155-59.

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lawsuits, street openings, eminent domain proceedings, and the like. He dealt with such concerns as the licensing of omnibuses and hackstands, illegal immigration, contract disputes, street cleaning, roving swine, the employment of minors as cartmen, the inspection of firewood, the removal of dangerous buildings, and the regulation of slaughter-houses.[31] Such items only hint at the extent of his work, however, since much of it involved advising the mayor and aldermen--not just in the full meetings reported in the minutes but in the meetings of the many standing committees which functioned as the city's executive.

In 1828 supporters of Andrew Jackson's wing of the party won the fall municipal elections and once in office swept out everyone not of the Jacksonian faith. Ulshoeffer was replaced by Robert Emmet, who, as the nephew and namesake of the martyred Irish patriot, was "the recognized head of the Irish people in the City of New York."[32] Emmet's appointment as corporation counsel was a sign of how far his countrymen had come in city politics. In 1817 they had rioted in Tammany Hall and broken up the furniture

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[31]See, in general, ibid., Index, pp. 1299-1300, and for particular items, ibid., vol. 12, pp. 526 [buses]; 780-81 [immigrants]; vol. 13, pp. 275 [contracts]; 584, 689, 802 [streets]; vol. 14, p. 551 [swine]; vol. 15, pp. 295 [cartmen]; 509 [firewood]; vol. 16, pp. 348 [buildings], and 397 [slaughterhouses].

[32]Thomas Addis Emmet, M.D., The Emmet Family, With Some Incidents Relating to Irish History (New York: privately printed, 1898), pp. 253-54. The elder Robert had been hanged as a revolutionary in 1803.

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when its anti-Irish leadership refused an assembly seat for his father, emigre lawyer Thomas Addis Emmet, but in the 1828 election Tammany welcomed the Irish with open arms and tailored its platform to appeal to them. Emmet's appointment was a both a reward for their support and a demonstration of Tammany's respect as well; by now the office of corporation counsel was beginning to serve as a sort of consolation prize, the red ribbon instead of the blue, a "second place" for a people not yet deemed worthy of the mayoralty itself.[33]

Ethnicity aside, Emmet was eminently qualified to be corporation counsel. As a boy he had joined his father in the British prison at Fort George where, as family legend proudly relates, he "received a classical education through the teaching of state prisoners."[34] After release by the British, the Emmets joined the Irish exile community in New York City, and Robert earned an honors degree from Columbia and studied law in his father's office. By the time the elder Emmet died in 1827, the two were running one of the most successful practices in the city, and Robert was a

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[33]For Tammany's early nativism, see Jerome Mushkat, Tammany: The Evolution of a Political Machine, 1789-1865 (Syracuse, N. Y.: Syracuse University Press, 1971), pp. 9-10, 54, 58, 66, and Gustavus Myers, The History of Tammany Hall, 2nd ed. (New York: Burt Franklin, 1968; orig. 1917), pp. 30, 43-44.

[34]Ibid., p. 253.

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recognized leader not just of the Irish community but of the bar itself.[35]

Emmet entered office in January of 1829 and began doing the same sort of work as his predecessors. In his first year or two in office, among other things he drafted a bill defining the duties of police clerks and another granting privileges to firemen, prepared deeds for five lots formerly part of Greenwich Lane, drafted a contract for the purchase of iron water pipes to replace wooden ones, and obtained the approval of the state prison commissioners for "a place of safe confinement to which it would be proper to remove female convicts."[36] During the same time he managed suits involving a variety of matters--an unpaid bill for repairing and winding the clock in the mayor's office, a claim to wharfage rights, a dispute over a street opening, title to the Williamsburg tidal lands, and the refusal of grocers to pay an excise tax earmarked for the House of Refuge.[37]

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[35]For Emmet's life, see ibid., pp. 253-55; McAdam, Bench and Bar, vol. 1, p. 319; New York Times, Feb. 16, 1873 [obituary], and "Memorial to the Late Robert Emmet," in vol. 13, Cephas Brainerd Collection, Library of the Association of the Bar of the City of New York.

[36]Common Council, Minutes, vol. 17, pp. 640, 644, 740; vol. 18, pp. 25, 38-39.

[37]Ibid., vol. 17, pp. 258, 506, and vol. 18, p. 344 [clock]; 582 [wharfage, street opening]; vol. 19, pp. 163, 202 [Williamsburg], and 401 [House of Refuge].

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After 1831, however, it becomes difficult to track his activities. In May of that year New York City implemented a new charter that had been prepared by a special convention in response to years of complaints about its machinery of government.[38] The new charter removed both the mayor and the recorder from the Common Council, making the mayor a purely executive officer and the recorder an exclusively judicial one. (Three years later an amendment would make the mayor, for the first time, an elected rather than an appointed officer.) The charter divided the Common Council into two houses, a Board of Aldermen and Board of Assistant Aldermen, and provided for them to sit in separate meetings and to conduct business separately. Resolutions and ordinances could originate in either body, and they became law when passed by both boards and signed by the mayor; the mayor could reject a bill, but his veto could be overridden by a simple majority of both boards. In addition, the new charter directed the two boards to organize new departments of city government--a provision they largely choose to ignore and continued to conduct the city's executive business themselves through their own committees. Far from streamlining the work of municipal government and making the corporation counsel's work easier, the new charter only

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[38]For proceedings of the convention, see "Journal of the Convention for Revising and Amending the Charter of the City of New York (1829)", in James Kent, The Charter of the City of New York, With Notes Thereon (New York: Childs and Devoe, 1836), pp. 269-329.

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complicated it and made his work harder. He had two boards to advise, and twice as many committees as before--all of whom at times seemed bent on working at cross-purposes with one another and with the mayor.[39]

To complicate matters further, it was not long before the two boards were thrown into chaos by a rapid turnover in membership due to the fact that the city had become a major political battleground between the Whigs and Democrats, with intermittent sniping as well by such splinter parties and factions as the Equal Rights Democrats, the Native Americans, the American Republicans, the Locofocos, the Hunkers, the Barnburners, and others too obscure to mention.[40] Emmet clung to office through several divided boards, but in 1837 the Whigs amassed a large enough majority to throw him out of office in favor of one of their own. After that for the next dozen years the city had a succession of mostly one- and two-year corporation counsels, each of whom had barely mastered the job

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[39]New York, Laws (1830), ch. 122.

[40]The literature on the rise of the "Second American Party System" is too voluminous to cite here, but for an excellent and practically exhaustive overview, see Edward I. Pessen's bibliographic essay at the end of his Jacksonian America: Society, Personality, and Politics, rev. ed. (Urbana: University of Illinois Press, 1985; orig. 1969), esp. pp. 349-59. In addition, a recent and highly useful anaylsis of local politics may be found in Amy Bridges' A City in the Republic: Antebellum New York and the Origins of Machine Politics (Cambridge: Cambridge University Press, 1984). For generally reliably data (e.g., the results of each municipal election, including political composi-

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before he was ushered to the door: George F. Tallman (Whig, 1837-39), Peter A. Cowdrey (Democrat, 1839-42), David Graham, Jr. (Whig, 1842-43), Cowdrey again (Democrat, 1843-44), John Leveridge (American Republican, 1844-45), James T. Brady (Democrat, 1845-47), and Willis Hall (Whig, 1847-49).[41]

As their politics suggests, this was a disparate group of corporation counsels. Tallman and Leveridge, members of two wealthy old Knickerbocker families, were prominent in a variety of social and civic affairs, and both were about as much businessmen as they were lawyers. Tallman was the New York agent of the American Trust Company and later became vice-president of Farmer's Trust, and Leveridge founded and ran the East River Savings Bank. Leveridge also found time to help organize the elitist St. Nicholas Society and to take part in the anti-immigrant crusade of the nativist American Republican party.[42]

In contrast to the prominence of these two, Cowdrey was scarcely known to the public at all. The "office lawyer" in a firm dominated by Tammany politician Samuel Cowdrey, he held no other political office, was never a prominent

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[41]Each term began and ended in May (the month chosen in 1831 for changes in administration); Tallman thus served two years, Cowdrey three, Graham one, Cowdrey (again) one, Leveridge one, Brady two, and Hall two.

[42]For Tallman's life, see New York Times, June 12, 1883, p. 4, and for Leveridge's, ibid., Feb. 18, 1886, p. 2, and McAdam, Bench and Bar, vol. 1, p. 394.

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member of the bar, and took no discernible part in civic or social affairs.[43] Hall was only slightly better known; he was a business lawyer who worked quietly and efficiently behind the scenes and measured his worth to his clients by the rarity of his appearances in court. Unlike Cowdrey, however, he was ambitious for political office and served two terms in the assembly and one year as New York attorney-general. He made enough from his practice to retire in 1848 at the age of 47 and to move to Saratoga Springs, where he lapsed into comfortable obscurity as proprietor of a small (and not very successful) law school.[44]

Graham and Brady, on the other hand, were early examples of a new phenomenon of the bar--the celebrity lawyer. Both were famed criminal defense lawyers who played as much to the tabloid press as to the jury and as a result of

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[43]The family relationship between the two Cowdreys is uncertain, but may well have been father-son or uncle-nephew. Peter Cowdrey may have been appointed corporation counsel as a surrogate for Samuel Cowdrey, a former corporation attorney and a minor power in Tammany. In the late 1830's Samuel had been forced by ill health to curtail his activities, and Peter's appointment can be seen as a way to keep the city's law business--and its fees--at least in his firm. I have been unable to find Peter Cowdrey in any of the biographical works consulted for this work and only shadowy glimpses of him through the activities of others in his family. See Common Council, Minutes, Index, pp. 306-08 [Cowdreys in city government]; New York Evening Post, Aug. 19, 1843, p. 3 [obituary of Samuel Cowdrey, with valuable details about his career], and New York City directories for 1825-51 [showing Peter Cowdrey practicing with Samuel Cowdrey and, in 1846, moving to Yonkers].

[44]Patterned, presumably, after Judge Tapping Reeves' operation in Litchfield, Conn., where Hall had received his own preparation for the law. For Hall's career, see McAdam, Bench and Bar, vol. 1, p. 341, and Appleton's Cyclopaedia of American Biography, vol. 3, p. 45.

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enormous publicity were able to command extravagant fees. Graham starred in the sensational trial of accused Staten Island murdereress Polly Bodine, and (in another case avidly covered by the press) bargained the charges against abortionist "Madame" Restelle down to a misdemeanor. And although it did not attract nearly as much attention from the penny press, he was one of the guiding lights behind the budding movement to reform or "codify" the archiac system of common law pleading; besides writing the standard text on New York court procedure, he served on the 1848 state commission on law reform and, according to its chairman, wrote as much of the famed "Field Code" as Field himself.[45]

Brady--like Graham, a brilliant criminal defense lawyer and, like Emmet, something of a professional Irishman--was one of the most celebrated lawyers of his time. He first came to public attention when he won the case of Sarah Coppin, a poor immigrant who had been orphaned on the passage from Ireland, robbed of all her possessions on landing, thrown into the poorhouse, and served with a deportation

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[45]Although David Dudley Field's name became synonymous with the New York code of 1848, it was actually the collaborative effort of a three-man committee composed of Arphaxed Loomis, who supervised the project, and Graham and Field, who did most of the actual drafting. For their comparative contributions, see Loomis' Historic Sketch of the New York System of Law Reform in Practice and Pleadings (Little Falls, N. Y.: J. B. & G. G. Stebbins, 1879), pp. 5-23. Graham died in 1851, leaving Field as its chief advocate and of the codification movement in general. For Graham's career, see McAdam, Bench and Bar, vol. 1, pp. 335-36, and New York World, May 8, 1878, p. 5.

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order. Brady was expert in several fields--patent law (Goodyear v. Day), medical jurisprudence (the Parrish will case), and family law (the Forrest divorce)--but he became best known for a series of spectacular criminal trials, anong them the defense of Daniel Sickles for the murder of Philip Barton Key. He was active in Democratic politics and could have had his choice of several offices, but refused them all except for corporation counsel--once, according to one story, turning down an offer of the U. S. attorney-general's office with the remark, "If there is anything for which I entertain a holy horror, it is compulsory association with Washington politicians."[46]

The rapid rotation through office of such a diverse group of individuals could hardly help but create problems. Each had barely settled comfortably into office before he had to vacate it and pass his work over to a successor--a successor, moreover, whom he viewed more as an opponent than a colleague. And even if these officers had been on the best of terms with one another, the transition would still have been a difficult one. It was not as if one appointee stepped into quarters in City Hall vacated by another, with a clerical staff standing ready to acquaint

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[46]Quotation from biographical sketch in Appleton's Cyclopaedia of American Biography, vol. 1, p. 354. See also McAdam, Bench and Bar, vol. 1, pp. 266-67 [portrait, facing 266], and James T. Brady, In Memoriam: Report of Proceedings at a Meeting of the New York Bar . . . February 13, 1869 (New York, 1869).

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him with file drawers full of past records. There was no office, no staff, no records--only a piece of paper authorizing him to act as legal counsel to the corporation. He operated out of his own private law office, in essence treating the corporation of New York City as just another client--a prize client, to be sure, and usually one that dwarfed the rest of his practice, but only a client nonetheless. It was up to him to employ any additional clerks needed to handle this business, and to arrange with his law partner (if he didn't already have one, he quickly obtained one) to oversee everything while he was out of the office attending meetings of the two boards and their committees.

Most of the corporation counsel's income came not from his salary but in the form of "taxed costs" for managing the city's cases and other legal proceedings. The flaw in this arrangement was that the cases and proceedings belonged to the office and not to the man--that is, to the office of corporation counsel and not to the incumbent who happened to occupy that office at the moment. When a new corporation counsel took office, the old one was expected to pass along promptly all pending cases and proceedings, together with all the records relating to them. The catch, of course, was that he was also passing along all hope of ever getting paid for his work. At the end of his term in 1842, for instance, Peter Cowdrey was caught with 145 cases in various stages of completion, which he complained he was

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"prevented from consummating, and from proceeding to realize the costs from the opposite party in case of eventual success."[47]

Since costs were not taxed and lawyers paid until completion of a case, in theory a corporation counsel stood to gain nothing from a large part of his work. Professional courtesy was supposed to ensure that this did not happen, but there was too much political animosity between incoming and outgoing officeholders to always count on such friendly resolution. There were several possible arrangements for the transfer of business, none of them entirely satisfactory to both parties. Sometimes the incoming counsel took all the cases and agreed to split the fees when they were taxed by the courts; the problem here was that he might be out of office himself before some of them reached decision, and no one could tell what the next corporation counsel would want to do. It was easier to divide them case by case along whatever lines seemed relevant--their stages of completion, the amount of time already invested, their place on the court calendar, their relation to areas of personal expertise, and so forth. But this sort of division too easily degenerated into a contest of wits, each trying to grab for himself the easiest and most lucrative cases and leave to the other the more difficult and least

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[47]See his report in Board of Aldermen, Proceedings, vol. 23, pp. 94-109; quoted at p. 98.

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remunerative ones. At times the two were unable to agree between themselves, and an annoyed committee of aldermen had to step in and settle the quarrel so that the city could get on with its legal business.[48]

Consequently, there was very little continuity in the operations of the office. It is as if a major corporation (which, of course, New York City was) moved all its legal work every year or two from one law firm to another--and, to continue the analogy, that these firms fell to fighting among themselves for custody of the juicier lawsuits. And that, additionally, this corporation had a annual turnover of 60 to 80 percent in its managers and board of directors;[49] that its chief executive officer was little more than a figurehead; that the division in charge of overseeing its legal affairs changed its members every year; and that at times the chief executive and other divisions made important legal decisions entirely on their own. Add one additional circumstance--that the corporation was in the

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[48]In the Cowdrey-Graham impasse, Graham suggested that the matter be resolved by the board as "that course which in similar cases has been usual." The board ordered the matter referred to the Law and Finance Committees of both houses, with power to audit and pay Cowdrey's services. See ibid., p. 40, and, for a similar instance with Leveridge, vol. 27, p. 226.

[49]A comparison of rosters of the boards of aldermen from 1831 to 1848 shows that for three-forths of these years the rate of turnover was 60 percent or more; overall, the lowest was 47 percent, the highest 94. The turnover was ever more extreme in the three-member Law Committee, which rarely had even one member returning. [From Board of Aldermen, Proceedings, vols. 1-35.]

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midst of a major expansion involving it in legal questions so new they had never been passed on by the courts--and you have very nearly the situation of New York City and its corporation counsel.

A few examples are enough to show how confused the administration of the city's legal affairs was during the period from 1831 to 1848. In April of 1832, for instance, the Board of Alderman--fearing that a state law abolishing the city's "grain measurers" and substituting officers of its own was "contrary to, and an infringement of, the chartered rights of the city"--referred the matter to its Law Committee and the corporation counsel. In May, however, when the next board (three-fifths of whom were brand-new members) received notice of the first case brought by the state under the new law, its members referred it to the "Attorney of the Corporation."[50] This change of counsel may have been by design, or it may have been a slip of the tongue by those not yet accustomed to distinguishing between the two officers. At any rate, corporation counsel Emmet was left on the sideline while young Daniel B. Tallmadge (who until then had been been doing nothing more exciting than prosecuting speeding cartmen, Sunday liquor sellers, and sidewalk-obstructing merchants)

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[50]Board of Aldermen, Proceedings, vol. 2, p. 398, and vol. 3, p. 22.

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began preparing Satterlee v. Sutton for argument all the way to the state's highest court.[51]

The Law Committee had responsibility for overseeing the case, but--typically--it was not the only aldermanic committee to become involved in the matter. When the state brought suit against two other grain measurers, the Board of Aldermen referred their cases to the Committee on Applications for Office.[52] In May of 1834 the Finance Committee entered the matter, noting how much it had cost the city so far ($173.75) and multiplying that by, conceivably, all forty grain measurers. The committee published a long legal opinion (whose author, incredibly, was the judiciary committee of the state senate) finding nothing wrong with occasional abrogations of the city's charter by the state legislature.[53] The Finance Committee forwarded this opinion to the Board of Aldermen and recommended that the case be dropped, and on June 26 the new board (the third in the matter, only three of whose fifteen members had been there in the beginning) complied. From an initial position

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[51]Ibid., vol. 4, p. 54, and vol. 4, p. 18. The case never made it beyond Superior Court, the first rung on the appellate ladder, and thus appears in none of the written reports. For manuscript records of the case, see Satterlee v. Sutton, Judgment Roll (1832), no. 752, in County Clerk's Office. Tallmadge was the younger brother of a prominent Democratic politician, Nathaniel P. Tallmadge, and seems to have been a great favorite of the aldermen.

[52]Board of Aldermen, Proceedings, vol. 5, p. 26.

[53]For this opinion and the Finance Committee's full report, see Board of Aldermen, Documents, vol. 1, no. 3.

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that the new state law should be resisted as a threat to the rights of the corporation, the city had--through a series of decisions by three Boards of Aldermen and Assistant Aldermen, two Law Committees, one Committee on Applications for Office, and one Finance Committee--come full circle.[54]

Other examples of similarly confused legal affairs are not difficult to find. In 1841 the Law Committee of the Board of Aldermen issued a report declaring that the city was obligated to defend an alderman who had been sued in a complicated affair involving bail in police court. On the strength of this report the board passed a resolution ordering the corporation counsel to represent the alderman, but the Board of Assistant Aldermen refused to concur in the resolution; their Law Committee had issued a legal opinion advising them that it would be a mistake.[55] Similarly, in 1842 the Law Committee of the Board of Aldermen drafted a resolution petitioning the legislature for a law allowing the city to institute "John Doe" suits against violators of its ordinances; the Law Committee of

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[54]Board of Aldermen, Proceedings, vol 7, pp. 86-88. Curiously missing from the above list are the three mayors who rotated through office during the controversy; aside from signing the resolutions, none made any official statement on the issue.

[55]The controversy is summarized in Board of Assistant Aldermen, Documents, vol. 19, no. 8.

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the Board of Assistants recommended against it, and the resolution died for lack of concurrence.[56]

The members of the two boards and of their various committees saw nothing unusual about tackling complex legal questions and issuing their own legal opinions. In 1835 a joint Finance and Law Committee of the Board of Assistants issued a legal opinion asserting that the city had the right, under its charter and by state law, to subscribe to $400,000 worth of stock setting up the Erie Railroad.[57] After the Panic of 1837, a special joint committee of both boards wrote an extensive legal opinion about a proposal (floated by the Chamber of Commerce) that the city ease the shortage of money by printing its own. Although conceding it was a "a very interesting question," the committee counselled against it as not, in its opinion, within the corporation's power.[58]

Nor did the aldermen and assistants hesitate to handle practical legal matters on their own. They remitted fines and overturned minor judgments as a routine matter, and

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[56] Ibid., vol. 18, no. 82.

[57] Ibid., vol. 4, no. 61, and Proceedings, vol. 6, pp. 294-96. The board settled for recommending that the state invest in the railroad. Despite the committee's blithe assurances, the law regarding municipal investment in private corporations was quite unknown and would remain so until a series of New York cases beginning in 1858. See Harry H. Pierce, Railroads of New York: A Study of Government Aid, 1826-1875 (Cambridge: Harvard University Press, 1853), pp. 26-40.

[58] Board of Aldermen, Proceedings, vol. 13, pp. 9-11, and Documents, vol. 4, no. 16.

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they seem to have regarded the settling of negligence claims in the same light, less as a legal matter than one of providing constituent services. The largest category of negligence claims involved injuries to horses on the city's streets and wharves, and they were assigned to committees according to where or why they happened--most commonly to Streets, Wharves and Public Places, or Police. These committees usually settled a claim more on the merits of the claimant than on the merits of the case, and one of the most difficult tasks of the corporation counsel was to convince them of the necessity of holding claimants to some legal standard other than being "poor and industrious."[59]

Between 1839 and 1848, relations between the corporation counsel and the mayor and the two boards became so acrimonious that the operations of the office were compromised. On its face it was a quarrel about the pay of his office, but like most such money squabbles it was really about power. And, typical of other municipal disputes of the time, it was poorly defined; no one knew exactly how much the corporation counsel was making, and whether it was deserved (his opinion) or "a much larger sum than is necessary" (the board's opinion).[60] Much of this

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[59]The horse cases will be discussed more fully in the next chapter as a part of the development of tort law. For a few examples, however, see Board of Aldermen, Proceedings, vol. 7, pp. 165-66; vol 11, pp. 370-71, and vol. 30, pp. 118-19.

[60]Ibid., vol. 16, p. 384.

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confusion came about because the pay of his office was a complex, ever-changing mixture: an annual salary (as late as 1839, still $500), primarily for making himself available for legal advice; miscellaneous "counsel fees" charged to the corporation for other services such as drafting bills and memorials, examining titles, and drawing up contracts; other fees charged to not to the corporation but to the recipients of deeds, leases, and other agreements; his share of the "taxed costs" assessed by court order against the losing parties in the city's lawsuits; and street opening fees (actually a species of taxed costs, levied against the lot owners) for his work in the legal proceedings involved in taking land for the construction of streets.[61]

Because only the first two were paid directly by the corporation and were, in fact, the least part of his compensation, the corporation counsel considered that the rest of his income should be of no concern to the Board of Aldermen.[62] Nor, for that matter, was it until 1839, when the aldermen began looking into ways to cut the municipal budget during the economic depression that had settled in

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[61]For a full discussion, see Ulshoeffer's report in ibid., vol. 13, pp. 158-59.

[62]To avoid the repetition of awkward nomenclature ("Board of Aldermen and Board of Assistant Aldermen" and "aldermen and assistants"), the account which follows will treat the controversy as one of the Board of Aldermen--with the understanding that the other board was involved as well, although generally only to the extent of voting concurrence with the Board of Aldermen.

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after the Panic of 1837. Discovering that the corporation counsel had recently received in one year alone "the enormous sum" of $26,948 in street opening fees, the board passed a resolution on April 29 declaring that he was "fully remunerated by the emoluments derived from services rendered for others" and would no longer be paid any salary or counsel fees by the corporation. In an additional provision the aldermen put a dollar figure on what it figured the office to be worth; if the corporation counsel could show that his gross income had fallen below $4,000 in any given year, the city would make up the difference.[63]

Hardly surprisingly, the resolution was passed by an outgoing Whig Board of Aldermen for the benefit of an incoming Democratic board and its new corporation counsel. The new aldermen were understandably wary about whether to accept this last-minute measure or to repeal it, and temporized by asking the comptroller to report exactly what amounts the corporation itself had paid the corporation counsel since 1835. To their surprise, the comptroller

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[63] Ibid., vol. 16, pp. 384-86. "Enormous" is hardly an exaggeration considering the equivalent of $26,948 in modern money; it would probably raise a few eyebrows today if it were revealed that a city official was raking in over $390,000 in "incidental fees" in addition to his salary. [Computed from Table A-2 in McCusker's How Much is That in Real Money?] The $26,948 (made by Emmet in 1835) was a bit of an aberration, the average running more like $12,000, according to the board's own figures. During the depression street openings suffered along with everything else, as did the corporation counsel's income from them; the total amount of these fees from 1839 to 1846 was less than $10,000. See table in Board of Aldermen, Documents, vol. 14, no. 17, p. 250.

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reported back that he had no idea; it would, he said, require "the examination of more than thirty thousand documents in this office" and the employment of several additional clerks.[64] The board dropped its inquiry and let the resolution stand.

There followed a long period of confusion, exacerbated by a rapid turnover in the seventeen-member Board of Aldermen. The new Democratic board (ten of whose members were newly elected) softened the impact of the "no-salary" resolution by voting on December 18, 1840, to award the corporation counsel $1,200 annually "in lieu of all charges for assistance and clerk hire."[65] In September of 1842 a Whig board (with nine new members) reduced this amount to $600.[66] The following year another Democratic board (ten new members) restored the corporation counsel's salary and fixed it at $3,000, intending it to be (as its members later explained) "in full payment of all services" performed by him.[67] They had decided that the corporation

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[64]Board of Aldermen, Documents, vol. 17, no. 14, p. 36.

[65]Board of Aldermen, Proceedings, vol. 20, pp. 69-71. References (here and following) to "new" or "newly" elected members refer to those who were not holdovers from the previous board; some "new" aldermen had served on earlier boards, but spot checks show even this number to be surprisingly small. I have not attempted a similar comparison of the Board of Assistants, whose composition largely mirrored the other board.

[66]Ibid., vol. 23, pp. 66, 186.

[67]Leveridge v. The City of New York, 2 Sandford (N. Y. Superior Court) 263, quotation from 266 (1849).

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counsel should receive a salary and clerk hire but no "counsel fees" for such services as drafting bills and memorials, drawing contracts, and so forth.

The American Republican board of the following year (sixteen new members) reduced this salary to $2,000 but, three days later, allowed a generous $1,600 in clerk hire.[68] To the surprise of corporation counsel Leveridge, however, the board began to balk at passing along his taxed costs in lawsuits and other proceedings; in justification of its refusal the board claimed that "in full payment of all services" included his services in lawsuits, and therefore the taxed costs assessed by the court belonged to the corporation itself.[69] Although this was a novel twist to be placed on the situation, there was really nothing illegal about it. Although taxed costs normally went to the client (in this case, the corporation) to be passed along to his lawyer, there was nothing preventing the client and his lawyer from making any private agreement they wished about them; a lawyer might, for instance, impose more substantial "counsel fees" and agree to waive

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[68]Board of Aldermen, Proceedings, vol. 27, pp. 23, 194. The board added $1,000 to the existing $600 clerk hire.

[69]A contention made explicit in Leveridge v. The City of New York, at 266.

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taxed costs altogether.[70]

The key word, of course, is "agree," and Leveridge--understandably upset at being deprived of the greatest part of the income of his office--denied that he had agreed to anything. Before he could establish the point, however, he and the American Republicans were out of office, and the Democrats and corporation counsel Brady were left to grapple with it. The new board (all but one of whom were newcomers, and few of whom had ever served before) went along with the previous board's actions. Its members retained the $1,600 allowance for clerk hire, and in their Revised Ordinances of 1845 fixed the salary at $2,000 "in lieu of all fees or other charges against the corporation."[71] There is considerable confusion as to whether, at the time, the board intended this clause to refer to taxed costs as well as to counsel fees. At some point in the next two years, however, either this board or the next one (also Democratic, half of whom were holdovers) decided that it did.[72]

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[70]A practice growing so common that in 1849 New York abolished the system of taxed costs altogether and left compensation to be negotiated between the lawyer and his client. See New York, Laws (1849), ch. 438, sec. 303.

[71]Quoted in Brady v. The City of New York, 1 Sandford (N.Y. Superior Court) 569, at 574.

[72]What was in their minds has to be reconstructed from Brady v. The City of New York, because the question was thrashed out either in private confrontations or in committee meetings and not in the recorded meetings of the board.

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Brady, of course, was equally convinced that it did not. He was no more successful than Leveridge in proving this point when he was office, but he was less willing than his predecessor to drop it when he left. Within weeks of leaving office, he brought suit against the city for $8,511 that he claimed he was owed for taxed costs in over two hundred cases. Brady and the city (represented by outside counsel, its current corporation counsel Willis Hall having an obvious conflict of interest) agreed to conduct the trial phase before referees.[73] After the referees ruled in favor of Hall, the city appealed the case to Superior Court (a local tribunal instituted in 1828 to relieve the Supreme Court of part of its burden), and on March 6, 1848, Judge Lewis H. Sandford began hearing the arguments of the two sides.[74]

Sandford was essentially dealing with a question of contract law: Did a contract exist by which the corporation and the corporation counsel had agreed that he waive his claim to taxed costs and other fees? Contract law, one of the great inventions of nineteenth-century jurispru-

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[73]To avoid waiting their turn on a crowded court calendar, litigants could agree to argue their cases before court-appointed referees (a procedure called a "reference"). The referees (usually retired judges, who were paid by the litigants for their work) reported their decision to a judge, who accepted it for the court and entered it into the record. For a more detailed definition, see Black's Law Dictionary, p. 1445.

[74]Brady v. The City of New York, 1 Sandford (N. Y. Superior Court) 569 (1848).

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dence, had not yet reached anything approaching its modern form, so Sandford approached the question a little differently than a later judge would have done. Lacking any convincing proof on the part of the corporation that any such contract existed (the burden of proof being on the party asserting that it did), he subjected the supposed agreement to a simple test of reason. Was it reasonable to suppose that $3,600 was intended by both parties to be fair compensation for all the services of the corporation counsel? To answer this question, he undertook an examination of exactly what these services were.

Consequently, we are given in the court record a remarkably detailed picture of the office of the corporation counsel as it existed then. One of Brady's clerks, Peter B. Sweeney--at the time, just one of many bright young lawyers rotating through the firm--testified to office memoranda he had made of Brady's various services to the corporation. According to his records, Brady spent a great deal of time advising the mayor, the members of both boards, nineteen standing committees of each board, two joint committees, and dozens of officers ranging from the comptroller to the various police captains. Most of this advice he provided in person, visiting the offices of the various officials and attending meetings of the two boards and their committees. As an additional part of his duties, he wrote innumerable letters, reports, opinions, election

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notices, legislative bills, memorials, ordinances, contracts, agreements, and the like. And on top of all this work, he handled practically all the city's lawsuits and other legal proceedings, often traveling to Albany and elsewhere to argue them.[75]

Brady operated from the firm of Brady & Maurice, and had expanded the firm to accommodate the city's law business. He and Maurice had hired Sweeny and another law clerk, a full-time copyist, and a clerk-messenger. According to Sweeny's testimony, paraphrased in the case report, even with this sizable force Brady was hard-pressed to handle all of the city's legal business:

> During the time of plaintiff's holding the office of counsel to the defendants, his services as their counsel required his attendance elsewhere than at his own office the greater part of each day. He attended at various offices of the defendants and gave advice. When plaintiff was absent from his office, Mr. Maurice, his partner, had the general charge of all business in the office. Witness and the clerks were usually in the office till after candle light, and Mr. Maurice usually remained until nine o'clock at night.[76]

Considering the amount of work that had been demonstrated, Sandford found $3,600 to be about right for Brady's services as advisor and counsellor but far from

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[75]Ibid., at 579-81.

[76]Ibid., at 584. Incredibly, according to the same record, Brady at the same time carried on "a good business" with private clients, both on his own and in partnership with Maurice.

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adequate for handling over two hundred lawsuits as well.[77] In effect, Sandford applied a standard of reason to the question of what the actual agreement had been: it was reasonable to suppose that the aldermen had intended $3,600 as adequate pay for "counsel work," but not reasonable to suppose they would have expected any lawyer to throw into the bargain the conduct of two hundred lawsuits. The board's arguments, in his opinion, fell "far short" of proving a contract and did not overcome its obligation as an employer to pay a employee for work performed. Consequently, Sandford ruled, the corporation was obligated to pay Brady the full amount of his taxed costs.[78]

The case was, obviously, about money; $8,511 was a substantial sum in those days.[79] But it was also about power, and control, and the attorney-client relationship. One way of understanding this is to consider the joking definition of the Golden Rule: He who has the gold makes the rules. If the corporation counsel was a wholly salaried employee of the Board of Aldermen, the Board of Aldermen made the rules. But if two-thirds of his compensation of office

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[77]Even translated into its equivalent in modern currency of slightly less than $60,000, it seems a remarkable bargain. [Computed from Table A-2 in McCusker's How Much Is That In Real Money.]

[78]Ibid., at 589-91. Emboldened by Brady's success, Leveridge also sued and won [Leveridge v. The City of New York, 2 Sandford (N. Y. Superior Court) 263 (1849)], as did a former corporation attorney [Sniffen v. The City of New York, 3 Sandford 193 (1850)].

[79]The equivalent of $144,687 today; see ibid.

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came from independent sources, the corporation counsel could make his own rules--up to a point, at least. That point varied according to circumstances, but the more financially independent he was of the Board of Aldermen, the more independent he could afford to be in his official actions.

The rules that mattered in this respect were the rules of the attorney-client relationship. The counsel to a corporation, any corporation, is beset by an intrinsic difficulty in this relationship: How does an attorney relate to a client who is, by definition, invisible, intangible, and incorporeal? How does he keep that relationship separate from his other relationships with the human agents who--in a very visible, tangible, and corporeal way--serve as the officers of that corporation? Who defines the corporation's legal interests, its counsel or these officers? Is he bound always to follow their directions? Where does his obligation lie when he is convinced their interests are in conflict with those of the corporation? What power, other than personal persuasion, does he have to compel his advice on them? Questions of this sort had already begun to arise in the relationship between the corporation counsel and the other officers of New York City government, and they would continue to plague it through the rest of its history.[80]

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[80]In a conversation with the author in 1987, corporation counsel Peter Zimroth identified awareness of the distinction between the corporation and its officers as one of the most important and, at the same time, most difficult and least understood responsibilities of the

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It was a question that these officers were either oblivious to, or impatient with; so far as they were concerned they <u>were</u> the corporation, and the corporation counsel was "their" counsel--a notion reinforced by their habit of referring to him in their minutes as the "counsel of the Board." The tendency to identify the corporation with the Common Council and its successor, the Boards of Aldermen and Assistants, was a strong one, deeply ingrained in both the citizenry and the members of municipal government. After attending an aldermanic dinner in 1835, for instance, former mayor Philip Hone jotted in his diary, "Tonight I dined with the honorable the Corporation."[81] And when New Yorkers referred to the manure splattered through their streets as "corporation pie," they were mocking not some invisible entity but the aldermen they held responsible for its continued presence.

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office. It is a problem that has been much agonized over by those serving both public and business corporations and has recently inspired a spate of such articles as Robert J. Kutak, "Whom Does the Corporate Counsel Represent," <u>The Corporate Director</u>, (Mar.-Apr. 1981), pp. 1-6; Brian D. Forrow, "The Corporate Law Department Lawyer: Counsel to the Entity," <u>The Business Lawyer</u>, vol. 34 (July 1979), pp. 1797-1815; Eric Schnapper, "Legal Ethics and the Government Lawyer," in Association of the Bar of the City of New York, <u>Record</u>, vol. 32 (Oct. 1977), pp. 649-57, and the sections on "Corporate Client-Lawyer Relationship" and "Government Lawyers" in Charles W. Wolfram, <u>Modern Legal Ethics</u> (St. Paul: West Publishing Company, 1986), pp. 732-59.

[81]Allan Nevins, ed., <u>The Diary of Philip Hone</u>, (New York: Arno Press, 1970; orig. 1927), p. 162; see also p. 336.

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The corporation counsel offended this "corporation" at his peril when he was considered a mere employee. The aldermen, for instance, were not pleased in 1846 when Brady informed them they had no authority to discharge prisoners from the workhouse and convey them to the polls.[82] Nor did mayor Robert Morris appreciate it in 1842 when corporation counsel Graham informed he had committed a serious breach of the law by seizing $5,000 in license fees and bearing it personally, in cash, to the First Marshal to clean the streets. Morris justified his action as a response to a health emergency and devoted three pages of his Annual Message to the City to a denunciation of Graham's meddling. His criticism is worth quoting at some length because it reflected the general opinion of the two boards as well about the powers of the corporation counsel.

The corporation counsel was not truly an "officer" of the city, Morris charged; officers were only those designated as such by the charter or by legislative act. All other persons employed by the aldermen by their ordinances and resolutions were "mere agents" of the corporation and could legally perform only such duties as were specially delegated to them.

> [O]f this class of persons is "The Counsel to the Corporation." He has no official power or functions, and can only bind the Corporation when he acts within the

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[82]Board of Aldermen, Documents, vol. 13, no. 5.

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> authority specially given to him, and which must be given either by resolution or ordinance. He can neither institute or defend a suit unless he is thus directed. By one of the ordinances of the Common Council it is made his duty to advise the two Boards and their Committees and Officers; but the Charter and common sense both require that neither the Boards, their Committees, nor their Officers, should follow his advice unless it accords with their own opinion of propriety. "He shall advise." His advice, however, has no power or obligation in it.[83]

In making these observations, Morris had nothing in mind other than putting Graham in his place, but his remarks underscored the chief deficiency of the office--its complete and utter dependence on the Board of Aldermen and Board of Assistants. It was a weakness the corporation counsel shared with the few other major officers the boards had seen fit to appoint; the comptroller, street commissioner, and almshouse commissioner were not true executives but, like him, were "mere employees." The solution (called for by one mayor after another, and routinely ignored by one board after another) was for the two boards to organize the departments of city government called for by the charter of 1831. All five of the mayors of the 1840's--Morris, James Harper, William F. Havemeyer, Andrew H. Mickel, and William V. Brady--made implementation of these departments one of the chief issues of their administrations. The two boards ducked and dodged the controversy

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[83]Robert H. Morris, "Annual Message of His Honor the Mayor," in Board of Aldermen, Documents, vol. 8, no. 4, pp. 34-35.

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until they were finally forced, reluctantly, to come to grips with it in 1848.[64] The timing, so far as the corporation counsel was concerned, could not have been better. With Brady v. The City of New York in litigation, the two boards could hardly ignore the need for a reform of the office of corporation counsel--a reform which, insisted several former corporation counsels, could only come about by making the office one of these new departments.

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[64]For a detailed analysis of this struggle, see Ira M. Leonard, "The Politics of Charter Revision in New York City, 1845-1849," in New-York Historical Quarterly, vol. 62 (1978), pp. 43-70, and vol. 63 (1979), pp. 7-23.

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Chapter IV

INVENTING A NEW MUNICIPAL LAW, 1783-1849

Those who write American legal history have had a particular fascination for the years between the Revolution and the Civil War. They see in this period a "formative era" or "golden age" in which judges and lawyers transformed hidebound English law into a vigorous new American offshoot.[1] It was by all accounts an extraordinarily fertile and creative period in American law. By the time of the Civil War a revolution had taken place in procedure, criminal law, corporations, contracts, property, family law, and tort.[2]

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[1]Roscoe Pound, The Formative Era of American Law (Boston: Little, Brown and Company, 1938), and Charles M. Haar, ed., The Golden Age of American Law (New York: George Braziller, 1965). Legal scholars dispute the exact nature of the changes taking places in this period, but agree that the era marks, in the words of Hendrik Hartog, a major "discontinuity" in the law. See his historiographic essay, "Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History," in Hendrik Hartog, ed., Law in the American Revolution and the Revolution in the Law: A Collection of Review Essays on American Legal History (New York: New York University Press, 1981), pp. 229-57.

[2]Lawrence M. Friedman, A History of American Law, 2 ed. (New York: Simon and Schuster, 1985), pp. 105-333, and Kermit Hall, The Magic Mirror: Law in American History (New York: Oxford University Press, 1989), pp. 106-28, 150-78.

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Nowhere was there greater change than in the law of municipal corporations, and nowhere was this change more rapid than in New York City. Between the end of the Revolution and the middle of the nineteenth century the corporation of New York City was completely redefined: from a passive, property-owning entity owing its authority to an ancient royal charter, into an active, service-providing government which was only incidentally a property owner and which derived its powers from the state legislature.[3]

The officers of New York City did not set out consciously to redefine the corporation and its powers, but to cope with immediate threats to the public welfare: fires that swept whole blocks of buildings, epidemics that sent people fleeing the city in panic, brackish water that sickened those who drank it, streets choked in filth and debris. They used law as a tool to achieve their immediate ends, with remarkable success but also without any way of knowing where those legal changes would ultimately lead. It was their actions and the consequences that flowed from them, both expected and unforeseen, that to a great extent has shaped American municipal law.

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[3]The thesis of Hendrik Hartog's Public Property and Private Power; see also Joan C. Williams, "The Invention of the Municipal Corporation: A Case Study in Legal Change," American University Law Review vol. 34 (1985), pp. 369-404, as well as her review essay on Hartog's book, "The Development of the Public/Private Distinction in American Law" in Texas Law Review, vol. 34 (1985), pp. 225-33.

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FIRE

Aside from the wartime fires of 1776 and 1778, all of the city's "great conflagrations"--fires that burned out of control and levelled several city blocks--took place in the first half of the nineteenth century: in 1804, 1811, 1813, 1835, 1839, and 1845.[4] The reasons are not difficult to understand. New York City was growing, quite literally, by leaps and bounds, with its population soaring from 60,515 persons in 1800 to 515,547 in 1850 and its settled area jumping from roughly Chambers Street to Gramercy Park. Gracious old residential neighborhoods in lower Manhattan gave way to a hodgepodge of stores, warehouses, factories, hotels, shops, offices, and other commercial uses, and displaced homeowners like Philip Hone found themselves, in his words, "marching reluctantly north to pitch their tents in places which, in their time, were orchards, cornfields, or morasses."[5] But even with this northward expansion, New York continued to be densely built and susceptible to the rapid spread of fire. The high price of building lots dictated that most structures, residential as well as commercial, would be crammed into narrow lots and share "party

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[4]Lowell M. Limpus, History of the New York Fire Department (New York: E. P. Dutton and Company, 1940), pp. 127-31, 148, 150-58.

[5]Nevins, Diary of Philip Hone, pp. 127-28. For the city's successive waves of northward expansion, see Charles Lockwood, Manhattan Moves Uptown: An Illustrated History (Boston: Houghton Mifflin, 1976).

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walls" with their neighbors--a circumstance that made it easy for fire, once started, to leap quickly out of control.

Moreover, the city relied on a force of volunteer firefighters who, despite their eagerness, were woefully undermanned and poorly equipped. While the city's population as a whole was increasing ninefold, the number of firefighters barely tripled (from 600 in 1800 to 1,898 in 1850), and their methods changed little from what they had been a century earlier. At the ringing of an alarm volunteers raced to the scene with hand-pumped fire engines that threw feeble streams of water onto the fire and all too soon ran dry. These were replenished, if all went well, by passing buckets of water from the nearest pump or cistern or from the river itself. Until the coming of the Croton Aqueduct system in the 1840's, hundreds of buildings were lost for lack of water or, for that matter, water pressure; when the top floors of the City Hotel caught fire in 1833, firefighters had to stand by and wait until the fire burned down within range of their hoses.[6]

Consequently, New Yorkers felt a terrible vulnerability to fire. No matter how careful an owner might be with his own property, he was at risk if another building caught fire anywhere near him; unless the fire was caught practi-

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[6]Limpus, History of the New York Fire Department, pp. 127-48.

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cally at the start, it could jump to the next building and sweep through whole blocks. In 1796 a fire at the Coffee House slip spread to over fifty buildings, and in 1804 a fire that began in a grocery store destroyed forty houses on Front Street; another fire in 1833, fanned by high winds, swept through seventy houses in just twenty minutes. And just as horrifying as the fires themselves was the way they were stopped--by firemen charging into buildings in the path of the fire, swinging axes and knocking down walls and roofs to create fire breaks. In these as well as innumerable smaller fires, property owners feared not just the fire itself but the sacrifice of their buildings to save others.[7]

With so little chance of containing fire, the city concentrated on trying to prevent it. Chimney and roof regulations dated back to 1657, and by 1731 there were so many ordinances relating to fire that the Common Council gathered them into a comprehensive fire code, "A Law for the Better Preventing of Fire."[8] After the Revolution the Common Council strengthened the fire code several times, and after the disastrous Boston fire of 1794 it extended

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[7] Ibid.

[8] Berthold Fernow, ed., Records of New Amsterdam, 7 vols. (New York: The Knickerbocker Press, 1897), vol. 1, pp. 34-35, and Common Council, Minutes (Colonial), vol. 4, pp. 82-83; see also ibid., vol. 1, pp. 139, 187, 211, 372, 392, and vol. 2, pp. 22, 183, 233.

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the "fire limits"--the area in which new wooden construction was forbidden--north of Canal to Broome Street.[9]

In 1802 the Common Council began considering regulating not just buildings but personal behavior and, uncertain of their authority, asked corporation counsel Richard Harison whether they could regulate "the use of fire and candles & the practice of smoking in livery stables," as well as the lighting of warming fires on the decks of ships.[10] Harison answered that in his opinion "the Common Council possess competent power by their charter for the purposes required. They are authorized to make by-laws for the Public good, which I think requires such regulations as tend to the Prevention of Fires." But Harison did not stop there. He believed that a good part of a lawyer's job consisted of anticipating trouble before it happened. Consequently, recognizing that the ordinance might be difficult to enforce, he added, "I should think that it would be advisable (if there is no particular reason to the contrary) to obtain an act of the Legislature recognizing or confirming the powers of the Corporation in this respect."[11]

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[9]Ibid., vol. 1, pp. xiv, 11, 16, 431, 499, 500, 682, and 684.

[10]Ibid., vol. 3, pp. 164.

[11]Ibid., pp. 165-66.

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There was nothing new about the legislature's passing acts regarding New York City. The colonial assembly had done so fairly often, and the state legislature even more frequently; between 1784 and 1801 some 155 acts had been passed dealing with everything from harbor development to dog licenses.[12] Many of the laws were made necessary because the charter did not give the city the right to levy taxes, but others were passed when the Common Council wanted to do something new, was uncertain of its powers under the charter, and played safe by covering itself with authority from the state. Even when its members were certain of their powers under the charter, they sometimes thought it prudent to ground their actions in state authority rather than call attention to a charter that was a relic of royal privilege.[13] But no matter what the reason for the laws, they all had one thing in common: they

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[12]Pomerantz, New York, An American City, pp. 58-59. A list of these laws with their dates can be found under the heading "New York City and County" in Index to the Laws of the State of New York (Albany, 1905), pp. 1460-62.

[13]To paraphrase jurist Murray Hoffman, after the Revolution "the people of the respective states had succeeded to all the privileges of the Crown," with the result that "it could not but happen, that royal charters would be looked upon with jealousy and assailed with vigor" [Murray Hoffman, A Treatise upon the Estate and Rights of the Corporation of the City of New York, as Proprietors (New York: McSpedon & Baker, 1853), pp. 32, 33]. New York City was particularly vulnerable to this republican animosity because it had long received special favors from the Crown--the flour monopoly, valuable land grants, status as a favored port--at what seemed the expense of the rest of the province.

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were passed on the request of the city itself and enacted by an obliging legislature.[14]

Harison, then, did not propose anything new. But what he did was to say for the first time what had been left unsaid before: when in doubt, do not rely on the charter but get authority from the legislature. His opinion, which was morally if not legally binding on the Common Council, took what had been a casual practice and gave it the sanction of official policy. If its members wondered in the future what they should do, they had this opinion to guide them. After 1802 their resort to the legislature for authority became more or less automatic, until by the 1830's it was difficult to tell, in the words of James Kent, "how far an ordinance of the Common Council rests upon the authority of the charter and how far upon the authority of some special statute." The corporation had set its foot on a path that would eventually make it more an agent of the state than a creation of its charter.[15]

During this period--the first half of the nineteenth century--New York City litigated three "fire cases" that are of particular interest in terms of the city's relationship to the state and federal governments. The first of

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[14]Hartog, Public Property and Private Power, pp. 87-90, 97-100, and 126-27.

[15]Kent is quoted in ibid., p. 97. Hartog notes that the number of New York City acts jumped from 38 in the 1784-1795 decade to 103 in 1806-1815, 299 in 1826-1835, and 412 in 1846-1855 [ibid., n. 50].

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these was Mayor v. Ordrenan, a case that arose in the course of the city's attempt to control a particularly dangerous fire hazard, the storage of gunpowder within its heavily populated limits.[16] In 1806, following the policy set forth in Harison's opinion, the Common Council secured passage of an act by the legislature that gave it the authority "to regulate the keeping, carting, conveying, or transporting of gunpowder or any other combustible" and to fine violators up to $250 for each violation.[17] A few months after the act was passed, the Common Council enacted an ordinance that limited the amount of gunpowder stored in any one place to 28 pounds, and set a penalty of $125 per hundredweight.[18]

The city had no particular trouble enforcing the law until 1812, when Jean Ordrenan (or Ordrenaux) was caught with 2,400 pounds of gunpowder in his possession and assessed a fine of $3,000. Ordrenan refused to pay, insisting he could not be fined any more than the $250 in the state law, and the city appealed to the state Supreme Court for a ruling. Arguing for the city, corporation counsel David S. Jones pointed out that the city had ample authority under its charter to protect the public safety

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[16]Mayor v. Ordrenan, 12 Johnson 122 (1815).

[17]New York, Laws (1806), ch. 126.

[18]Common Council, Minutes, vol. 4, p. 291.

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and had not even needed the state law; the ordinance itself should govern this case, and not the statute. Speaking for the court, justice John Spencer disagreed. He assumed that the act had been passed on the application of the corporation ("it being almost the invariable course of proceeding"). Once that happened, in his opinion, the statute took precedence over any concurrent power the city might have from its charter. "The application by the corporation to the legislature, and the latter having, in several instances, legislated on the subject matter . . . operates as a limitation to any general and undefined powers in the charters," he declared, ruling in favor of Ordrenan.[19]

Jones was eager to appeal the case, convinced that the city stood a good chance of winning. He urged this course "unhesitatingly" on the Common Council, but had to admit that "the expense . . . would probably be greater than the amount recovered in case of ultimate success."[20] That was enough to settle the matter as far as the aldermen were concerned. Why spent more than they could probably collect from the case? To Jones' disappointment, they decided to accept the verdict of the Supreme Court, and with it Spen-

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[19]Mayor v. Ordrenan, 12 Johnson 122, at 125, and Common Council, Minutes, vol. 7, p. 516, and vol. 8, p. 153. The case report cites not the 1806 ordinance but its 1812 re-enactment, in Laws and Ordinances of the Mayor, Aldermen and Commonalty of the City of New York (1812), ch. 19.

[20]Common Council, Minutes, vol. 8, p. 153.

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cer's doctrine about the subordination of the charter to special acts of the legislature.[21]

The Ordrenan decision was an important landmark for several reasons. First of all, it was a judicial declaration that legislative enactments relating to New York City could be deemed as expressing the wishes of the city itself; this doctrine remained good law at least through the 1840's.[22] Secondly, it warned the city fathers that they would have to abide by the laws they asked the legislature for, no matter what might be in the charter. And finally, it carried in it the necessary (if unspoken) implication that state laws governed with or without the city's consent. If the city had to abide by these laws even after it changed its mind, then the laws obviously took precedence over the city's own wishes; from there it was a short leap to the doctrine that the city had to defer to any state laws regarding its affairs, whether it had asked for them or not, and whether it liked them or not.[23]

The second "fire case" was also a gunpowder case, but it involved the city's relationship not with Albany but with Washington. On June 1, 1815, two policemen, Jacob Hayes and Aaron Williams, stopped a cartman careening down

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[21]Ibid., pp. 153, 157-58.

[22]Hartog, Public Property and Private Power, p. 98, n. 54, citing several cases using Ordrenan as precedent.

[23]People ex. rel. Wood v. Draper, 15 New York 532 (1857).

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Broadway and discovered that his cargo was a load of gunpower. Hayes and William were delighted with their find, for by law--the same state law and local ordinance under which Ordrenan had been prosecuted--the gunpowder would be sold and the proceeds awarded to the finders. They took the cartman before the Mayor's Court, where he was fined and forced to forfeit the powder to them.[24]

Instead of ending there, the matter took an unusual turn. The gunpowder had been owned by the United States and had been in transit to one of its arsenals in the city, so the federal district attorney promptly sued the two policemen in U. S. District Court for trespass. Hayes and Williams tried to enter the Mayor's Court record in their defense, but the judge refused to admit it. Declaring that "the property of the United States is not Subject to the Laws of this State," he ruled against them and assessed damages of $300.[25] The policemen turned to the Common Council for relief, and the board referred the matter to the Law Committee and corporation counsel Jones. Alarmed at the implications of the judge's holding, the committee recommended on January 6, 1817, that Jones appeal the case to the U. S. Circuit Court.

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[24]Common Council, Minutes, vol. 8, pp. 736, 747.

[25]Quoted in ibid., p. 748.

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The case then disappeared from view for over two years while it waited its turn on a Circuit Court calendar clogged with patent cases and other pressing business. In 1819 it finally received a hearing, but the arguments Jones and his associate Peter A. Jay used in the case are not known, nor is the court's exact ruling; the case was not published in any of the case reports of the court, and none of the legal papers have survived. The little that is known about the case is that on June 28, 1819, a triumphant Jones notified the Common Council that "a Judgment has been obtained in favor of the Defendants" and that he and Jay were billing the corporation $100 each for their services. "From the importance of the principle involved in this case and the attention we were obliged to give to the Cause, I presume the fees charged by us will be considered as moderate," he wrote.[26]

Several things are noteworthy about this case. First of all, it shows that at times the Common Council and the corporation counsel were deeply aware of the legal implications of what they were doing, and deliberately tried to shape the law in the city's interests. In recommending the appeal, the Law Committee referred to the District Court's

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[26]Ibid., vol. 10, pp. 457-58. Jones and Jay were not paid the customary taxed costs by the court because these were not recoverable against the United States.

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ruling that federal property was not subject to local control, and declared,

> Your committee, thinking that the principle Established by this Decision is one very important to the City, have thought it expedient . . . to have the Question finally settled in order that the Magistrates in future may know with presicion [sic] the extent of their Jurisdiction. . . .[27]

The second interesting thing about the case is that it is one of the earliest instances of something that would later become a serious problem for New York City: its relationship with Washington. In 1817 that relationship did not matter all that much because the federal government did not do much except deliver the mail and provide defense against foreign enemies; still, it was important enough that the Common Council wanted to define exactly what it was and assert the corporation's rights within it.[28] And finally, the case is noteworthy because it shows the capricious process by which great "landmark cases" were sometimes chosen and decided.

One of the great unresolved questions in the early decades of the republic was the issue of "divided sovereignty," or it later came to be called, "dual federal-

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[27]Ibid., vol. 8, p. 748.

[28]For an historical overview of the troubled relationship between the national and local governments, see Joan C. Williams, "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law," Wisconsin Law Review (1986), pp. 83-153.

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ism."[29] Where did the power of the national government end, and that of the states and their local subdivisions begin? The tenth amendment declared, "The powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[30] But it left unaddressed the question of which was to prevail when laws passed by these two governments within their proper spheres came into conflict, as they inevitably would.

The New York gunpower case arose at a time when Chief Justice John Marshall was on the lookout for a test case that would allow the Supreme Court to address the issue. The Hayes-Williams case posed the question in its purest form: a law passed under the state's power to protect the safety of its people had come into conflict with one passed by Congress under its authority to protect the nation against foreign enemies. Which power would prevail? If the minutes of the Common Council are correct, the Circuit Court of Appeals held that, in this case at least, the state's power (as exercised by its delegation to New York City) did. It seems an ideal case to have been appealed to the Supreme Court for adjudicating the sovereignty ques-

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[29]David E. Engdahl, Constitutional Federalism in a Nutshell, 2nd ed. (St. Paul, Minn.: West Publishing Co., 1987), pp. 1-51.

[30]U. S. Constitution, Amendment 10.

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tion, but Marshall chose McCulloch v. Maryland for adjudication instead.[31]

Why McCulloch instead of the gunpowder case? It was a matter partly of timing, partly of coincidence. Because of the crush in business in the Second Circuit, the Hayes-Williams case was not decided until late 1818 or early 1819, and by that time McCulloch was entering the judicial pipeline in Maryland. Marshall had to hear the McCulloch case to uphold the constitutionality of the Bank of the United States, and by a happy coincidence (the case arose from a Maryland law that interfered with the bank) it also gave him a chance to settle the sovereignty issue. As a result it was McCulloch v. Maryland, not United States v. Hayes and Williams, that decided that "[t]the government of the United States . . . though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding."[32]

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[31]4 Wheaton (17 U.S.) 316 (1819). For discussion of the case, see Engdahl, Constitutional Federalism, esp. pp. 6-27; G. Edward White, The Marshall Court and Cultural Change, 1815-35 (New York: Macmillan Publishing Company, 1988), pp. 542-67 [vols. 3 and 4 of History of the Supreme Court of the United States, the 9 vol. history published by The Oliver Wendell Holmes Devise], and Gerald Gunther, ed., John Marshall's Defense of McCulloch v. Maryland (Standford: Stanford University Press, 1969).

[32]4 Wheaton (17 U.S.) at 405. There is no evidence Marshall ever considered the New York case (or, for that matter, was even aware of it), but if he had, he would not have found it nearly as attractive as the Maryland case. It was easier for the court to sell the doctrine of federal sovereignty by striking down a state tax on a bank than by

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The third of New York City's "fire cases" concerned its relationship both with the state and with its own citizens. Despite all the city's efforts at prevention, there finally occurred on December 17, 1835, the fire that had been so long feared--"the most awful calamity which has ever visited these United States," in the opinion of diarist Philip Hone.[33] On a night so intensely cold that water froze in the hydrants, the flames leapt "like flashes of lightning" from building to building in the business district south of Wall Street, and the glow in the sky was visible as far away as Philadelphia. When it finally burned itself out, the fire had destroyed nearly 700 stores bulging with merchandise and laid waste almost half of the city's First Ward. Estimates of the loss ran from 20 to 40 million dollars, a stupendous sum for the 1830's and one that threatened to bankrupt several insurance companies.[34]

Also threatened was the city treasury, because in stopping the fire the city opened itself to ruinous lawsuits. The fire was so far out of control that the only way of stopping it was to blow up buildings in its path. The com-

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asserting that a federal officer could haul gunpowder recklessly through New York City's streets.

[33]Nevins, Diary of Philip Hone, p. 185.

[34]Ibid., pp. 184-89, and Limpus, History of the Fire Department, pp. 150-58, and map at p. 162. The equivalent loss in modern dollars would be $300 to $600 million, using the multiplier in McCusker's How Much in That in Real Money?.

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mon law recognized something called "the law of overruling necessity" that permitted one person to sacrifice the property of another to prevent a greater harm--jettisoning cargo to save a ship in heavy seas for instance, as well as pulling down a building to halt the spread of fire. Because there was some question whether the artificial person who was the corporation of New York City could do the same, in 1813 the city secured a legislative act authorizing it and placing the decision in the hands of the mayor or recorder and any two aldermen. As a check against rash use of the power, the act promised that the city would pay "the damages which the owners of such building, and all persons having any estate and interest therein" might suffer.[35]

The Common Council that petitioned for the act never anticipated anything like the fire of 1835 or all the lawsuits that rose from the ashes. Under the direction of the mayor and aldermen, the firemen blew up a number of buildings to make a fire break, and late the next day the conflagration was over. The embers had barely stopped falling from the sky when the owners of these buildings and of their contents began suing for damages under the 1813 law.

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[35]The statute and a discussion of the common law rule may be found in Russell v. Mayor, 2 Denio 461 (1845).

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The Common Council had no choice except to pay for the buildings; most were not particularly valuable, and a fair price could easily be fixed from assessment figures on the tax rolls. The Common Council did object, however, to the claims pouring in for loss of the merchandise in the buildings. This value was difficult to verify inasmuch as most business records had gone up in the smoke along with the merchandise, and the aldermen were presented with what they felt were wildly inflated figures. In one case, for example, the owner of a building asked less than $10,000 for the structure, and his son who ran the business turned in a claim for $250,000 for its contents.[36]

Faced with what amounted to a run on the city treasury, the mayor and Common Council felt they had no choice but to defend the suits. Over the next ten years some 200 or more claims were handled by a succession of corporation counsels--Robert Emmet, George Tallman, Peter Cowdrey, David Graham, and John Leveridge. They did their best to minimize the city's losses, but they were limited by having to defend a statute that precluded the usual common law defenses, such as proving that a given building would have been lost to the fire anyway. Under the law of 1813, if the city blew up the building, it owed its owner compensation, period. The best the corporation counsel could do

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[36]Mayor v. Lord, 18 Wendell 126 (1837), appealing the same, 17 Wendell 285 (1836).

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was to urge on the court whatever construction of the statute's wording most favored the city--and since the act had been silent on the matter of contents, it was argued that damages should be limited solely to the buildings.

In 1843 Graham used this argument in trying some 70 cases in Superior Court, and the judge agreed with his logic and ruled that the statute did not obligate the city to pay for contents.[37] But the matter did not die there. Denied any remedy from the 1813 law, the claimants switched tactics and brought a test case under the doctrine of eminent domain, arguing that the city had taken private property for public use and therefore owned compensation to its owners. Faced with this challenge, the corporation counsel (first Graham, then Cowdrey) insisted that the statute alone should govern the situation. As Cowdrey expressed it, there was "no just apprehension for supposing that a remedy can be found at common law, independent of the statute, greater than that which the statute itself gives."[38]

In writing the opinion of the Court of Appeals, justice Greene C. Bronson agreed with him completely, and ruled that the law of eminent domain, which governed the taking

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[37]His detailed report on these cases, listing plaintiffs and amounts sought, was published in Board of Aldermen, Documents (1845), no. 66.

[38]Board of Aldermen, Proceedings, vol. 23, pp. 96-97.

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of private property for public use, did not apply to these circumstances. For one thing, nothing had been "taken," only destroyed; the city got no use from it and therefore owed nothing for it. And for another, because the state had passed a special law dealing with the situation, anyone suing in connection with that situation was limited to the operation of that particular law. "It is sufficient to say that the statute gives a right where none would have existed without it, and points out the remedy," Bronson declared, "and where that is done, the statute remedy can alone be pursued."[39]

The Russell case was a landmark in several ways. First of all, it served as a precedent for all the other "contents" cases and saved the City of New York an enormous amount of money.[40] But its importance goes far beyond such immediate benefit. It made resort to legislative authority even more attractive to the city than before; in effect, it said that when the city undertook new responsibilities, instead of taking its chances on the common law it would be wise to limit its legal exposure and protect itself by special statute. In a sense, it was the other side of the Ordrenan coin; not only was the city bound by its legislative creations, so were potential plaintiffs.

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[39]Russell v. Mayor, at 465.

[40]See Talman's report in Board of Aldermen, Documents (1838-39), no. 20.

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The greatest significance of Russell v. Mayor, however, is that it formed an underpinning for the later "takings" jurisprudence that allowed state and local governments, in the interests of the larger public good, to deprive citizens of the use of their property without necessarily having to compensate them for that deprivation.[41] Russell took the old common-law doctrine of "overriding necessity," applied it to a municipal corporation, and used it to justify the destruction of property to protect the public safety. Later courts and treatise writers would expand this doctrine to allow states and municipal corporations to extend necessity doctrine to practically all exigencies of public health and safety, covering everything from compulsory vaccination to tenement house reform.[42]

PUBLIC HEALTH

The city feared disease just as much as fire, in particular the threat of epidemics of yellow fever and cholera. Medical science had not yet identified the spread

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[41]Scott M. Reznick, "Land Use Regulation and the Concept of Takings in Nineteenth Century America," Chicago Law Review, vol. 40 (1973), pp. 854-93. Russell is discussed at p. 861.

[42]A treatise writer who explicitly drew this connection was William P. Prentice, who was long associated with the corporation counsel's office as counsel to the Health Department; see his Police Powers Arising Under the Law of Overruling Necessity (New York: Banks & Brothers, 1894). See also Rodney L. Mott, Due Process of Law (Indianapolis: Bobbs-Merrill, 1926), esp. sec. 128 [citing, among other, Russell v. Mayor, for extending the law of overruling necessity "to the exigencies of public health and order"].

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of yellow fever with the mosquito or of cholera with contaminated water and contact with fecal matter. The reigning theory was a belief in "noxious vapours" rising from heat, moisture, and decayed animal and vegetable matter. New York City offered all three in abundance. In addition to the polluted pond called the "Collect," lower Manhattan had any number of low-lying, swampy patches of ground. Poorly drained lots held stagnant pools of scummy water that bred swarms of flies and mosquitoes, while the foul contents of privvies and crude cesspools (known as "sinks") overflowed their foul contents onto streets already awash in garbage and manure. A horde of scavenging hogs daily stirred this nauseating mixture, called "corporation pie" by the irreverent. Churchyards in the middle of the city teemed with unembalmed bodies thrust into shallow graves or crowded vaults. When the summer sun beat down on the city, "noxious vapours" shimmered in the air like a palpable presence. In 1821 the Common Council pondered the purchase of an "Analytical Airmeter" advertised as capable of "ascertaining with the greatest precision the State of the Air we breathe and announcing the approach of contagious disease."[43]

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[43]For the state of public health in nineteenth-century New York City, see John Duffy, A History of Public Health in New York City, 1625-1866 (New York: Sage Foundation, 1968), and Charles E. Rosenberg, The Cholera Years: The United States in 1832, 1849, and 1866 (Chicago: The University of Chicago Press, 1962). For an 1806 report on noxious vapors, see Common Council, Minutes, vol. 14, pp. 592-94, and for consideration of the airmeter, p. 104.

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The Common Common began grappling in earnest with the problem of public health after several outbreaks of yellow fever in the 1790's. The young recorder James Kent lost his infant daughter to one of these epidemics and was ever after bitter about the "hot, noisy, hateful" city that had taken her away.[44] All New Yorkers who could manage to do so fled the city for the summer and did not return until the first cool weather of autumn mysteriously abated the disease. Government collapsed, business ground to a halt, and jobs vanished. It became obvious that if the city was to survive, it would have to overcome these devastating epidemics.

In 1798 a joint committee from the Common Council, the Chamber of Commerce, the Medical Society, and the Health Commission was appointed "to investigate the causes of the PESTILENTIAL DISEASE which has lately prevailed in this city, and to suggest the best means to prevent its return."[45] The committee reported back to the Common Council on January 28, 1799, and recommended a number of remedies: furnishing pure water, draining all standing water, filling low lots, regulating sinks and privvies, providing sewers, paving and cleaning the streets, and prohibiting burials in the city during the summer. But how

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[44]Kent to Moss Kent, Jr., quoted in Horton, James Kent, p. 116n.

[45]Common Council, Minutes, vol. 2, p. 500.

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could such sweeping reforms be effected? They would require, in the words of the committee's report, "a strong discretionary power being somewhere lodged by the State Legislature." And, the committee was forced to acknowledge, "we know not where it can be so properly placed, as in the hands of the immediate representatives of the city . . . ."[46]

The committee urged that if the Common Council did not already have this power from the charter, it seek it at once from the legislature. Accordingly, the board ordered recorder Harison to prepare and report such a law, and with some modifications it was speedily passed by the legislature.[47] This law clothed the corporation with broad powers to protect the public health, and under its authority the Common Council was able to improve the health and sanitation of the city enormously. The aldermen passed ordinances declaring as nuisances the worst health hazards--sunken lots, water-filled cellars, unsanitary sinks and privvies, and other sources of filth. The corporation attorney, who was paid by being awarded a percentage of the fines, prosecuted violators so aggressively that even the most reluctant began cleaning their lots, filling

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[46]Two slightly different versions of the report appear in ibid., pp. 494-99, and 500-508; quoted at 498-99.

[47]Ibid., pp. 508, 509; New York, Laws (1799) [Andrews edition] p. 181

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low areas, and draining long-standing pools of water. Along with draining the Collect and developing the waterfront, these measures dried up so much of the mosquito habitat that by the end of 1820's yellow fever was no longer a regular summer visitor.

The Common Council's actions marked a major departure from traditional nuisance law. Although there had been times in the past when it or its colonial predecessor had declared something a "common," or general, nuisance and took action to abate it, these were exceptions to the general practice.[48] Traditionally the abatement of nuisance was by action of private law, in which individuals brought suit against neighbors whose property had become offensive; for instance, a homeowner might sue a neighbor to force him to drain a pool of sewage from his property. Random suits by neighbor against neighbor, however, were not enough to serve the needs of a growing city like New York. And besides, the legal system itself was beginning to discourage private suits; they were too often a nuisance themselves, the nitpicking of neighbors bent on hampering the very industrial development the state was interested in encouraging. Instead of leaving nuisance abatement in private hands, it was felt better to entrust it to city or

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[48]See, for example, Common Council, Minutes (Colonial), vol 5, pp. 111-12, 118-19, 126, and the post-Revolutionary Common Council, Minutes, vol. 1, pp. 17, 140, 142, 208, 719, and vol. 2, p. 428.

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state authorities. They could balance the objections of neighbors to noise and unpleasant odors on the one hand and, on the other, the benefits accruing to the community at large by allowing that industry to operate unmolested.[49]

As a result, the city's reliance on public nuisance regulation grew rapidly in the first half of the century. Nuisance ordinances rapidly brought under regulation a multitude of health hazards: rendering plants, offal from butchers' shops, garbage dumps, ponds and marshes, menageries, dead animals in the streets, fish cars, dusting carpets outdoors, chicken yards, barns and stables, dumping dye stuff in the streets, bell ringing, and eventually even the burying of the dead.[50]

By the 1820's the city's growth had overrun what had once been pleasant rural churchyards. Unable to expand their burial grounds because of the buildings that now hemmed in their property, the churches were reduced literally to stacking corpses on top of one another and crowding their vaults beyond their capacity. In warm weather people in neighboring houses and stores had to shut

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[49]Paul M. Kurtz, "Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions--Avoiding the Chancellor," William and Mary Law Review, vol. 17 (1976), pp. 621-70.

[50]See entries for these under the heading "Nuisances, general ordinances, protests and changes" in Common Council, Minutes, Index, p. 939-40.

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their doors and windows against the overpowering stench, despite the nearly unbearable heat.

The 1799 health committee report had identified cemeteries as a prime source of noxious vapors, and in 1806 the Common Council had secured special legislation authorizing it to regulate burials in the city.[51] But except for sporadic regulation of a few graves here and there--particularly of the Negro Burying Ground--the Common Council was reluctant to tackle the problem.[52] Then in 1822 there was a terrifying outbreak of yellow fever in one of the city's "better neighborhoods." The epidemic clearly began in the immediate vicinity of Trinity Church, site of the oldest and most congested burial ground in the city, and then radiated out from there. In the resultant public panic, the aldermen gained the support they needed and passed an ordinance forbidding burials south of a line running along Canal and Grand streets.[53]

Opposition to the ordinance was highly emotional. Not only was the city depriving the churches of a good part of

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[51]New York, Laws (1806) [4 Webster], p. 43.

[52]Duffy, Public Health, pp. 218-20.

[53]For contemporary accounts of the epidemic, see Peter S. Townsend, M.D., An Account of the Yellow Fever as It Prevailed in the City of New-York in the Summer and Autumn of 1822 (New York: O. Halsted, 1823), and [no author given] A History of the Proceedings of the Board of Health of the City of New York in Summer and Fall of 1822 (New York: P. and H. Van Pelt, 1823). See also Duffy, History of Public Health, pp. 218-20.

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their income, but it was denying parishioners the solace of keeping families together after death. Feelings ran so high that many of the churches felt justified in defying the ban, and went on with their burials. It became the unhappy duty of corporation counsel Michael Ulshoeffer to take the churches to court, as well as defend against a suit for breach of covenant brought by the Brick Presbyterian Church.[54]

It was not an easy task. In arguing the city's right to prohibit burials, Ulshoeffer had to argue fundamental new law. If the case reports have a peculiar inarticulateness about them, it is because the terminology was not yet in place to describe legal issues only then emerging. Ulshoeffer was in the curious position of arguing the primacy of police power over contractual obligations--but without once using the term "police power," which did not become a part of the language of law until Chief Justice Marshall used the term in Brown v. Maryland in 1827. In effect, Ulshoeffer was asserting something that did not yet have a name.[55]

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[54]The original manuscript records of several of these cases are on file in the New York County Clerk's Divison of Old Records. These include Mayor v. Slack (1824, no. 415; 1825, no. 369); Mayor v. Coates (1826, no. 897; 1828, nos. 1111, 1112); Mayor v. Mack (1828, no. 1110), and Mayor v. Stuyvesant (1824, nos. 411, 419; 1825, no. 368; 1828, no. 987, and 1829, no. 1109).

[55]Brown v. Maryland, 12 Wheaton 419. Marshall had come close three years earlier in Gibbons v. Ogden with "internal police" [9 Wheaton 1, 210]. The phrase did not appear in the United States Digest until 1879 or enter Bouvier's Law Dictionary until 1883; see Ruth Locke Roettinger, The Supreme Court and State Police Power

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The churches claimed that the city ordinance interfered with private property rights and was an unconstitutional impairment of contract between them and their parishioners. Undeniably, they had "ancient" rights to the ground, often going back to royal grants of a hundred years or more. Ulshoeffer could only argue that these private rights had to balanced against the city's responsibility to protect the public health and welfare. In doing this, he seized on the primacy of statute law asserted by Ordrenan. "The power in question is a legislative power," he argued, "which must, on the subject of regulation, be transcendent."[56] The burial law interfered with private property no more than did fire laws or other ordinances, none of which had ever been considered impairments of contracts. The court agreed on this and other grounds, returning judgment for the city and upholding the ordinance as "necessary for the public good."[57]

The best known of the "burial cases" is Brick Presbyterian Church v. Mayor, a suit against the city for breach of covenant and one in which Ulshoeffer and his co-counsel Peter Jay faced a peculiar legal predicament. In 1766 the city itself itself had conveyed the property to

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(Washington: Public Affairs Press, 1957), pp. 10-11.

[56]Coates v. Mayor, 7 Cowen 59 (1827).

[57]Ibid.

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the church with the express stipulation that it be used as a cemetery and nothing else. The deed between the corporation and the church included a covenant that as long as the church paid its annual quitrent, it could "quietly use, occupy, and enjoy the premises."[58] How could the corporation counsel defend such an obvious breach of contract?

The arguments of counsel are absent from the case report, but it can be assumed that Ulshoeffer made the same points reported in the other burial cases.[59] Justice John Savage took particular note of his argument that at the time of the contract the cemetery was so remote that neither party dreamed it would ever be surrounded by houses. And in an echo of Ulshoeffer's argument in Coates, he found this ordinance scarcely different from other regulating such nuisances as slaughterhouses.[60]

The Brick Presbyterian case was unique, however, in that to regulate this particular nuisance, the corporation had to break a contract it had made. Legally, how could it do this? Savage dealt with the dilemma by describing the modern city as one with a dual character. On the one hand, it was a corporation like all others, authorized by charter to hold and convey real estate and to enter into contracts.

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[58]Brick Presbyterian Church v. Mayor, 5 Cowen 538, 539.

[59]See, in particular, Coates v. Mayor, where arguments of counsel are given at length; 7 Cowen 585, at 593-601.

[60]5 Cowen 538, 542.

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On the other hand, it had regulatory powers given it by the charter and more recently by the state, giving it responsibility for protecting the public health and welfare. Which would prevail if the two parts of the corporation came into conflict, as they did here? In a decision that became a major precedent in American law, justice Savage held that its public, regulatory (or "legislative") side had to prevail.[61]

All the pending burial cases were appealed from Common Pleas and decided together (as Coates v. Mayor) on the basis of the doctrine in Brick Presbyterian. Over time, Brick Presbyterian Church became a textbook case that explained the nature of the American municipal corporation. James Kent discussed it and the other cemetery cases in his Commentaries; J. D. Wheeler chose it for his pioneering Practical Abridgement of American Common Law Cases in 1834; Thomas M. Cooley expounded on it in his influential Treatise on Constitutional Limitations in 1868, and in 1872 treatise writer John F. Dillon devoted several pages to it in his definitive Law of Municipal Corporations.[62]

Few cases in American law have been so influential in creating in new legal doctrine. Spencer is justly famed

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[61]Ibid. For a more detailed analysis, see Hartog, Public Property and Private Power, pp. 78-81.

[62]All cited, along with many others, in Hartog's Public Property and Private Power, p. 78, notes 23 and 25.

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for "inventing" the public/private distinction and giving municipal corporations the capacity to deal with the problems of rapid urbanization. Without taking away from his accomplishment, however, he did not so much invent something as put a name to something that had already been invented. From the report of the health committee in 1799 to the prohibition against burying in 1822, the Common Council and the corporation counsel had been welding together a new urban law from bits and scraps of the law of nuisances and powering it with authority borrowed from the state legislature. What Spencer did was to give the product its final finish, fix a brand name on it, and send it to the market. Not until he did so, did the city realize what it had wrought. In the words of Hendrik Hartog,

> Implicitly, Judge Savage denied the existence, let alone the legitimacy, of the legal entity that had been the prerevolutionary corporation of the city of New York. In its place he described a peculiar public agency that happened, almost by accident, to find itself encumbered by chartered property rights. New York City, as Savage acutely saw, derived its governmental authority from its subservience to the state legislature . . . . In less than half a century New York City had become the opposite of what it once had been.[63]

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[63] Ibid., pp. 80-81.

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WATER

The 1799 health report declared, "In suggesting the means of removing the causes of pestilential diseases, we consider a plentiful supply of fresh water as one of the most powerful, and earnestly recommend that some plan for its introduction into this city be carried into execution as soon as possible."[64] The condition of New York City's drinking water was appalling, coming as it did from wells contaminated by tidal waters, human and animal waste, glue factories, dye manufacturers, slaughterhouses, and other polluters. The Tea Water Pump--once a source of such excellent water that it was sold door-to-door--had been contaminated by the Collect, where people now washed their clothes, emptied chamberpots, dumped garbage, and disposed of dead horses.

Despite the opinion of the Health Committee that the city ought to supply pure water as a public service, the Common Council was persuaded to let a group of private entrepreneurs led by Aaron Burr furnish the water supply. As it turned out, the water company was a ruse they had devised as a way of sneaking a Republican-controlled bank past the Federalist legislature. Authorized by their

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[64]Common Council, Minutes, vol. 2, pp. 497-98.

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charter to divert surplus capital into money transactions, the directors turned the Manhattan Company into a bank that was only incidentally a water company. As late as 1830 it served less than one-third of the city, and poorly at that.[65]

By the 1820's the Common Council was so dissatisfied that it began debating plans for an entirely new water system. The need for a new and reliable supply was becoming acute; the city needed copious amounts of water not just for drinking but for cleaning the streets, fighting fires, and supplying new industries. But it had become obvious that the city would have to go beyond its own borders to find a suitable supply, and the practical problems of planning and managing such a project were so enormous that the Common Council became bogged down just considering them. The aldermen debated several schemes but took no definitive action until two disasters--a $600,000 fire in 1828 and a cholera epidemic that took 3,500 lives in 1832--forced it on them. In November of 1832 they settled on the Croton River as source of the water, and corporation

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[65]Edward Wegemann, The Water-Supply of the City of New York, 1658-1895 (New York: John Wiley & Sons, 1896), pp. 1-19, and Charles H. Weidner, Water for a City: A History of New York City's Problem from the Beginning to the Delaware River System (New Brunswick, N.J.: Rutgers University Press, 1974. For a brief history of the Manhatten Company, see Pomerantz, New York, pp. 187-92, and for a more detailed account, Beatrice Reuben, "Burr, Hamilton, and the Manhattan Company," Political Science Quarterly, vol. 72 (1957), pp. 579-607, and vol. 73 (1958), pp. 100-25.

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counsel Robert Emmet drew up legislation appointing a commission for the project. The commission reported a detailed plan the following year, and finally, on May 2, 1834, the legislature passed the long-awaited Croton Aqueduct Act.[66]

The Croton Aqueduct project has rightly been hailed as one of the greatest engineering accomplishments of the nineteenth century. Planned on a grand scale, it impounded 600 million gallons of water in northern Westchester County and carried it 40 miles to the city through an ingeniously devised system of aqueducts. Besides its massive size, it was also distinguished for many technological innovations, such as the use of an inverted siphon to boost water pressure. Beginning with the construction of this system, writes Charles H. Weidner, "New York City has contributed more to the modern science and technology of constructing dams and aqueducts than any other city or public agency in the world."[67]

In addition to being the engineering wonder of its day, the Croton Aqueduct was also one of the legal marvels of the nineteenth century. It was the first time an American city had gone that far beyond its boundaries and condemned and bought large tracts of land, assembled a huge labor

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[66]New York, Laws (1834), ch. 451. Wegeman, Water Supply, pp. 13-28, and Weidman, Water for a City, pp. 24-31.

[67]Ibid., pp. 40-51; quoted at 51.

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force, and built a massive public works project.[68] The Common Council felt some trepidation about undertaking such a project. The board was, in the words of alderman Fyler Dibblee, "in the situation of a mariner embarked on an unknown sea where he would be deprived of the light of the sun, moon and stars, with a compass which he knew to be defective."[69]

The compass of which he spoke was the board's experience with the Manhattan Company, which, if it pointed in any direction, pointed away from ever again relying on a private company to furnish the city's water. Its experience with Burr's company had been a maddening one of evasive answers, broken promises, faulty construction, poor maintenance, and a penchant for tearing up the streets without warning and leaving them unrepaired. As a result, one of the board's earliest decisions was against entrusting "the great and vital interest of the City . . . [to] powers conferred on private incorporations."[70]

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[68]Its closest rivals were the water systems of Philadelphia and Boston. Philadelphia had gone only slightly upstream from its limits to tap the Schuylkill River, however, and Boston's water project--still in the planning stages when the Croton system was completed--was considerably smaller.

[69]From a pamphlet in the New York Public Library, Remarks of Mr. Dibblee in Common Council on Discussing the Resolution Offered by Alderman Stevens [1831], p. 7.

[70]Report of the Water Committee in 1825, in Common Council, Minutes, vol. 14, p. 326.

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But where would the corporation find authority to undertake such a project? Certainly not from the charter, which had never envisioned such an enterprise, and certainly not from a meager body of municipal law designed for simpler times. The courts had made it plain that a city's power was, in the words of James Kent, "confined to its own limits; and, without some special provision, it cannot, of course, possess any control or rights in or over lands lying within another town."[71] Fortunately, the City of New York knew exactly where it might find that "special provision"--its old friend, the state legislature. But would the legislature see its way clear to making such an unprecedented grant of authority? Corporation counsel Emmet thought so, and found the perfect argument. The legislature had already granted such authority, only it had given it to the Manhattan Company. All the power the city needed--the power to condemn upstate lands, impound water behind dams, and divert this water to the city--had been given to the Manhattan Company in its charter of 1799, and had lain there unused ever since; instead of going to the Bronx River as originally proposed, the company had sunk wells in Manhattan. Emmet argued that inasmuch as the company had forfeited these powers by its failure to perform,

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[71]Denton v. Jackson, 2 Johnson's Chancery Reports 320, at 336 (1817).

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the legislature could simply transfer them to the corporation of New York City.[72]

It was hardly that simple, of course, but eventually the legislature agreed to form a special commission to study the feasibility of such a project. The commission, set up in 1833, reported favorably on a plan to use the Croton River as a source, and the following year the legislature put it in charge of managing the project for the city. The use of a special commission appointed by the state but responsible to the city was a landmark itself, the precursor of a whole host of later boards, commissions, and "authorities" that came to occupy a legal limbo somewhere between state and municipality. These would become a source of considerable friction between state and city, but in the 1830's the Croton Aqueduct Commission was embraced enthusiastically by both governments. It provided the legislature with assurance that the project would be handled professionally, and it relieved an already overburdened Common Council from its day-to-day management.[73]

Between 1831 when the Croton project was first proposed to 1842 when its water flowed into the city, four corpora-

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[72]Report of special committee in Common Council, Minutes, vol. 19, p. 521. The entry does not explicitly identify Emmet as the author of this stratagem, but it is almost certain inasmuch as the surrounding text (esp. p. 520) makes clear he was working closely with the committee.

[73]Wegemann, Water Supply, pp. 27-35.

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tion counsels--Robert Emmet, George Tallman, Peter Cowdrey, and David Graham--handled the commission's legal work, with the exception of certain condemnation matters in the hands of local counsel in Westchester County. Some of it was of a highly technical manner. Rather than employ workers directly, the commissioners let most of the work at contract; but contracts for a public works project of such scope did not exist, and the corporation counsels had literally to invent them as they went along.

The "master contract" they eventually developed is displayed in Edward Wegemann's history of the city's water supply, and a reading makes it obvious that they tried to foresee every eventuality and cover it ahead of time. Among its many sections are those bearing such titles as "Extra Work," "Not to Assign to Others," "Competent Men to be Employed," "Time of Performance," "If Work be Abandoned or Delayed," "Evidence that Work, Labor, and Materials Are Paid For," and "Prevention of, and Indemnification for, Accidents." Its provisions could easily be adapted to other public works--street and sewer work, for instance--so that it became a working tool for drafting city contracts in general. It stood the test of time so well that the Water Department was still using it in 1896 when Wegemenn did the research for his book. "Although the language is somewhat antiquated," he explained, "it was not deemed

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advisable to change it, as most the clauses have been tested in the courts, in the language given."[74]

The most famous legal matter involving the Croton Aqueduct project is the case of Bailey v. Mayor--like Brick Presbyterian, one of the landmark cases of nineteenth century law.[75] On January 8, 1841, shortly after the 150-foot-high dam had been completed, a heavy rain flooded the Croton River and swept it away, sending a wall of water crashing down on Bailey's mills downstream. Claiming that the dam was "negligently, unskillfully and carelessly constructed," Bailey held the city responsibile and sued for $60,000 in damages. Peter Cowdrey argued the case for the city before chief justice Samuel Nelson of the New York Supreme Court, in its Westchester County circuit.[76]

In his defense of the city, Cowdrey tried to distance the officers of the corporation as far as possible from the Croton Aqueduct Commission. "They did not appoint the water commissioners or the engineers or the agents who executed the work," he pointed out, "and had no power to direct them as to the manner of doing it, or to remove them

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[74]Ibid., Appendix II, pp. 241-11; Wegemann quoted at p. 241. It is likely that other cities borrowed the New York City contract and adapted it for their own use.

[75]Bailey v. Mayor, 3 Hill 531 (1842); affirmed on appeal as Mayor v. Bailey, 2 Denio 433 (1845).

[76]3 Hill 531, 535, 537. Cowdrey was assisted by Daniel B. Tallmadge.

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for unskillfulness or misconduct." In fact, he argued, the city was forbidden by law to exercise authority over work being done outside its limits, and for that reason the legislature had arranged for it to be done "under the control of state officers subject to be removed by the state government."[77]

Sitting on the bench, Nelson looked at the matter from another perspective. The city, not the state, was paying for the project and stood to benefit from it. In accepting the state-chartered Croton Aqueduct Commission as a means of carrying out the project, the city had adopted the commissioners as its own agents.[78]

Although corporations were in general responsible for the acts of their agents, Cowdrey relied on an established doctrine that a government was not responsible for agents or employees acting in the discharge of public functions. In such instances the rule of respondeat superior (literally, "let the superior answer") did not apply; public functions were conducted under authority granted by the state, and under the doctrine of sovereign immunity one could not sue the state or--by extension, in this instance--the city. Cowdrey argued that "the defendants should be regarded as the agents of the public [i.e., the

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[77]Cowdrey's argument is summarized only briefly in 3 Hill 531, at 537-38; the quotations are from 2 Denio 433, at 436-37.

[78]3 Hill 543.

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state] in supplying a portion of its territory with one of the essential means of health and life, and not as a private corporation undertaking the enterprise for profit."[79]

It was on this crucial point that the case hinged. And Nelson, deliberating at a time when Brick Presbyterian Church held considerable fascination for the judicial mind, felt compelled to consider Cowdrey's argument within the larger picture of the city Savage had described. Granted, the city's agents acting in a public or governmental function could not obligate the corporation for negligence. On the other hand, there was another side to the city--its corporate, property-holding self. What if the Croton Aqueduct Commissioners were the agents of that self? In Nelson's mind, they were. Where Cowdrey saw the project in terms of the the city's responsibility for public health--a responsibility given it by the state--he saw the project as being primarily for the "private emolument and advantage of the Corporation," with any public benefit strictly incidental. As a result, he held the corporation to the same standards as a private company and declared it responsible for the negligence of its agents.[80]

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[79]3 Hill 531, at 537, and 2 Denio 533, at 437.

[80]3 Hill 531, 539. Nelson's reasoning is curious inasmuch as the project was more a financial burden for the city than a source of emolument; technically, however, it did amount to an addition to its real estate and therefore to its wealth.

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The Court of Errors affirmed the decision--oddly, without affirming Nelson's reason for the ruling. Chancellor Reuben Walworth, writing the opinion for the court, clearly disagreed with his reasoning and took pains to base his own decision on the fact that the dam stood on property belonging to the Corporation. Walworth treated it as a nuisance case, and pointed out that like any other owner, the city was bound to see that its property--in this case, a dam--was not used in a way to damage the property of others. Except for a brief dissenting opinion, the other members of the court did not reveal their reasoning, but they voted 19 to 4 to uphold the decision of the lower court.[81]

So it was that Nelson's decision stood and, like Ordrenan and Brick Presbyterian Church, in time took on a life of its own. Writing almost a century later in Virginia Law Review, Charles M. Tooke credited it with giving American law "the basic formula to be invoked wherever the question of liability or non-liability in tort of municipal corporations is raised." Other courts picked up the Nelson's doctrine and extrapolated from it a general guideline for determining when a city was and was not responsible for

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[81]2 Denio 433, 439-51. Generally, the decision of the highest appellate court is the holding that is always cited for the case, but in this instance Nelson's holding--which gets at the issue more so than Walworth's--is generally cited. At this time the Supreme Court was actually the more "judicial" of the two, the bench of the Court of Errors being composed primarily of state senators.

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the actions of its agents. If an injury came from the city's public, governmental personality, the city would not be responsible. If it came from its private, proprietary self, it would be.[82] This distinction would lead to absurdities, such as determining whether a victim electrocuted by a city-owned electric system had touched a wire leading to a street light (public) or to an electric meter (private).[83] On the whole, however, it gave lawyers some guidance in deciding whether to settle or litigate a given claim, and it gave judges a framework on which they could hang their decisions. It was a rule of law that almost no one liked but that everyone could live with, and one in which New York City corporation counsels became, of necessity, the nation's experts.

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[82]Charles M. Tooke, "The Extension of Municipal Liability in Tort," Virginia Law Review vol. 19 (1932), p. 97; quoted at 100. See also Hartog's discussion of the case in his Public Property and Private Power, pp. 225-27, and his citations in notes 23 and 28. The rule and its application to particular instances is discussed in detail in Osborne M. Reynolds, Jr., Handbook of Local Government Law (St. Paul: West Publishing Co., 1982), sec. 193 ["Governmental v. Proprietary Distinction in Operation"].

[83]Hodgings v. Bay City, 156 Michigan 678, 121 N.W. 274 (1909), cited in Tooke's "Extension of Municipal Liability in Tort" at p. 103. Other absurdities cited by Tooke include a Georgia ruling that denied compensation because the excavation into which the plaintiff fell was not for a water main (private) but for a pipe going to the municipal swimming pool (public), and a North Carolina decision awarding damages to a woman who fell down the stairs of a municipal building on the grounds she was on the way to pay her taxes (private) rather than attend a minstrel show in the municipal auditorium (public).

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STREETS

Nothing absorbed the corporation counsel's attention more during these years than the streets of New York City. There were, first of all, the myriad legal problems that sprang up as the city rushed to open new streets ahead of the onslaught of development. And then there were all the problems that came about because the streets were where much of the life of the city went on, where mishaps occurred and victims demanded redress. If the corporation had had no other legal work, the streets alone would have kept its lawyers busy.

The charter had given the city authority to lay out its streets and to alter and repair them, but by the early 1800's the Common Council was having difficulty enforcing its determination of where these streets should run. Real estate developers had a distressing way of acting as if, in the words of corporation counsel Harison, "every Individual had the right to lay out Streets over his Grounds according to his own Fancy."[84] In 1799 the city had secured legislation declaring that no street would be laid out without the approval of the Common Council, but it was widely ignored. Developers were selling lots far beyond the city's settled area and had no idea how the city would eventually plat its

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[84]Common Council, Minutes, vol. 4, p. 401.

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streets, so they surveyed them to suit themselves and counted on the city's later accepting them.[85]

The situation was so chaotic that in 1807 the Common Council decided to settle the matter once and for all by drawing up a street map for the entire island. To make the map's authority unassailable, the aldermen had corporation counsel Richard Harison apply for legislation authorizing it and appointing a commission to decide where the streets should go.[86] The result of the commission's work was the famous map of 1811 that fixed on the city its rectangular gridwork of streets and avenues. Although the design has since been deplored for its lack of esthetics--especially its disregard of the natural terrain of hills and valleys--it was hailed at the time for the grand scale of its design and was considered a huge improvement over the old warren of narrow, crooked streets. The city fathers envisioned fresh air and sunlight streaming in through straight, orderly vistas to drive away noxious vapors and bring health and vigor to the populatiion. Mainly, though, they hoped the new map would ensure a more rational development of the island, and for the most part they were proved right. Although real estate developers grumbled at first,

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[85]See Harison's report on the problem in ibid., pp. 398-401, and Underwood v. Stuyvesant, 16 Johnson 181 (1821).

[86]Common Council, Minutes, vol. 4, pp. 353-54; New York, Laws (1807), ch. 115.

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they soon realized that the map was a boon to their operations; they could plat tracts far ahead of time and know exactly where the streets would run.[87]

In 1813 the legislature approved the process which the city used for the next several decades in opening these streets. First, the Common Council would ask the state Supreme Court to appoint assessors for a given street. Next the assessors, in a feat of bookkeeping legerdemain, would award property owners compensation for the land taken, but offset that by the value of the subsequent enhancement to the property--most often resulting in a charge to the owner that amounted roughly to the cost of making the street. A lot owner, for instance, might be awarded $400 for the land taken for the street but charged $1,000 for the improvement to his property, so that the city wound up with the $600 that the work would cost.[88]

The process, hardly surprisingly, was the source of many disputes. It also made up a large part of the work of the corporation counsel, who was in charge of overseeing the process and handling the legal work. When the Common Council voted to open a new street, he asked the court to appoint assessors, transmitted their findings back to the

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[87]John Reps, The Making of Urban America (Princeton: Princeton University Press, 1956), pp.294-99, and Hartog, Public Property and Private Power, pp. 159-65 [map, pp. 160-61].

[88]The procedure is explained by Robert Emmet in a report in Board of Aldermen, Documents (1835-36) no. 56.

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court, and reported the court's approval to the city. In addition, he handled all the legal work involved in the transfer of the land and represented the city in the litigation that often resulted.

A sampling of these cases gives some idea of the issues raised by street openings and improvements. Excluding disagreements over dollar amounts, one of the most common disputes was who should pay, a matter not as easy to determine as one might think. Much of the real estate in Manhattan was not sold outright but conveyed by long-term leases, which were in turn broken up into sub-leases to other parties. Every person in this chain got busy pointing a finger at someone else when the street assessor came calling. In 1813, however, corporation counsel David Jones won Mayor v. Cashman and established that a standard clause in most such leases--one that obligated the lessee for "duties, taxes, assessments, impositions, and payments"--could be deemed as including charges for street openings and improvements.[89]

Then there was the problem of churches and charitable institutions, whose directors claimed they did not have to pay because they were exempt from property taxes. A test of this principle came in 1814, when several churches refused to pay their assessments for the improvement of

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[89]10 Johnson 96 (1813).

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Nassau Street. Jones took them to court and argued that in granting tax exemptions, "it must be presumed that the legislature intended only to relieve from a burden, not from a benefit." The court upheld his argument, ruling that the churches should pay their share of this benefit just as any other property owner.[90]

The ingenuity of New York real estate speculators knew no bounds, and for a time some shrewd operators worked a scheme to profit from the enhancement to their property without paying any of the cost of the streets. They bought tracts of land, subdivided them into lots according to the new street map, and then in selling them reserved title to the 60- and 100-foot strips of land that would later be taken for the streets. The result was that when the streets were opened by the city, the new lot owners were assessed for the benefits of the streets but the developer received the payment for the land that was taken for them. Few buyers understood this at the time of purchase and were understandably upset when they discovered it during assessment proceedings; by that time the seller was long gone, and the owners were left to take out their anger on the assessor and the corporation counsel. Robert Emmet finally sued one of these sellers in an 1833 case, Wyman v. Mayor,

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[90]Matter of Nassau Street, 11 Johnson 77 (1814). The ruling stipulated that the actual amount of this benefit might be computed differently for churches than for commercial establishments.

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and got the court put an end to a practice that had become a major headache for his office.[91]

The streets were also fertile ground for the rise of a new type of case, the tort or negligence lawsuit. A tort is a civil (as opposed to criminal) wrong, excluding those that arise from contracts. The concept covers such matters as assault and battery, slander, libel, trespass, and conversion, but the largest single category is negligence: through carelessness, one person injures another and is made to pay for it.[92] Tort law is a nineteenth-century invention, and a relatively late one at that. The first treatise on torts did not appear until 1859, and negligence was, in the words of Lawrence Friedman, "the merest dot on the law."[93] The rise of tort law is usually linked to the rise of injury-producing engines and machines, particularly the railroad locomotive, which charged across the nation leaving mangled workmen, wrecked carriages, and dead cows in its wake.[94]

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[91]11 Wendell 186.

[92]Cataldo, Introduction to Law and the Legal Process, pp. 169-221

[93]Friedman, History of American Law, pp. 261-64; quoted at 261. See also Hall, Magic Mirror, pp. 123-26. The treatise mentioned is Francis Hilliard's The Law of Torts, or Private Wrongs.

[94]Ibid., and Friedman, History of American Law, p. 262. For the argument that judges shaped tort law to shift the cost of industrialization from the capitalist to the workingman, see Morton Horwitz, The Transformation of American Law, 1790-1860 (Cambridge: Harvard University Press, 1977).

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For the cities, however, the engine of tort law was the street, for it was there that the citizen daily came into touch with the corporation. The street was where he slipped, tripped, fell, tumbled into excavations, overturned his carriage, had his horse break a leg, was attacked by marauding hogs, or suffered other mishaps. And it was "street work"--not just street construction itself but the laying of sewer, gas, and water pipes--that broke his windows, undermined his foundation, and flooded his basement. When any these wrongs occurred, he knew whom to blame: the corporation. And increasingly he turned to the courts for compensation rather than, as in the past, petitioning his alderman for redress. When these litigatants began flocking to court with their claims, the judges had to develop new doctrine to deal with them, and a new law of municipal liability in tort emerged from the process.[95]

The field was so new that the judges were groping in the dark every bit as much as the lawyers, and counsel for the city at times found the logic of the courts bewildering. Consider, for instance, two cases Peter Cowdrey tried in 1842 and 1845, Mayor v. Furze and Wilson v. Mayor, both

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[95]For the early history of municipal tort law, see Edwin M. Borchard's treatise, "Government Liability in Tort," published in several parts in Yale Law Journal, vol. 34 (1924-25), pp. 1-43, 129-57, and 229-49; vol. 36 (1925-26), pp. 1-41, 757-807, and 1039-1100.

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involving the problem of street drainage.[96] In the first the city, acting under authority of a state law, had built storm drains and sewers in Pearl Street but failed to keep them open and in good repair, with the result that the basement of Furze's bakery had been flooded. When a Common Pleas jury awarded Furze $750 damages, the city appealed to the state Supreme Court. Cowdrey argued that because the city was acting under state authority in its governmental (rather than property-owning) function, it could not be held liable. To his surprise, chief justice Samuel Nelson--who very recently had made much of this distinction in Bailey--disagreed. The grounds for his disagreement were very narrow and difficult to follow, but in the end he decided that whether the city's action had been governmental or proprietary, once it made the sewers it became responsible for keeping them in good repair.[97]

The circumstances of Wilson v. Mayor are so similar that it is surprising that the city even defended the case. In making 40th Street and 7th Avenue, the city had blundered by failing to install any drains or gutters at all, and the runoff from a heavy rain came pouring down both streets and flooded Wilson's property at their intersection. Wilson sued for damages, lost in Common Pleas,

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[96]Respectively, 3 Hill 612 (1842) and 1 Denio 595 (1845).

[97]Hartog tries to make sense of his logic in Public Property and Private Power, pp. 230-31, but even he does not entirely succeed.

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and appealed to the Supreme Court--the same body that just laid down the Furze doctrine. Cowdrey had to fall back on the same argument that had been thrown out in that case, claiming that the corporation had no liability for actions undertaken, under a state law, by its governmental side. To his astonishment, justice Samuel Beardsley agreed. In his opinion, the state law gave the corporation the power to make sewers and drains but not the duty to make each and every one that might be desired.[98]

Did this mean then that Furze was overturned? Not exactly. Beardsley had found a maddeningly fine distinction between the two: in the Furze matter the sewers had already been made so the city had a duty to keep them open, but in the Wilson case the city had not installed them so it had no duty at all. It is hard to reconcile the logic of these two cases, or of early municipal liability cases in general. In groping their way through to new doctrine, the judges did not always seem sure themselves what they meant--nor, when he went to gather them into his commentary on municipal law, did treatise writer John Dillon. In explaining their decisions, he eventually retreated to a position that law and logic "are not always precisely coin-

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[98]1 Denio 595 (1845).

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cident or coterminous" and that distinctions "are sometimes easier to feel than to unfold and define."[99]

Cases involving injury to the person were just beginning to be brought in court against the corporation. The usual remedy was legislative rather than judicial, with the claimant looking to the Board of Aldermen rather than the courts for compensation. Constituents could usually count on a sympathetic hearing from their elected representatives, who were inclined to dispense mercy rather than strict justice. In May of 1831, for instance, a horse backed off the pier at New Slip and had to be destroyed, and its owner, cartman Samuel Borden, applied for redress to the Board of Aldermen. The Committee on Wharves, to which his petition was referred, reported back to the board:

> Your Committee, after hearing the facts, are of opinion that the Corporation, who have the control of the wharves, ought to make good the loss to a considerable extent, and that it ought not to fall on Mr. Borden, who does not appear to have been in fault; but who is a poor man, said to have a large family, and by the accident is cast out of employ.[100]

Similarly, when a horse belonging to another cartman ran off the pier at Oliver Street the next year, the

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[99]Quoted in Borchard, "Government Liability in Tort," Yale Law Journal, vol. 34, p. 230.

[100]Board of Aldermen, Proceedings, vol. 1, p. 81. The report gave no reason for believing Borden was not at fault, other than noting that "the horse was gentle and had no bad tricks."

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Finance Committee admitted that "the precise circumstances attending to the loss do not appear," but recommended that the corporation pay the owner $40 anyway.[101] In 1836 Benjamin Briggs lost his horse off the wharf at the foot of Vesey Street, and the Police Committee recommended payment of $120. "The petitioner is an industrious cartman, and has sustained great loss and inconvenience by reason of this accident," the committee declared, noting by way of justification that the "string piece" marking the edge of the dock was down.[102] Only under extreme circumstances would the board harden its heart against a plaintiff--as, for example, when it learned that Hiram Parker's horse, which drowned falling into the Old Slip, was blind and had been left unguarded.[103]

By the 1840's the aldermen were beginning to have mixed feelings about these cases, and to require some finding of fault on the city's part. There were simply too many of them, and the aldermen lacked the time to give them the attention they needed. Besides, claims against the city were becoming something of a cottage industry, and the aldermen were becoming suspicious of them. When they were

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[101] Ibid., vol. 7, pp. 165-66.

[102] Ibid., vol. 11, p. 371.

[103] Ibid., vol. 7, p. 45. Parker was also not represented as being poor and industrious, and may have been deemed able to absorb the loss.

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petitioned in 1843 for the loss of a horse who had broken his leg allegedly by hitting a stopcock protruding above the street surface, they asked corporation counsel Cowdrey for his advice. Cowdrey thought it likely the horse had simply slipped on the ice, but above all he felt it was a matter for the courts and not for a committee of aldermen to decide. He told the aldermen, "It does not belong to the Departments of the City Government to recommend the too prevalent sentiment of making the Corporation responsible for all the misfortunes of citizens which may happen to them in the public streets."[104]

On the other hand, the corporation did not necessarily fare any better in court. In the winter of 1841 a milkman named James Wellington was joyriding with friends through the streets when he hit a rock embedded in the snow, overturned his sleigh, and broke his leg. Blaming the presence of the rock on some nearby street work, he sued the corporation in Common Pleas for $500 in damages. Corporation counsel Cowdrey showed that he had been speeding, had six heavy adults packed into his sleigh, and had careened around a corner slick with ice. He even produced the foreman of the street crew, who denied they had been doing any work in the area at the time. All to no avail, as Cowdrey bitterly reported back to the aldermen: "The jury have

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[104]Ibid., vol. 26, pp. 241-42.

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judged, and they have decided, as they always will do, in favor of the plaintiff with his broken leg, if there be least room for charging negligence upon the public authorities."

By the end of the first half of the century, claimants still petitioned their aldermen, but they were beginning to find that juries could be even more sympathetic. And increasingly the aldermen were taking themselves off the hook by routing such petitions to the corporation counsel and following his advice. In deciding which claims to settle and which to litigate, he followed both the rule of the law and--surprisingly--of the heart. In writing the Board of Assistants about certain suits in his hands in 1845, corporation counsel Brady made the policy of the office explicit. "I think that the City should resist, to the utmost, the various attempts made by dishonest men to speculate upon its Treasury by experimental and unconscionable suits," he wrote, "but it should at the same time compromise and settle all cases wherein, though it may have the law, it has not justice, and right, on its side."[105]

Where to draw this line was not always easy, and in 1848 a case arose that put corporation counsel Willis Hall to the test. The case came about because of one of the most persistent rural habits--the keeping of pigs--survived

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[105]Board of Assistant Aldermen, Proceedings, vol. 26, pp. 33-59, at 36.

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all attempts of the city to stamp it out. One of the anomalies of urban life in nineteenth century America was that pigs still roamed the streets, rooting through the garbage, defecating on the sidewalks, and making a general nuisance of themselves. Although they were the subject of much rough humor, they were also dangerous; a belligerent 300-pound hog with long, sharp tusks is no laughing matter. Ordinance outlawing pigs dated back to 1788, but they were poorly enforced and thus largely ignored.[106] The latest such enactment had been in 1839, but it was widely flouted.

On April 24, 1846, a large hog had been roaming Chatham Street unmolested for more than a day when eight-year-old James Levy came out to play. The hog sniffed the air, then suddenly "attacked, assaulted, ran at, ran over, fell upon, and mortally wounded" the boy before the horrified eyes of bystanders.[107] Some months later his angry, grieving father brought suit, hoping to make an example of the corporation's negligence, and the mayor and Board of Aldermen were faced with the question of whether to settle or to defend the case in court. It could not have been an easy

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[106]The city had established its right to control swine in an earlier test case, People v. Harriet, 1 New York Judicial Repository 258 (1818). This case and the hog problem in general are discussed in Hartog, Public Property and Private Power, pp. 139-42. For the persistence of rural mores in the city, see Howard Rock, "A Delicate Balance: The Mechanics and the City in the Age of Jefferson," New-York Historical Society Quarterly, vol. 63 (1979), pp. 93-114, and for pigs in other cities, Rosenberg, Cholera Years, p. 103.

[107]Levy v. Mayor, 1 Sandford (Superior) 465, 466 (1848).

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decision. Public sympathy was very much with the family, and there was considerable sympathy within the corporation itself; its officers knew that if they had seen to the enforcement of the ordinance as they should have, the tragedy would not have happened. Refusing compensation to the the family must have seemed heartless, but in the end that is what was decided. The case came before the Superior Court on March 13, 1848, and corporation counsel Willis Hall defended the indefensible, the city's failure to enforce its ordinance.

Actually, as the case makes plain, what he was really defending was the city's freedom from being held responsible whenever someone broke the law. Sympathetic as its officers were toward Levy, the city could not afford to let such a responsibility be fixed on it. The arguments that Hall presented in the case are not known, but judge John Sandford made exactly the ruling the city wanted. The city had a duty to protect the people with wholesome laws, he said, but "injuries to both person and property will occur, which no legislation can prevent, and which no system of laws can adequately redress." The city could not be called on to guarantee against mishaps or "to make good, by way of damages, its inability to protect against such misfortunes."[108]

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[108]1 Sandford 465, 467.

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What is significant about the case, aside from the ruling itself, is the way it was presented and decided. Levy's lawyer based the family's claim on the city's failure to live up to its charter, which had given it the power to ordain laws for the "good rule and government of the city and of all persons within its limits. In pursuance of that power, he declared, the city had passed its ordinance against swine but then failed to enforce it.[109] It is clear from his remarks, however, that Sandford took it for granted that the state had granted this power to the city and that the ordinance had been enacted under that authority. He spoke of the city's "legislative powers" as including the right to restrain swine from running at large, and remarked on its duty to protect "the citizens of the state" [emphasis added].

There was, in fact, no special act of the legislature granting the city the power to regulate swine, but by this time it had become natural for a judge like Sandford to assume that there must have been. How else could have the city have had authority to enact such a regulation? The courts had come a long way--from Ordrenan, where a judge assumed that if the legislature passed a special city law then the city must have asked for it, to Levy, where a judge assumed that if the city had passed a regulatory

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[109]The plaintiff's arguments are given at 1 Sandford 465-66, but none for the defendant.

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ordinance it must have asked for a special city law.[110]

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[110]1 Sandford 465, 467. Sandford also noted that in terms of its liability for failure of enforcement, the city stood "upon the same footing, within its own jurisdiction, as the state government does in respect of the state at large."

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CHAPTER V

AN ELECTED DEPARTMENT HEAD: DAVIES AND DILLON

The passage of the Charter of 1849 raised extravagant hopes in the hearts of the reformers. "It effects a complete revolution in our City Government," exclaimed the Courier. "We are to have a new Government, new in its organization, new in its objects, new in its methods--and new in its results."[1] The Herald foresaw an era of "clean streets, responsibility throughout the city government, and economy in our municipal expenditures."[2] "It will pretty surely correct the many abuses and stop some leaks in the treasury," opined the Tribune. "It brings within reach of the People many branches of the public service hitherto entirely beyond their control; it must reduce the cost of our City Government."[3]

This burst of optimism was inspired by Section 9 of the charter, which took control of the city's affairs from the

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[1]Courier and Enquirer, Apr. 12, 1849, p. 3.

[2]Herald, Apr. 5, 1849, p. 2.

[3]Tribune, Apr. 10, 1849, p. 2.

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"Council of Common Scoundrels" and put it in the hands of a full-fledged executive branch:

> The executive powers of the corporation shall be vested in the mayor, the heads of departments, and such other executive officers as shall be from time to time created by law, and neither the common council nor any committee or member thereof, shall perform any executive business whatever except such as is, or shall be, especially imposed on them by the laws of the state . . . .[4]

Reflecting nineteenth-century distrust of a strong executive, the new charter did not concentrate power in the mayor but instead dispersed it among nine independent departments of city government. Among these was, at long last, a Law Department.[5] Section 18 of the new charter declared that

> [t]here shall be an executive department known as the "law department," which shall have the charge of, and conduct all the law business of the corporation, and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the corporation; and shall have the charge of and conduct the legal proceedings necessary in opening, widening or altering streets; and draw the leases, deeds and other papers connected with the finance department; and

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[4]New York, Laws (1849), ch. 187.

[5]Technically speaking, the Law Department came into existence on May 8, 1848, when the Common Council established an interim department to operate under its supervision until the charter went into effect the next year. Incumbent corporation counsel Willis Hall served as its appointive head until his resignation in May of 1849, at which time Henry E. Davies was appointed to serve pending the results of the November election. See Board of Aldermen, Proceedings, vol. 34, pp. 885-89, and vol. 37, pp. 62, 150.

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> the chief officer thereof shall be called the "counsel to the corporation."[6]

Like the other new department heads, the corporation counsel was to be elected for a three-year term and to appoint his own subordinates. Among these were two bureau chiefs: a corporation attorney for prosecuting violations of the ordinances, and a public administrator for handling the probate of intestates.[7]

To the reformers, the charter seemed to address their main complaint: that for years the city's most important executive decisions had been made by committees of aldermen and assistants, "sitting in some out-of-the-way room, with the door locked," and acting in obedience to the dictates of party leaders.[8] The new charter promised to change this state of affairs. Ideally, experienced men of affairs--businessmen, lawyers, doctors, engineers, accountants, and other professionals--would come forward and offer their services as department heads. The voters would scrutinize their qualifications carefully and choose the ablest among them to run the city. Once in office, the new department heads would be answerable only to the citizenry and would

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[6]New York, Laws (1849), ch. 187, sec. 18.

[7]Ibid., secs. 18, 20.

[8]For a litany of their complaints, see Leonard, "Politics of Charter Revision," quoted at p. 51, citing the Daily Plebeian, May 4, 1843.

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discharge their duties free of political debts and obligations. The city would be governed ably, efficiently, and honestly, a shining example to the rest of the nation.[9]

Somehow this reform went awry. Instead of becoming something its citizens could point to with pride, the government of New York City shortly became synonymous with corruption itself, with the city treasury plundered by one band of rascals after another: first the infamous "Forty Thieves" Board of Aldermen, then mayor Fernando Wood and his confederates, followed by the Supervisors' Ring, and finally, that model of municipal depravity, the Tweed Ring. One might reasonably ask, What happened? How did the Charter of 1849 come to be, in Jerome Mushkat's words, "a sad hoax on reform"?[10] How were the city's politicians able to take a carefully crafted reform and bend it so easily to their own ends?

The Law Department provides a sort of keyhole view of this process. It was not just a typical department, one whose problems reflected those of its sister agencies, but also a major overhead agency whose head was ex officio involved in practically everything of importance in the

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[9]For an analysis of the aims of the charter, see Edward K. Spann, The New Metropolis: New York City, 1840-1857 (New York: Columbia University Press, 1981), pp. 61-64.

[10]Jerome Mushkat, Tammany: The Evolution of a Political Machine, 1789-1875 (Syracuse, N.Y.: Syracuse University Press, 1971), p. 265.

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city's affairs.[11] The corporation counsel was sometimes a participant, but always at least an observer, in the defining events of the 1850's and 1860's, and through his eyes we can see with dismaying clarity the failure of reform and the triumph of corruption. We can also see the moral choices these men were forced to make, and the consequences of these choices both to them and to the city they served. The corporation counsels during this time--Henry E. Davies (1849-52), Robert J. Dillon (1853-55), Lorenzo B. Shepard (1856), Richard Busteed (1856-59), Greene C. Bronson (1860-62), John E. Develin (1863-65), Richard O'Gorman (1866-1872), and E. Delafield Smith (1872-75)--all responded in different ways to these choices. If their experiences can taken as any guide, the true "shame" of the nineteenth-century American city was not the existence of corruption (which had existed before, and would again) but the increasing willingness of otherwise honest officials to accommodate themselves to it.

In the beginning, however, the new Law Department seemed likely to live up to the hopes of its creators. Its first head, Henry E. Davies, was exactly the sort of cor-

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[11]"Overhead agencies," as defined by Wallace S. Sayre and Herbert Kaufman [in their Politics and the Metropolis (New York: W. W. Norton & Company, 1965; orig. 1960)], are those (such as Law, Budget, and City Planning) that "have a substantial impact upon all the programs and policies of the city government" [p. 349], as opposed to "line agencies" (Police, Fire, Sanitation, etc.) that do not shape policy so much as simply carry it out [p. 249].

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poration counsel they had in mind: a successful lawyer, civic leader, and reform politician. Davies had been born in a log cabin on the shores of Black Lake, New York, and had ridden the circuit as a frontier trial lawyer before coming to the city in the late 1820's. Specializing in corporation law, he represented clients as diverse as the Erie Railroad and the Mutual Life Insurance Company, and was much in demand as "chamber counsel" to other lawyers. An ardent supporter of the anti-slavery movement (his wife was a Tappan), Davies was drawn into Whig politics and quickly became one of the party's more popular platform speakers. In November of 1849 he was swept into office on the strength of a general Whig landslide, defeating Democrat Lorenzo B. Shepard in an election that saw anti-slavery "Barnburners" deserting their party in droves to vote a straight Whig ticket.[12]

Davies had actually been corporation counsel since May, having been appointed by the Whig Board of Aldermen to an interim Law Department set up the previous year.[13] By

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[12]Sketches of Davies' life appear in National Cyclopaedia, vol. 3, p. 26; McAdam, Bench and Bar, vol. 1, pp. 291-94, and New York Times, Dec. 18, 1881, p. 2. For the election of 1849 (in which the municipal races were of far less interest to the voters than the election of the next state legislature), see New York Tribune, Oct. 27, 1849; Post, Sept. 20, 1849, and Oct. 30, 1849; Herald, Nov. 5, 1849, and Nov. 16, 1849 [all p. 2].

[13]Succeeding Willis Hall in the same post, as noted above; see Board of Aldermen, Proceedings, vol. 34, pp. 885-89; vol. 37, pt. 1, pp. 62, 101, 150, 178. The motives of the aldermen in setting up interim departments is open to question. Were they "anticipating the will of the legislature" as Mayor Caleb S. Woodhull put it [Board of Aldermen, Documents (1840), no. 1, pp. 19-20]? Or were they trying to

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the time he took office as an elected head on January 1, 1850, he had the department already organized and running smoothly. The Board of Aldermen had provided him with an office in City Hall, complete with desks, filing cabinets, and the latest in gas lighting. Davies began keeping meticulous records--records that, for the first time, belonged to the office and would remain there--and also began assembling the first volumes of a permanent law library. He called in all the cases currently in the hands of outside counsel, substituting himself for counsel in some and returning the rest, under his close supervision, to the firms where they had been placed.[14]

The results of his efforts were striking. In his first six months as department head he arranged the settlement of 16 long-pending lawsuits and took 45 others to court. Of the those decided by the time Davies reported on them, the city won 34 and lost only four--a record that moved mayor Caleb S. Woodhull to public praise of the new department for its "prompt and faithful attention to this

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beat the legislature to the punch, with appointed department heads instead of elected ones?

[14]Board of Aldermen, Proceedings, vol. 37, pt. 2, pp. 270-71, 651; vol. 38, pp. 114-15; vol. 39, pp. 77-78; Board of Assistant Aldermen, Proceedings, vol. 36, p. 230; vol. 37, p. 135

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branch of the public interests."[15] Davies did not provide the same sort of win-loss statement in his 1850 report, but he did note that recoveries against the city had been gratifyingly small.[16] The following year he reported that the department had disposed of a record 92 lawsuits, including several that settled important principles affecting the city.[17]

There were, in fact, a number of important cases decided on behalf of the city during his term. In Benson v. Mayor the state Supreme Court ruled that the city's ferry franchise was a vested right that could not be taken away by the legislature.[18] In Adriance v. Mayor the Court of Appeals overturned a Supreme Court decision holding that it was unconstitutional for the city to finance its streets (which were a benefit to the entire public) by assessing the lot owners only; had the lower court ruling been allowed to stand, title to the streets already built would have reverted to the original owners of the soil beneath

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[15]Figures and quotation from the mayor's annual message to the city, in Board of Aldermen, Proceedings, vol. 38, pp. 24-25. Two of the losses were pro forma verdicts awarding such nominal damages that they amounted to wins.

[16]Board of Aldermen, Documents (1851), no. 3, p. 99.

[17]Ibid. (1851), no. 9, esp. pp. 144-45. There were no comments in the 1852 report, only a long list of cases.

[18]The case is reported in 10 Barbour 223 (1850). In his Public Property and Private Power, Hartog notes, "This opinion stands as evidence that in 1850 New York City's corporate estate remained secure" [p. 241].

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them.[19] In another case, Sun Mutual v. Mayor, the Supreme Court gave the city access to an important new source of revenue by ruling that the assets of life insurance companies could be taxed as personal property.[20] And in Heyward v. Mayor, the same court ruled that property taken by the city for a particular use (in this instance, an almshouse) did not revert to the original owner if that use was discontinued.[21]

Davies was justly proud of his record in court, but he was just as adept at keeping the city out of court. When the Harlem Railroad refused to build an overpass at a dangerous intersection, for instance, he suggested to the Board of Assistants (who had passed a resolution ordering an immediate lawsuit) that they first try invoking the city's right, under a clause he discovered in the company's franchise, to declare the offending track an impediment to traffic and begin tearing it up. Before the assistant aldermen could break out the crowbars, the company capitu-

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[19]For the holding in Adriance (a case not published in the court reports), see its sister case, People ex rel Griffin v. Mayor of Brooklyn (1851), 4 New York 419. Davies discusses the importance of Adriance in Board of Aldermen, Documents (1851), no. 45.

[20]8 Barbour 450 (1850).

[21]8 Barbour 486 (1850). These and other cases (some of which he had personally argued) are discussed by Davies in Board of Aldermen, Proceedings, vol. 39, pp. 78-80, and Documents (1851), no. 45.

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lated, and the city was spared what Davies felt certain would have been a long and expensive lawsuit.[22]

Davies advised the aldermen on a number of other questions as well. In 1849 when the English actor William Macready appeared at the Astor Place Opera House before a hostile, largely Irish audience, a riot broke out that resulted in widespread bloodshed and property damage throughout the neighborhood. The owner of the Opera House presented the Board of Aldermen with a claim for $5,000 for damages, arguing that the city was liable for having failed to control the mob. Worried, the aldermen forwarded the claim to Davies with a request for advice. There was no New York law on the subject, but Davies discovered two cases in other states that enabled him to reassure the aldermen there was "no legal principle which subjects the Corporation to liability for unlawful, riotous, and tumultuous acts of individuals, not in the employ of the Corporation and not acting in accordance with its directions."[23]

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[22]Board of Assistants, Proceedings, vol. 37, p. 119, and vol. 40, pp. 7-10 [quoted at p. 9]. Davies thought, but could not guarantee, that the city would eventually win such a suit; in the meantime, however, nothing would be done about the intersection.

[23]Board of Aldermen, Documents (1850), no. 13, pp. 22-26. Davies' opinion remained good law only until 1855, when the state legislature passed an act making cities liable for riots. The Astor Place riot is described in Joel Headley's The Great Riots of New York, 1712-1873 (Indianapolis: Bobbs-Merrill, 1970), pp. 114-20.

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Davies also dealt with two other unusual matters. Racing another company to a fire, Eagle Hose Company No. 4 ran its fire engine onto a sidewalk and sideswiped a house on Division Street. The owner sent a claim for the damages to the city, and the Board of Aldermen asked Davies for instructions. Noting that the firemen were violating a city ordinance at the time, he replied that "in no view of the relation subsisting between the Corporation and the company, can any responsibility be attributed to the Corporation for such wilful misconduct of the company."[24] And after a number of spectacular residential explosions, Davies was asked whether the city had authority to prohibit the installation of gas lighting by do-it-yourself homeowners. Most definitely, he answered; in its wisdom, the Montgomerie charter had given the city ample powers to prohibit the use of anything "deemed dangerous to the public welfare and the lives of citizens."[25]

In addition to answering these and other questions, Davies was kept busy with innumerable other matters. With the new charter requiring that all work for the city be performed by contract, he wrote literally hundreds of contracts and dealt with the inevitable questions arising from

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[24]Board of Aldermen, Proceedings, vol. 37, pt. 2, pp. 370-72.

[25]Ibid., vol. 43, pp. 396-97 [Davies, paraphrasing the charter].

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them.[26] He--or, more accurately, his clerks--prepared over 500 deeds and leases each year, and examined "a very large number" of titles.[27] He also drafted state laws that city officials wanted, and lobbied against bills they opposed. In the legislative session of 1852, for instance, he opposed attempts to weaken the city's fire laws, exempt bonds and mortgages from taxation, and authorize a private toll bridge over the Harlem River, and he drafted dozens of bills and memorials for the city, including a statute written after a horrifying school fire, requiring

> that all doors to school houses, and other buildings used or frequented by the public, now erected, or which may hereafter be erected in the city of New York, shall open outwards. . . for the protection of the lives of those who may frequent such buildings, in case of alarm by fire or other cause.[28]

The new Law Department was off to an impressive start, but already there were signs of trouble ahead. For all the hopes of the reformers, and even under the guardianship of such a model public servant as Davies, the new department was proving just as susceptible to political influence as the old office. Davies' first two appointments--Whig ward leader James S. Thayer as public administrator and state

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[26]For a discussion of contract problems, see his annual report in Board of Aldermen, Documents (1850), no. 7, pp. 119-21.

[27]Board of Aldermen, Proceedings, p. 658.

[28]Ibid., vol. 45, p. 281, and Board of Assistants, Proceedings, vol. 44, p. 517.

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committee chairman Theodore E. Tomlinson as corporation attorney--were blatantly political, proof if anyone needed it that the Whigs were just as avid for the spoils of victory as Tammany.[29] Politics intruded into the Law Department in another way as well. Although the charter had intended that the Law Department "have the charge of, and conduct all the law business of the corporation," the Board of Aldermen refused to allow Davies the staff he needed and instead used "outside counsel fees" to reward attorneys favored by the majority party.[30] In 1850, for example, the board turned down Davies' request for an increase in his $2,100 allowance for clerks, while parcelling out over $10,000 in counsel fees to a dozen or so favored attorneys.[31]

Financially speaking, the practice made no sense; for a quarter of that amount, the city could have had a full-time professional staff handling all its legal business efficiently and economically. Politically, however, it made a great deal of sense; scattering $10,000 in occasional fees

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[29]For biographical sketches, see New York Times, Nov. 28, 1776, p. 8 [Thayer], and Aug. 22, 1887, p. 2 [Tomlinson].

[30]Quoting New York, Laws (1849), ch. 187, sec. 18.

[31]Board of Aldermen, Documents (1840), no. 43, and Office of the Comptroller of the City of New York, Report for the Year Ending December 31, 1850, pp. 68-70. Among the lawyers most frequently retained by the Whigs were James R. Whiting, William Kent, and Murray Hoffman. The Democrats, who took over the board in 1852, favored John Van Buren, Peter B. Sweeny, and Lorenzo Shepard [ibid. (1850), pp. 68-70; (1851), pp. 86-87, and (1852), p. 74].

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to leaders of the bar was an investment that returned greater political dividends than hiring another two or three salaried drones in the Law Department. As a result, Davies' requests for a larger staff budget fell on deaf ears, and he found himself grudgingly digging into his own pocket to pay for the additional clerks he needed.[32]

Despite these minor clashes, Davies enjoyed a generally congenial relationship with the Whig boards of 1850 and 1851. This changed abruptly, however, when the Democrats won a majority in the fall municipal elections of 1851 and the "Forty Thieves" Board of Aldermen opened for business the following January. Besides launching the career of William Tweed, the 1851 board became notorious for perpetrating a series of outrageous "steals," including the Gansevoort Market, the Broadway streetcar line, and the Third Avenue Railroad. Selling their votes for $1,000 each, its members awarded a $600,000 contract for a patented "Russ paving" that proved so worthless it had to be torn up. With one year left in his term of office, Davies found himself serving as counsel to, in the words of the Tribune, "the most debased, corrupt and disgraceful body of men ever invested with legislative power, at least

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[32]As revealed in an addendum to his final annual report, in Board of Aldermen, Proceedings, vol. 48, pp. 658-59.

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in this country."[33]

Why, one wonders, did he not try to use the power of his office to interfere with their schemes? In truth, the thought probably never occurred to him, or to anyone else for that matter. Just as the street commissioner was expected to tend to nothing but the streets, the health officer to nothing but the public health, and the water commissioner to nothing but the flow of water, so was the corporation counsel expected to tend to nothing but the city's legal affairs--lawsuits, deeds, contracts, legislation, requests for advice. There was no more reason for him to root out corruption than there was for any other officer of municipal government.

Perhaps, it might be argued, even less. The charter specifically commissioned him to "conduct the law business of the corporation . . . when so ordered by the corporation", a wording that seemed to rule out any role as a watchdog over erring officials.[34] Unless ordered to bring them to account, it was quite literally none of the corporation counsel's business--and the possibility that he might be so ordered was remote in the extreme, inasmuch as the corporation upon whose orders he awaited acted through

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[33]Tribune, June 1, 1853, p. 2. An account of the Forty Thieves, rich in detail, is given in Denis Tilden Lynch, "Boss" Tweed, the Story of a Grim Generation (New York: Arno Press, 1974; orig. 1927), pp. 73-94. See also Spann, New Metropolis, pp. 299-305.

[34]New York, Laws (1849), ch. 187, sec. 18 [emphasis mine].

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these selfsame officers. It was a basic tenet of corporation law that, being invisible and incorporeal, a corporation had to act through its duly authorized officers; for the corporation of the City of New York, those officers (at least, as understood in the mid-nineteenth century) were the members of its Common Council, organized into a Board of Aldermen and Board of Assistant Aldermen. Unless authorized by them, no other servant of the corporation, including its legal counsel, had any power to act in its name. No matter what Davies' personal opinion might have been regarding the interests of the corporation, he was legally bound to carry out the wishes of its officers.[35]

Viewed in this light, it is hardly surprising that Davies did not take it upon himself to stamp out corruption in the Board of Aldermen. Even so, he must not have been entirely comfortable to find himself in court in 1852 defending a group of aldermen who had been caught red-handed awarding a bogus contract for the rebuilding of Washington Market. The contract, awarded to a confederate

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[35]The problems inherent in the corporate attorney-client relationship continue to perplex the profession today. See American Bar Association, Model Rules of Professional Conduct, Rule 1.13, "Organization as Client"; the chapter "Corporate Client-Lawyer Relationship" in Charles W. Wolfram's Modern Legal Ethics (St. Paul.: West Publishing Co, 1986), pp. 732-59; Robert J. Kutak, "Whom Does the Corporate Counsel Represent?" in The Corporate Director (Mar./Apr. 1981), pp. 1-6; Robert P. Lawry, "Who is the Client of the Federal Government Lawyer?" in Federal Bar Journal, vol. 37 (1978), pp. 61-71, and Brian D. Forrow, "The Corporate Law Department Lawyer: Counsel to the Entity," The Business Lawyer, vol. 34 (1979), pp. 1797-1819.

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of theirs, was illegal on at least two counts: the resolution authorizing it had been vetoed by the mayor and repassed without the concurrence of the Board of Assistants, and the contract had been awarded in secret by the superintendent of markets without competitive bidding. Davies became involved in the matter when a group of taxpayers went to court and asked for an injunction forbidding the city to go through with the contract.[36]

Christopher v. Mayor[37] was a difficult case to defend. The contract was clearly illegal, leaving Davies to play the only card he had: the argument that the plaintiffs had no legal standing in the case and that the judge should dismiss their petition. Before a plaintiff could have a lawsuit accepted by the courts, the law required that he be able to demonstrate a "peculiar and personal interest" in the matter. The tenants of Washington Market might well have had such an interest, or even another contractor competing for the job. But in Davies' opinion, mere "taxpayers and freeholders" were so remotely affected by the contract that they had no legitimate standing in court.

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[36]Christopher v. Mayor, 13 Barbour 567 (1852). .

[37]Despite the title of the case, the plaintiffs were not suing the mayor (who had, after all, vetoed the contract) but the corporation itself, whose formal name ("the Mayor, Aldermen, and Commonalty") is traditionally shortened in legal citations to "Mayor." Similarly, the names of Joseph Christopher and some half-dozen co-plaintiffs are cited simply as "Christopher."

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Justice Henry P. Edwards disagreed. "It appears by the complaint that [the plaintiffs] are tax-payers and freeholders in the city," he wrote. "The necessary effect of the act complained of will be to impose a burthen upon their real estate. Their interest, then, is as certain and direct as that of a stockholder in a moneyed or other corporation." Having disposed of Davies' main argument, he went on to declare the contract void and to issue a permanent injunction barring the city from going forward with it.[38]

It was a landmark ruling. Not so much because it voided the contract (a minor setback for the Thieves, who were already cooking up far juicier "deals") or even because it opened the courtroom door to taxpayer suits (which the reformers used far less aggressively than might have been expected). It was a landmark in a far more fundamental way: as a widening of the courts' vision of exactly what comprised the corporation of the City of New York. Although its legal name (the one under which it held property, made contracts, sued and was sued) was "the Mayor, Aldermen, and Commonalty of the City of New York," for all practical purposes "corporation" equalled "Common Council." And in the mid-nineteenth century, "Common Coun-

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[38] Ibid., quoted at p. 570. Davies' actual brief is lost to history, but his main points are acknowledged by Edwards, albeit in the course of refuting them.

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cil" equalled "aldermen and assistants," the mayor having been subtracted from the equation in 1831 by his removal from the Common Council, and the "commonalty" never having been much of a factor from the beginning. But now came the Supreme Court of the State of New York, announcing that the commonalty--the "tax-payers and freeholders"--held a prominent place in the equation.

Few New Yorkers grasped the significance of the ruling. What interested them at the time about the case was simply its result--the defeat of one of schemes of the corrupt Board of Aldermen--and not the legal loophole through which the reformers had wriggled into court. Davies himself did not appear to be particularly upset by the loss of the case; he had given the board the representation to which it was entitled, and no one could have expected any more, or any less, of him. Nor did his conduct of the case appear to harm his standing with his colleagues, who could have been expected to realize that the corporation counsel was simply doing his job.

Christopher v. Mayor was overshadowed by litigation of far more interest at the time, some thirty-three cases involving $800,000 in total damages, brought against former mayor Cornelius Lawrence for buildings he had ordered blown up to halt the spread of the "Great Fire of 1835."[39] After

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[39]This fire and the great mass of litigation arising from its ashes are dealt with later in this work.

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New York's statute of limitations had tolled on these claims (most of which had been disallowed by the courts), a group of New Jersey plaintiffs had attempted another bite of the apple by bringing suit in their own state in 1847. Inheriting these cases from his predecessor, Davies made their defense the top priority of his office, and his reputation was riding far more on them than on Christopher v. Mayor.

Although the cases had been assigned to New Jersey trial counsel, Davies supervised them closely and gave them an unusual degree of personal attention. He held over forty conferences with former mayor Lawrence and the New Jersey lawyers, and personally coaxed the city's witnesses (who, as the plaintiffs were smugly aware, were beyond the reach of New Jersey subpoenas) into appearing in court. Davies considered the cases the most important litigation in his office, and considered the decision in favor of the mayor, handed down in November of 1852, as the signal triumph of his term of office. Mayor Lawrence, who would have been personally responsible for satisfying the $800,000 judgment, was effusive in his praise. "I feel particularly indebted to you for the zeal and attention that you gave the suits," he wrote in a public letter of thanks. "I think better could not have been done than you did."[40]

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[40]New York Times, Mar. 11, 1853, p. 8. For Davies' part in the matter, see ibid., and Journal of Commerce, Mar. 22, 1853, p. 3.

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Davies was anxious to return to his neglected private practice and had no interest in seeking a second term. As a result, voters in the November municipal election were given a choice between two brand-new candidates for corporation counsel: the Whig nomineee, Ogden Hoffman, and the Democratic candidate, Robert J. Dillon. If professional qualifications had determined the election, Hoffman would have won easily. He had six years experience as district attorney and another two as U. S. attorney for the Southern District, and had served two terms in Congress. He had been practicing law almost thirty-five years, had written extensively on legal subjects, and was widely admired as "the Erskine of the American bar."[41] For someone as prominent as Hoffman to run for corporation counsel was a sign of how prestigious the office had become.

In comparison, Dillon was practically a dilettante at the bar. His only experience in the law was as a junior partner in the office of his father, a well-to-do Irish emigre lawyer named Gregory Dillon. The Dillons ran a leisurely, old-fashioned practice and devoted much of their time to business and philanthopic activities, particularly the Irish Emigration Society and its offshoot, the Emigrant Savings Bank. The bank was largely their creation, with

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[41]Quoting McAdam, Bench and Bar, vol. 1, pp. 359-60, the reference being to Scottish jurist John Erskine. See also National Cyclopaedia of American Biography, vol. 11, pp. 84-85.

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the elder Dillon its founder and president and Robert its general counsel. It was this wealth and his popularity with Irish voters, rather than any broad expertise in the law, that commended him to Tammany as a candidate for corporation counsel.[42]

Wealth--or lacking that, the backing of wealthy friends--was the first prerequisite to seeking office in mid-nineteenth century New York. To gain the nomination of his party, a candidate had first to be nominated by his ward, and normally the only voters attending the ward primaries were party footsoldiers who expected to be paid for their votes. The next step was for the party's executive committee (the county chairman, a few key associates, and the ward leaders) to meet and select a candidate from those nominated by the wards. Just as in the primaries, the executive committee expected a candidate to pay for his nomination. The party would, after all, be put to considerable expense in the coming election; in the words of Gustavus Myers, "the 'boys' would have to be 'seen'; such and such a 'ward heeler' needed 'pacifying'; a band was a

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[42]See A Century of Growth: The Emigrant Industrial Savings Bank (privately printed, 1950). Dillon did not make the cut for McAdam's Bench and Bar, and his newspaper obituaries feature his political and civic activities while barely mentioning that he was a lawyer. See Times and Herald, Nov. 27, 1872, both p. 2. Dillon's personal wealth is difficult to estimate; it was not one of New York's great family fortunes, but substantial enough that the Irish-American had to defend him against charges of being a "social aristocrat" [Oct. 30, 1852, p. 3].

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proper embellishment, with a parade to boot, and voters needed 'persuading.'"[43] Consequently, most executive committee meetings took on the character of an auction, with one nominee bidding against another until the last dollar was bled from his wallet. Once selected, the names of the nominees were presented to a larger county convention for pro forma ratification by the rank and file.[44]

Obviously, a well-heeled candidate like Dillon was at an advantage in this process. But in addition to money, he had other assets the executive committee was looking for as well. He was highly regarded in the Irish community ("the worthy son of a worthy father," enthused the Irish-American),[45] and the committee needed an Irish name to balance a municipal ticket that was heavily "Yankee and Yorker" at the top (Jacob Westervelt, mayor, and Azariah Flagg, controller). In addition, there was not a breath of

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[43]Myers, History of Tammany Hall, p. 153.

[44]Tammany had developed this process into a science, but the Whigs--and later the Republicans--chose their candidates the same way; Ogden Hoffman went through the same winnowing process as Robert Dillon, and probably paid as much for his nomination. For a contemporary description of the process, see Journal of Commerce, Mar. 9, 1853, p. 3 [letter from "O.B.W."], and William A. Brewer [writing as "Henry von Spuyten"], A Few Thoughts for Taxpayers and Voters (New York: Charles B. Norton, 1853), pp. 45-46. For slightly later works describing essentially the same system, see William Mills Ivins, Machine Politics and Money in Elections in New York City (New York: Arno Press, 1970; orig. 1887), pp. 7-27, and Matthew P. Breen's classic Thirty Years of New York Politics, Up-to-Date (New York: Arno Press, 1974; orig. 1899), pp. 38-44.

[45]New York Irish-American, Oct. 30, 1852, p. 3.

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scandal attached to his name, and with the Forty Thieves dominating the headlines the party badly needed to spruce up its image. Dillon qualified on all three counts: wealth, ethnic appeal, and personal character. Exactly how much law he knew was far down on the executive committee's list; if he had any questions, he could always turn to his clerks or outside counsel for help.

As it turned out, the merits of the two candidates had very little to do with the election. The municipal election of 1852 was a sideshow to the state and national races in the same election, with the choice of corporation counsel--and other municipal officers as well--of far less interest to the voters than the election of a president, congress, governor, legislature, state judiciary, and other officers. The Democrats were united (at least, as united as they ever got) behind Franklin Pierce and the Compromise of 1850, while the Whigs were torn between admiration of Winfield Scott and disgust at the party's compromise with slavery. The election rapidly shaped into a referendum on the Compromise of 1850, with the press running apocalyptic headlines ("THE DAY OF JUDGMENT")[46] and warning of the consequences of electing the wrong party ("thousands . . . ruined, tens of thousands reduced from comfort to want, hundreds of thousands impoverished . . ."). In this great

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[46]Herald, Nov. 2, 1852, p. 4.

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national contest, the role of New York City was seen as crucial. "As goes the city, so goes the State," the Herald exhorted the voters, "and as goes the State, so goes the Union."[47]

In contrast, the editorial pages were practically devoid of comment on the local races. The Irish-American commended the Democrats for having nominated Dillon, and the Post gave a perfunctory endorsement to Tammany's city ticket, but on the whole the press paid very little attention to the municipal election, and practically none at all to the merits of the departmental candidates.[48] Dillon and his fellow officers owed their election solely to the greater Democratic victory. "New York City has dumbfounded the Whigs, laid them out stiff and cold," chortled the Herald. "The Presidential ticket seems to have swept everything along with it--the Corporation, State officers, Congressional, city, county tickets, and all."[49]

Hoffman ran about 3,000 votes ahead of his party, a level of ticket-splitting that created barely a ripple in

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[47]Herald, Nov. 3, 1852, p. 4.

[48]Irish-American, Oct. 2, 1852, p. 2, and Oct. 30, 1852, p. 3; Post, Nov. 2, 1852, p. 2. Issues of the Times, Post, Herald, and Tribune for the four weeks before the election show practically no editorial comment on the departmental candidates, and very little on the mayoral race.

[49]Herald, Nov. 3, 1852, p. 2.

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the Democratic tide running against him.[50] Clearly the voters had not weighed the professional qualifications of the candidates and chosen the better qualified of the two. Instead, the two parties had chosen the candidates--in the case of the Democrats, for reasons that had nothing to do with fitness for the job--and the voters had chosen between the two parties, for reasons that nothing to do with issues of local government.

The illogic of the system was rapidly becoming apparent to anyone who gave it a thought. Among its critics was merchant Willian A. Brewer who (as "Henry von Spuyten") issued a pamphlet decrying "primary elections, pot-house politics, and the barter and sale of the most important rights of the corporation." Brewer drew a lurid picture of the goings-on at a typical ward primary and pronounced the whole system rigged against the emergence of decent candidates. And even on those rare occasions when such nominees did emerge, he went on, their election depended on the entirely unrelated matter of their affiliation with one of the two great national parties. What sense did this make? he demanded. What connection did national issues have with the selection of municipal officials? "Is there

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[50]The vote for mayor was 33,251 for Democrat Jacob Westervelt and 23,719 for Whig Morgan Morgans, while that for corporation counsel was 29,693 for Dillon and 26,347 for Hoffman [Valentine's Manual (1853), p. 522]. Unless there was a great deal of reciprocal ticket-splitting, it would seem that only about 3,000 (or 5 percent) of the voters crossed party lines in voting for corporation counsel.

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any intimate relation between the Compromise and the Croton Aqueduct?--the Foreign Policy of Russia, and the domestic propriety of Russ-pavement?--between good statesmanship and good sewerage?"[51]

Perhaps not. But that was the way the system worked, and as a result New York City had as its corporation counsel a merely passable lawyer instead of a superb one. Hoffman shrugged off his defeat and went on to be elected New York attorney-general the following year. It is useless to speculate what he might have done with the Law Department; in fact, with a Tammany mayor and a Tammany Common Council, he might have had a worse time of it than Dillon. Dillon, for all his lack of legal expertise, at least had the advantage of being able to work smoothly with the mayor and Common Council. And, in fairness, there was much that was admirable about him: he was honest, intelligent, and utterly devoted to the public welfare. He was also, as it turned out, an able administrator, and that was what saved him.

The Tammany Board of Aldermen was the first to realize--the first, that is, after Dillon himself--that he

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[51]Brewer ["Henry von Spuyten"], A Few Thoughts for Taxpayers and Voters, quotations at pp. 18 and 47-48. In a similar vein, the Times ran an editorial "Men Who Don't Meddle With Politics" deploring the "scores of excellent men" who had withdrawn in disgust from voting in municipal elections.

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was no Davies, and would need ample office help. After years of denying Davies any more than two clerks, the board arranged for Dillon to have a staff of five.[52] The enlarged staff relieved the corporation counsel of an enormous amount of work, handling not just routine paper work (contracts, deeds, leases, title searches, and so forth) but almost surely doing a great deal of legal research as well. For instance, in answering a question about street openings, Dillon based his answer on thirteen separate acts of the legislature, citing chapter and page, and in dealing with an inquiry about the Harlem Railroad he mentioned having examined the company charter, three statutes, and four ordinances. From the scattered nature of these references (e.g., thirteen statutes pulled from volumes dating from 1815 to 1843) it is obvious that someone had spent a great deal of time scrabbling through the law books in the library. That someone was, almost certainly, not Dillon himself.[53]

Under Dillon the office handled much the same work as it had under Davies. With the city compelled by law to

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[52]The first appointees were Francis L. Hodges, Carleton Edwards, Bernard J. Malone, Renaldo H. French, and J. S. Hunt [Valentine's Manual (1853), pp. 58]. By the end of the year Hodges, Edward, and Hunt had been replaced by Abraham R. Lawrence, George S. Tuckerman, and P. C. Lee [ibid. (1854), p. 68, and (1855), p. 72].

[53]The opinions are printed in Board of Aldermen. Proceedings, vol. 50, pp. 307-09, and Board of Councilmen [successor to Board of Assistants], Proceedings, vol. 53, pp. 286-88.

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perform all work under contract, the staff wrote literally hundreds each year. One list of contracts, covering only three months, ran for six closely spaced pages and included such subjects as sewers, basins, curbs, gutters, street paving, sidewalks, fences, police stations, firehouses, and the removal of a sunken ship.[54] The city continued its rapid pace of street openings, throwing a tremendous amount of work on the corporation counsel and his staff.[55] In addition, Dillon was asked for advice on the usual variety of subjects. Could the city increase its police force without applying to the legislature for authority?[56] Did the city have the right "to control or direct the manner of constructing buildings in this city, or the height thereof?"[57] Could the Department of Lamps and Gas hire municipal employees to light the city's street lamps?[58]

Curiously, two questions were almost indentical with ones that Davies had handled: Was the city responsible when a fire engine knocked over the stoop of 111 Christie?

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[54]Board of Aldermen, Proceedings, vol. 50, index, pp. 82-86.

[55]See, for example, ibid., vol. 49, pp. 43, 143, 159, 164, 186-88, 227-28, and 259.

[56]Ibid., pp. 327, 477-78; Dillon found sufficient authority in a law already passed.

[57]Ibid., vol. 54, p. 31; an interesting question, for which there is unfortunately no record of an answer in either the Proceedings or the municipal archives.

[58]Ibid., vol. 50, pp. 422-23; no, according to Dillon, who held that the law required such work to be done by contract.

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How could the city force the Harlem Railroad to repair the pavement along its tracks? Dillon reached the essentially same answers as Davies (the city was not liable for the damaged stoop, and it could threaten removal of the tracks), but the way he reached them suggest that there was as yet very little continuity in the office. From a reading of these opinions, it is obvious that Dillon or someone on his staff had researched both questions from scratch, when--had they known about it--they could have saved themselves a great deal of work by referring the aldermen to Davies' opinion on the same subject. This suggests two things: first, that the office's records were not in very good order, and, second, that a complete turnover in staff from one administration to another was good politics but bad business.

Litigation in the office continued to run at around two hundred cases a year, but fortunately for Dillon little of it was particularly complicated or involved novel questions of law. He argued a string of cases that, for a time at least, broadened the city's exemption from liability for various torts. In Pack v. Mayor, the Court of Appeals ruled that the city could not be held responsible for the negligence of a contractor's employee, and then reaffirmed and strengthened the ruling in Kelly v. Mayor.[59] And in

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[59]Respectively, 8 New York 222, and 11 New York 432 (both 1853).

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Griffin v. Mayor the same court refused to find the city responsible for the acts of its citizens in obstructing the streets.[60]

The case that generated the most interest at the time was De Baun v. Mayor, a case practically identical to Christopher and decided on similar grounds. Like Davies, Dillon found himself in court in fruitless defense of a Board of Aldermen who had awarded a fraudulent contract, this time for "Russ" paving. The aldermen had given the contract to a favored firm without competitive bidding, for $6.50 a yard when the going rate was $3.50. Unable to claim that the taxpayer plaintiffs had no standing in the case, Dillon argued instead that the court had no standing--that is, that by virtue of being a corporation, the municipality was free from judicial interference in its internal decisions. Hardly surprisingly, the court thought otherwise, and voided the contract.[61]

The greatest accomplishment during Dillon's term of office--and the one of which he was proudest--was the acquisition of Central Park for the city. The Law Department was involved in the creation of the park in two ways. First, Dillon represented the city in the legal controversy created by the legislature's approval of two competing

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[60]9 New York 456 (1853), essentially a holding that the city was not liable for the consequences of failing to enforce a law.

[61]16 Barbour 392 (1853).

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plans--one for "Jones Wood" Park along the East River, promoted by certain interested property owners, and the other (favored by the mayor and aldermen) for a larger, more central site.[62] Once this controversy was ended in favor of the Central Park site in December 1853, Dillon's real work began. His office was responsible for the legal work involved in acquiring 7,520 lots held by 561 different owners and in assessing the cost of the purchase on 34,000 individual lots in the neighborhood of the park. It was one of the most complicated series of real estate transactions ever made by the city, second only to acquisition of land for the Croton Aqueduct, and Dillon accomplished the incredible feat of getting it all done in two years.[63]

Under Dillon's management, the Law Department continued the politicization begun under Davies. No doubt as a condition of his nomination (one can hardly imagine the appointments being his own idea), he named Daniel Sickles corporation attorney and Peter Sweeney public administrator. At 34, Sickles was a bully and a braggart,

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[62]For an account of the long and complicated controversy, which was eventually settled by the state Supreme Court, see Roy Rosenzweig and Elizabeth Blackmar, The Park and the People: A History of Central Park (Ithaca, N.Y.: Cornell University Press, 1992), pp. 18-54.

[63]Ibid., pp. 59-91; figures from pp. 78 and 81. Under supervision of the state Supreme Court, a Commission of Estimate determined the value of the lots that were taken, and assessed property in the neighborhood of the park for the imputed increase in its value. The corporation counsel provided legal advice to the commission and handled all the legal work involved in transfer of the property, including title searches, conveyances, and orders of eviction.

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a Tammany insider described by one biographer as "linked to stories about both tampering with and stealing ballot boxes, brawls--he was once bodily thrown down a stairway at a rally--and deceptive political manipulations."[64] As a lawyer he was considered by George Templeton Strong to be "one of the bigger bubbles of the scum of the profession."[65] At 29, Sweeney was a shadowy presence in the Hall, a "fixer and deal maker" who shunned the spotlight as much as Sickles basked in it. Sweeney plied his connections with his uncle, the powerful alderman Thomas J. Barr, so assiduously that his nickname in the Hall was "the Nephew of My Uncle." While serving as public administrator, he advanced his political career by serving as a member of the Tammany general committee, ward boss of the Twentieth, and lobbyist in the legislature.[66]

The appointments of Sickles and Sweeney reinforced the tradition, begun by the Whigs, of choosing bureau chiefs for their service to the party instead of their professional qualifications. The positions were rapidly becoming

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[64]This is the same Sickles who later shot Philip Barton Key for seducing his wife and who, as a Union general, lost a leg at Gettysburg while placing his corps in a foolhardy position. See Nat Brandt, The Congressman Who Got Away With Murder (Syracuse: Syracuse University Press, 1991), quoted at p. 22, and W. A. Swanberg, Sickles the Incredible (New York: Charles Scribner's Sons, 1956).

[65]Quoted in Brandt, The Congressman, p. 36.

[66]For a thumbnail sketch of his career prior to his years with the Tweed Ring, see Alexander T. Callow, Jr., The Tweed Ring (New York: Oxford University Press, 1966), pp. 42-43.

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sincecures, with clerks doing most of the actual work while the appointees spent their time practicing politics and private law. Both offices paid decent salaries, supplemented by fees and gratuities, and both made their holders privy to a great deal of inside information about the city's business and that of its citizens.[67]

The financial value of the office of corporation counsel itself attained mythic proportions during Dillon's time in office. At first glance, it would not seem that it was any great prize. The ordinance that established the office under the Charter of 1849 described its duties in detail, and then went on to declare, "The salary [$3,500] to be paid to the Counsel to the Corporation, shall be a full compensation, as between him and the Corporation, for all the services he may be required to render by this article." The ordinance went on to authorize him to keep all "taxed costs" due him from parties other than the Corporation, a burst of generosity considerably diminished by the fact that the same session of the legislature had just

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[67]Although his job was to prosecute violators of the ordinances, the corporation attorney was probably paid more for not prosecuting them; that is, it would be naive not to suppose that he got his cut of the bribes given the aldermen for "fixing" such fines. As for the public administrator, in addition to his statutory fees for administering estates, he was almost certainly "remembered" by grateful auctioneers, movers, and other tradespeople, not to mention long-lost heirs.

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abolished them.[68]

Consequently, it came as a shock when the citizens of New York read in the January 19, 1853 issue of the Journal of Commerce that the outgoing corporation counsel Davies had received during his term "probably TWO HUNDRED THOUSAND DOLLARS above and beyond what should have been allowed."[69] How could this be? Because, according to the Journal, "a master head" had been at work. Slipping through a loophole in the ordinance of 1849, Davies had charged the city $10,000 for managing the New Jersey fire cases. His justification was that section 420 of the ordinance of 1849 had specified that, as a condition of his salary, the corporation counsel was to manage cases "in any court in this state." Not New Jersey. Even more outrageous, in the opinion of the Journal, was the fact that he had pocketed $50,103 in street opening fees in 1852 alone--which, using some quick arithmetic, meant to its editors that in three years he had made over $150,000 in street opening fees alone. The whole affair was "a clear fraud upon the public" and Davies ought to be if not sent to prison, at least

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[68]Title X, secs. 412-20, 425 [quoted], of "An Ordinance organizing the Departments of the Municipal Government," in Proceedings of the Boards of Aldermen and Assistant Aldermen, vol. 17, pp. 122-34, and New York, Laws (1849), ch. 438, sec. 303 [abolishing taxed costs].

[69]Journal of Commerce, Jan. 19, 1853, p. 3.

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sued to return his fees.[70]

Davies defended himself with a long and closely reasoned rebuttal. He pointed out that $10,000 was a reasonable fee for defending an $800,000 lawsuit, and that at any rate it had been set not by himself but by the Board of Aldermen in consultation with private counsel. As for the street opening fees, these had been awarded by the courts in accordance with state law and if they seemed high, it was only because the city was opening record numbers of new streets. The $50,000 had not been net profit for him--he had paid clerical and other expenses from it--and it represented payment for work performed over three years' time, not just one. The street opening fees for his entire term amounted not to $150,000, as the Journal claimed, but only $64,000. "I have received precisely what was adjudged by others, having no interest in the question, as a just equivalent for the services rendered," Davies declared.[71]

Unfortunately, Davies' long and detailed answer was not nearly as memorable as the pithier "TWO HUNDRED THOUSAND

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[70]Ibid. The Journal ran a series of editorials on the subject, subsequently published in pamphlet form A Series of Unanswered and Unanswerable Editorials.

[71]From a letter addressed "To the Citizens of New York," in Journal of Commerce, Mar. 11, 1853, p. 3. It should be noted that street opening fees were set by special legislation govering street openings, and were not affected by the 1849 law abolishing "taxed costs."

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DOLLARS" which embedded itself in the collective consciousness of the New York City bar. Even those who struggled through his three-columned reply (much of it in agate type) came away with the impression that if he had not quite made $200,000, he had still done quite well for himself. The impression left by the whole episode was that to be elected corporation counsel was almost to be handed a license to print money.[72]

The Journal's disclosures could not have come at a more opportune time for the Democratic administration, whose members seized on it as a welcome diversion from other headlines featuring their own misdeeds. At a time when twenty-nine aldermen and assistants were under indictment by a grand jury, the members of the Board of Aldermen were given a rare chance to pose as reformers; under their direction, Dillon wrote a new state law outlawing street opening fees and replacing them with a special yearly allowance.[73] Pegging this allowance at $6,500, however, did little to lessen the attractiveness of the corporation counsel's office. With his compensation now set at $10,000 a year he commanded a higher salary than any other officer

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[72]Again, monetary comparisons are difficult to make, but one can imagine the scandal if today's Journal of Commerce revealed that the corporation counsel had helped himself to a $3 million dollar fee. [Comparison from McCusker, How Much Is That in Real Money?, Table A-2.]

[73]Board of Aldermen, Proceedings, vol. 49, p. 488; Documents (1853), no. 19; New York, Laws (1854), ch. 122.

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in state or local government--higher than his fellow department heads ($2,500 to $3,000), the mayor ($3,000), the justices of the Court of Appeals ($2,500), the attorney-general ($2,000), or even the governor ($4,000).[74]

Davies survived the scandal about his fees and later served with considerable distinction on the bench of the New York Supreme Court and the Court of Appeals.[75] Dillon served the remainder of his own term and returned to practicing law with his father and running the Emigrant Bank. In 1856 in recognition of his labors in the legal creation of Central Park he was appointed to its first Commission, the bi-partisan board that approved the design of the park and oversaw its implementation. "He was a man of very refined taste, and a great lover of landscape scenes, and to his suggestion is due the construction of many of the most delightful parts of the Park," the New York Times eulogized him in 1881.[76] The bank and the park, not the

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[74]Figures from Valentine's Manual (1854), pp. 176-80, and New York Legislative Manual (1854), pp. 366, 368.

[75]Davies served three years in the Supreme Court and eight in the Court of Appeals, the last two as chief justice. His biography in McAdam's Bench and Bar [pp. 291-94] lists the more important rulings he made, among them People v. Lemmon (freeing, in New York, a slave in transit from one slave state to another), the Parrish will case (a leading case on testamentary capacity), and Metropolitan Bank v. Van Dyck (sustaining the federal Legal Tender Acts). After retiring from the court in 1867, Davies served as dean of New York University law school from 1870 until his death in 1881.

[76]Times, Nov. 27, 1872, p. 2. For a more measured evaluation, see Rosenzweig and Blackmar, The Park and the People, pp. 120, 143-45, 270.

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law, were the two great passions of his life, and he is remembered more for them than for his term as corporation counsel. Still, he left his mark on the office--if, for nothing else, for being an honest and upright public servant in a spreading sea of corruption.

Dillon's chief failing was that his vision of honesty was passive rather active, holding himself scrupulously honest but ignoring the corruption around him. The city needed not just an honest chief legal officer but an activist one--and this it would get, if only briefly, in its next corporation counsel.

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CHAPTER VI

DEFYING THE MAYOR: LORENZO SHEPARD, 1856

Lorenzo Shepard was chosen corporation counsel in an off-year municipal election featuring, in the words of the Times, "a confusion of candidates and parties."[1] The old party system had been thrown into chaos by the slavery issue to the point that by the fall of 1855 the old familiar party divisions no longer existed. Tammany's Barnburner and Hunker factions had been transmuted into "Hardshells" and "Softshells," each claiming to be the true Democratic Party and running its own slate of "official" candidates. The Whigs nominated a set of candidates, but most of their members had deserted to two new parties: the nativist Know-Nothings (who had made a surprisingly strong showing in 1854, almost electing a mayor) and the anti-slavery Republicans, who were as yet barely organized as a party. As a result, in the municipal election of 1855 the voters were presented with a bewildering array of candidates, without the familiar party labels to guide

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[1]Times, Nov. 3, 1855, p. 4.

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Shepard, running on the Softshell ticket, was opposed by Republican William Curtis Noyes, a prominent attorney, and anti-slavery advocate, and three other candidates who were Law Department "alumni": Hardshell John B. Haskin, the current corporation attorney; Whig Theodore Tomlinson, Davies' corporation attorney, and Know-Nothing Louis N. Glover, who had clerked for Sickles.[2] With the possible exception of Noyes, Shepard was clearly the best qualified of the lot. At 34, he was one of the most promising young men in the New York City bar, a prodigy who had begun the study of law at the age of 14, had been admitted to the bar at 20, and appointed an examiner in chancery at 24. After abolition of the Chancery Court in 1846 (by a constitutional convention at which he had been the youngest delegate), he had devoted himself to private practice, finding time along the way to write two or three law books and edit a volume of case reports.[3]

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[2]Noyes was a leading anti-slavery advocate and a frequent speaker at Republican gatherings; for his life, see Who Was Who, Historical Vol., p. 383. Haskin had become corporation attorney when Sickles left the office to serve in the American legation in London, and the two later served together in Congress [Brandt, Congressman Who Got Away With Murder, pp. 28-31, 76-78]. Tomlinson, a successful lawyer and state chairman of the Whig party, is eulogized in the Times, Aug. 22, 1887, p. 2. I have been unable to find biographical information about Glover.

[3]For Shepard's life, see National Cyclopaedia, vol. 3, p. 388; Times, Sept. 20, 1856, p. 8, and Sept. 27, 1856, p. 1; Herald, Sept 20, 1856, p. 8, and Sept. 23, 1856, p. 5; Board of Councilmen, Proceedings, vol. 63, pp. 870-75; Tammany Scrapbooks (bound volumes of clippings and memoriabilia in New York Public Library), vols. 1 and 2, and William C. Gover, The Tammany Hall Democracy of the City of New York (New York: Martin Brown, 1875), pp. 35-37.

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Shepard was also something of a political prodigy. Elected to the Tammany General Committee at the age of 18, he had risen rapidly through the ranks and by the 1850's was recognized as one of its most influential members. Newspaper editorials of the day have left the impression that the city's "best men"--its business, professional and social elite--had withdrawn in disgust from party politics ("Our city is fearfully misgoverned and despoiled, and corruption has been growing worse for years," Horace Greeley complained in 1860, "mainly because her substantial citizens . . .. have too generally neglected or slighted their public duties"),[4] but in fact, as Amy Bridges has shown so tellingly in A City in the Republic, in the 1850's the city's "better element" was still quite active in partisan politics, particularly in Tammany Hall.[5] Shepard was a member of this class by birthright if not by bank account, the son of a respected attorney who had died and left the family in genteel poverty when Shepard was fourteen. Shepard's closest boyhood friends were Abram S.

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[4]Tribune, Oct. 16, 1860, p. 4; quoted, along with similar comments in other newspapers, in Amy Bridges' A City in the Republic: Antebellum New York and the Origins of Machine Politics (Cambridge: Cambridge University Press), p. 126.

[5]Ibid., pp. 126-131. Bridges subjects the reigning "elite retreat" school of thought (Robert Dahl, Sam Bass Warner, Jr., Gabriel Almond, Edward Pessen, and Frank Otto Gatell) to a reality check by comparing lists of elites with lists of active party workers.

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Hewitt, Edward Cooper,[6] and other sons of the elite, several of whom joined Tammany as young men and formed a reform wing that was soon dubbed the "Shepard Guards" in recognition of his leadership. Shepard's political genius consisted of an ability to meld all the Hall's disparate groups--not just "Hards" and "Softs" but youthful idealists and wary party professionals alike--into a cohesive political organization.

In recognition of his talents, Shepard was promoted rapidly up the political ladder, playing an increasingly influential role in the state organization as well. There he mediated again--between Hunker and Barnburner, between Hard and Soft, between city and upstate. In 1852 he was chosen to preside over the Syracuse Democratic convention, and he was elected a delegate to both the 1852 and 1856 national conventions. He was also given more immediate and material rewards for his services. Of all the legal positions in New York City, the three most important governmental ones were the U. S. attorney for the Southern District, the New York County district attorney, and the New York City corporation counsel. By the time he was 35, Shepard

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[6]Friendships noted by a contemporary, John E. Parsons, who whose "Memorial to Edward Morse Shepard" [in The Association of the Bar of the City of New York, Yearbook (1911), pp. 189-200] eulogizes Lorenzo Shepard [pp. 190-92] almost as much as it does his son.

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had been elected or appointed to all three, a record no one else has ever matched.[7]

The race for corporation counsel in 1855 was a close one, and Shepard owed his election as much to the reformers as to the professionals in his party. On November 1 the City Reform League, at a mass rally presided over by industrialist Peter Cooper, officially endorsed his candidacy and praised his ability and integrity.[8] The endorsement encouraged Noyes, who recognized that his own chances of winning were slim, to withdraw and throw his Republican support to Shepard. The two endorsements, coming on the very eve of the election, provided Shepard the margin he needed, allowing him to edge past his nearest opponent, the Know-Nothing Glover, by a vote of 19,496 to 18,119.[9]

Shepard's brief tenure in office (he would serve less than a year) is notable chiefly for showing the difference it made when an activist corporation counsel took it upon himself to oppose corruption in government. Shepard had a firm grasp of who his client was--the corporation, not just its officeholders--and felt an obligation to protect its

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[7]National Cyclopaedia, vol. 3, p. 338.

[8]Times, Nov. 2, 1855, p. 1.

[9]Haskin and Tomlinson split another 7,000 or so votes between them; for the returns of this and the other departmental races, see New York Times, Nov. 10, 1855, p. 1, and Nov. 13, 1855, p. 8. In this election New Yorkers split their tickets as never before, choosing as department heads three Softshells, two Hardshells, two "combined Hard-Softs," and two Know-Nothings.

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interests over those of its incumbent agents. It was an attitude that exposed him to considerable political risk, but it was a risk he pronounced himself willing to take. "I was placed in office to aid in enforcing the laws," he declared, "and it was not my business to stand silently by while a great wrong was being done against them."[10]

The great wrong to which he referred was mayor Fernando Wood's attempt to seize Central Park as his own personal fiefdom--an attempt that without Shepard's intervention might well have succeeded. Wood was, in the words of his most recent biographer, "a peculiar combination of good and evil."[11] He remains even today one of the city's most controversial and least understood mayors, a bundle of contradictions who defies easy understanding: a corruptionist and reformer, a clandestine Know-Nothing and the immigrants' best friend, a party statesman and political double-crosser, a person described by a contemporary as "the handsomest and most brilliant man he had ever met, and

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[10]Board of Councilmen, Proceedings, vol. 63, p. 734.

[11]Jerome Mushkat, Fernando Wood: A Political Biography (Kent, Ohio: The Kent State University Press, 1990), p. 60. See also Samuel A. Pleasants, Fernando Wood of New York (New York: Columbia University Press, 1948); Leonard Chalmers, "Fernando Wood and Tammany Hall, The First Phase," and "Tammany Hall, Fernando Wood, and the Struggle to Control New York City, 1857-1859," in New-York Historical Society Quarterly, vol. 52 (Oct. 1968), pp. 379-397, and vol. 53 (Jan. 1969), pp. 7-33.; Morris. R. Werner, Tammany Hall (Garden City, N. Y.: Doubleday, Doran & Company, Inc., 1928), pp. 60-103, and Denis Tilden Lynch, "Boss" Tweed: The Story of a Grim Generation (New York: Arno Press, 1974; orig. 1927), pp. 110-30, and Gustavus Myers, History of Tammany Hall, pp. 150-52, 174-93, 204-101.

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the most corrupt man who ever sat in the Mayor's chair."[12] The first of New York City's machine bosses, he served as a prototype for those who followed him. "To understand Tweed one must know Wood," Denis Lynch writes. "For Tweed studied Wood, analyzing minutely every move he made."[13]

When Shepard took office in January of 1856, Wood was entering his second year as mayor. His first year had been such a grand success that he had largely overcome the stigma of his earlier shady business dealings. Presenting himself in his first year as a "model mayor,"[14] he personally tended to citizens' complaints, professionalized the police force, closed brothels and gambling houses, proposed public works jobs for the unemployed, and championed the cause of municipal home rule. In doing so, he won (at least for a while) the grudging admiration of some of the city's most respected opinion makers, among them George Templeton Strong, William F. Havemeyer, William B. Astor, the Chamber of Commerce, and the City Reform Club, and such

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[12]Alexander B. Callow, Jr., The Tweed Ring (New York: Oxford University Press, 1966), p. 18, quoting Samuel Tilden's biographer John Bigelow.

[13]Lynch, "Boss" Tweed, p. 122.

[14]A phrase given currency by E. A. Hutchinson in A Model Mayor: Early Life, Congressional Career, & Triumphant Municipal Administration of Hon. Fernando Wood (New York: American Family Publications, 1855).

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leading journals as the Times, the Tribune, and Harper's Monthly.[15]

But in his second year Wood's basic character flaws began to show themselves, and some of his staunchest early supporters began disowning him. Robert Dillon, for instance, had worked closely and happily with him as corporation counsel in 1855, and at first could not believe he would try to use Central Park for his own benefit. "The innate evil of the man," he lamented, "forced itself upon my mind by slow degrees and with extreme regret."[16] Shepard, who had always distrusted Wood, was less surprised. To him, Wood the statesman was of a piece with Wood the businessman, a man branded in court as a forger and swindler, and one who could be counted on to show himself as big a crook as mayor as he had been as a businessman.[17]

That time was not long in coming, and it involved the city's latest and most expensive undertaking, the great

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[15]Spann, New Metropolis, pp. 364-80; Mushkat, Fernando Wood, pp. 41-50, and Lynch, Boss Tweed, pp. 122-30.

[16]"Spicy Correspondence between Mayor Wood and Robert J. Dillon," in the New York Times, Nov. 4, 1856, p. 3.

[17]A grand jury indicted Wood in 1851 on evidence he had defrauded his business partners, but a friendly judge saw to it that criminal charges were not heard until one day after the the statute of limitations had expired. In a subsequent civil suit, however, the court ruled that Wood had indeed committed fraud, and ordered payment of damages to his former partners. See Mushkat, Fernando Wood, pp. 25 and 254 (notes 45-47), and Werner, Tammany Hall, p. 61.

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Central Park project. The title to all the land making up the park had vested in the city in February of 1856, but the legislature adjourned in April without making any provision for developing the park. The senate had passed a bill that Dillon had drafted earlier providing for the park's development by a blue-ribbon commission of prominent citizens, and this bill or some variation of it seemed all but certain to pass the next session. In the meantime, though, Wood moved into the vacuum created by the delay. On May 21 he pushed an ordinance through the Common Council creating his own Central Park Commission, a commission that was somewhat unique in that it consisted only of himself and street commissioner Joseph S. Taylor.[18]

The commission was, for all practical purposes, Wood himself. Taylor was in such poor health (he would die the following year) that he could barely handle his ordinary duties, let alone take on any additional ones; besides, he was indebted to the mayor politically and could be counted on to support whatever Wood wanted to do with the park. Wood diverted attention from his one-man rule by inviting the same civic leaders named in Dillon's bill to serve as a "consulting board" with the commission. Two of his nominees, Dillon and William Cullen Bryant, saw through

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[18]Board of Aldermen, Proceedings, vol. 62, pp. 340-42; Board of Aldermen, Documents (1857), no. 5, pp. 5-10 and 135-36, and Herald, June 13, 1856, p. 4.

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Wood's scheme and refused to have anything to do with it, but Washington Irving, George Bancroft, James E. Cooley, Charles F. Briggs, James Phalen, Charles A. Dana, and Stewart Brown all lent the prestige of their names to the mayor's project.[19]

"The net result of this little trick is that the whole control over the laying out of the grounds and the expenditures of the money (some six or eight millions, be it remembered) is placed in the hands of the Mayor--for Mr. Taylor is certain to play a mere second fiddle," warned the Herald.[20] The newspaper fretted that under Wood's mismanagement the park would be become "a disgrace to the city . . . a curse and not a blessing," but the concern of its editors was not shared by the rest of the city's press. Distracted by the bloodshed in Kansas and the upcoming presidential election, most newspapers paid little attention either to the commission or the advisory board, and what little coverage they did give reassured their readers that all was well with Central Park. In reporting on the formation of the advisory board, the Times pronounced it

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[19]For Taylor's secondary status, see the Herald, June 13, 1856, p. 4, and for formation of the advisory board, Board of Aldermen, Documents (1857), no. 5, pp. 8-9. The members of the board were, in the order listed above, an author, historian, book dealer, magazine editor, real estate investor, newspaper editor, and banker [Times, Apr. 2, 1890, p. 4, for Phelan, and National Cyclopaedia entries for all others].

[20]Herald, June 13, 1856, p. 4.

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"perfectly in accordance with the bill reported in the legislature" and enough to "inspire confidence" in the mayor's Central Park project. Most other newspapers were equally uncritical, and left their readers with the impression that the mayor had set up the same governing body as the one in Dillon's bill.[21]

Nothing could have been farther from the truth. The advisory board had no official standing and existed only by Wood's personal invitation, and while it could make recommendations it had no power to put them into effect. All authority for developing the park was lodged in the two-man Central Park Commission--in essence, Wood himself. The ordinance of May 21 declared,

> The said Board [the Central Park Commission] shall have full power to govern, manage and direct the said park; to consult, examine and determine upon the plan for the improvement thereof, to lay out and regulate the grounds; to pass and make rules for the regulation and government thereof; to appoint such gardeners, engineers, surveyors, clerks and laborers as may be necessary; to prescribe and define their respective duties, and the amount of their compensation to be fixed by the Common Council.[22]

It was an incredible amount of power to be placed in the hands of the mayor and one hand-picked department head.

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[21] Times, May 27, 1856, p. 4. For the generally favorable reaction in the press, see Rosenzweig and Blackmar, The Park and the People, p. 97, and citations at p. 551, n. 5.

[22] "An Ordinance for the Regulation and Government of Central Park," May 21, 1856, in Board of Aldermen, Documents (1857), no. 5, pp. 135-36; sec. 2 at p. 135.

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Next to the Croton Aqueduct, Central Park was the largest public works project the city had ever undertaken, and its total cost was expected to run well over the $5 million originally estimated. As the dominant member of the "commission," Wood had control of an immense wealth of patronage jobs and contracts--"more," an assemblyman later noted, "than the Erie Canal cost originally, more than the Hudson River Railroad cost--more than the cost of any park in Europe."[23]

Within weeks Wood had rented office space in the Shoe and Leather Bank (whose president was a close friend, city treasurer Andrew V. Stout) and hired two engineers, a landscape designer, four surveyors and eight assistants, four axemen, ten office workers, and a thirty-member police force headed by a captain.[24] Almost immediately he ran into a problem. The ordinance had created a start-up fund from the rents and sales the city was beginning to receive for buildings within the park, but comptroller Azariah Flagg refused to release the funds, on the grounds that all such income was already pledged by law to the city's sinking fund. To Wood's annoyance, the corporation counsel weighed in with a legal opinion supporting the comptroller.

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[23]Quoted in Rosenzweig and Blackmar, The Park and the People, p. 188.

[24]Board of Aldermen, Proceedings, vol. 64, p. 412 [office and staff]; ibid., vol. 62, p. 342, and Mushkat, Fernando Wood, p. 53 [Stout].

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"The terms of the Sinking Fund ordinance are clear," he declared, "and there is no provision in the Central Park act [of 1853] withdrawing either the buildings or the rents from the effect of these terms. . . ."[25]

The mayor disagreed. Why would the legislature have authorized the taking of the land if it had not intended the city to develop the park? "The labor and services are being performed pursuant to law, and the claim upon the Corporation is beyond doubt," he argued. "There can be no reason, founded on legal or equitable grounds, why money cannot be provided forthwith for payment."[26] But Wood's protest was futile; armed with Shepard's legal opinion, Flagg refused to turn over the rents and there was nothing the mayor could do about it. Now Wood was worried. If he could not finance even this small staff, how could he ever let contracts and hire a small army of employees? Flagg and Shepard had placed his whole scheme in jeopardy.

Fortunately for him, the mayor, recorder, and aldermen were meeting at the same time as a county Board of Super-

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[25]"An Ordinance for the Regulation and Government of Central Park," May 21, 1856, secs. 4-6; "Communication from the Corporation Counsel," July 12, 1856, in Board of Aldermen, Proceedings, vol. 63, pp. 148-51. The sinking fund had been mandated by the legislature as a way of retiring the city's Croton Aqueduct bonds.

[26]Quoted in New York Sun, July 9, 1856, p. 2.

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visors to approve the annual tax levy.[27] Normally this was a pro forma proceeding. Municipal officers had already turned in their estimates, the comptroller had drawn up the city's budget, the legislature had approved it, and the Committee on Annual Taxes had determined what the total levy should be. But this time, breaking with all precedent, mayor Wood made a motion that the Board of Supervisors insert into the $3.2 million levy an additional $200,000 for the Central Park Commission. Alderman David Jackson objected, reminding him that the city was required to have every item in its budget approved by the legislature. The mayor waved his misgivings aside. In a very similar matter, he explained, the corporation counsel had told the comptroller that the supervisors could levy such taxes on their own. Although a number of members were skeptical of this story, in the end the board approved the $200,000 addition by a vote of 14 to 8.[28]

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[27]In New York State each county had a Board of Supervisors which among its other duties had responsibility for levying state and county property taxes. Because New York City was co-terminous with New York County, its city taxes were treated as county taxes, and the mayor, recorder, and aldermen allowed to act as its Board of Supervisors. See New York, Laws (1787), ch. 9 [in effect until 1857], and Edward Dana Durand, The Finances of New York City (New York: The Macmillan Company, 1898), p. 28.

[28]Board of Supervisors, Proceedings and Documents (1856), pp. 99-101. The amount of the levy is sometimes reported as $7 million, reflecting the fact that in addition to its own taxes the city collected and passed along another $4 million for the state of New York.

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At its next meeting a frosty letter from comptroller Flagg was read into the record. The corporation counsel had not advised him at all as mayor Wood had claimed, but had been speaking of a quite different matter--the payment of a court-ordered judgment against the corporation. There was no more similarity between the two, Flagg charged, than "between a hawk and a handsaw."[29] If Wood was abashed at being caught in a lie, he did not show it. Holding onto his majority in the Board of Supervisors, he beat back an attempt to rescind the $200,000 levy and only grudging allowed passage of a resolution asking an opinion from the corporation counsel.[30]

Shepard answered on July 17, breaking down the board's question into three parts: Did the city have an inherent power, as the mayor claimed, to levy "usual and necessary" taxes without authorization from the legislature? If not, was there any general statute that authorized the $200,000 levy? Any special law? No, he answered; no, and no. "The power of tax [sic] is a governmental power and can only be exercised by the supreme authority, the State," he declared, "either directly by its own agents, or indirectly

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[29]Ibid., pp. 111-13. A judgment (payment of damages to a plaintiff) did not have to be approved by the legislature because it had already been authorized--in fact, mandated--by the state through its judicial branch. Legislative approval would have been not only superfluous but unconstitutional, amounting to legislative review of the judiciary.

[30]Ibid., pp. 117-18.

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by grants of the power to . . . counties, cities, towns, &c."[31]

That was settled law then, and it remains settled law today. American cities have never had any authority to levy taxes of their own and have always been subject to legislative approval, in one form or another, of their fiscal operations.[32] Although this authority would later be granted in the form of general laws, in 1856 New York City still had to submit its annual budget to the legislature and--just as it had every year since 1787--secure passage of a bill approving every item in it.[33] As an early champion of what would later be called municipal home rule, Wood knew that very well but chose to disregard it. Law, to his way of thinking, was not something to be obeyed but, when it interfered with him, simply a nuisance to be gotten

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[31]Shepard to Board of Supervisors, July 17, 1856, in Board of Supervisors, Proceedings and Documents (1856), document 4; quoted at p. 3.

[32] See Joseph F. Zimmerman, State-Local Relations: A Partnership Approach (New York: Praeger Publishers, 1983), pp. 49-84; Eugene McQuillin, Municipal Corporations, ch. 16, sec. 44.05, and for New York in particular, New York Jurisprudence 2d, sec. 1423; Durand, Finances of New York City, pp. 88-107; Paul E. Malone, The Fiscal Aspects of State and Local Relationships in New York (Albany: J. B. Lyon Company, 1937), and Sayre and Kaufman, Governing New York City, pp. 558-62.

[33]The 1856 act, entitled "An Act to enable the Supervisors of the City and County of New York to raise money by tax," was typical, running to three pages of items ($5,000 for jail repairs, $6,000 for cleaning the docks, $5,000 for a police and fire telegraph, etc.) and warning that no portion could be applied to any purpose other than the stated ones [New York, Laws (1856), ch. 176].

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around. Or, as he once explained to the Sun, "merely technical reasons" should not allowed to stand in the way of what clearly needed doing in municipal government.[34]

Consequently, Wood resolved to ignore Shepard's opinion just as he had ignored the law itself. This put the Board of Supervisors in an awkward position, with its members forced to go on record as supporting either Wood or the law. Belatedly, it dawned on some of the aldermen just what a coup the mayor had accomplished in getting them to pass the Central Park Commission ordinance. Anguished cries rang through the chamber--"a swindle," "a powerful engine to defraud the city," "the greatest humbug in the city"--but, with the mayor still commanding a majority, the board tabled Shepard's opinion and left the $200,000 in the levy. All that remained was for the total levy, including the $200,000, to be formally enacted into law at the board's next meeting on July 21.[35]

Shepard found himself in the same frustrating position as his predecessors. As corporation counsel he could advise, but he could not compel obedience to that advice. He could tell the mayor and the Board of Supervisors that the Central Park levy was illegal, but he could not forbid

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[34]Sun, July 9, 1856, p. 2. See also his comments on "technical objections" in his report on Central Park in Board of Aldermen, Proceedings, vol. 64, pp. 405-06.

[35]Herald, July 12, 1856, p. 1; Times, July 25, 1856, p. 4, and Board of Supervisors, Proceedings and Documents (1856), pp. 128.

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them to enact it. If no one stepped forward to challenge it, the mayor would have $200,000 to distribute as he saw fit, with virtually no oversight by the Common Council or any other body. And, Shepard realized, this was just Wood's first trip to the well. If he got away with this scheme, how much would he walk away with next?[36]

Shepard hoped that one of the reformers would bring a taxpayer's suit to block the mayor, but it soon became apparent that the likely candidates had either left the city for the summer, were preoccupied with more pressing issues, or had confused the mayor's bogus "commission" with the advisory board and were loathe to be seen as opposing members who were their own clubmen and companions. In addition, noted one newspaper, many had been told by their lawyers that if the Central Park tax were passed, the entire $3.2 million city levy would be illegal and they could escape paying their taxes that year. When "a leading member of the Reform Committee" was called on and requested to apply for an injunction, reported the Dispatch, "he respectfully declined, as he said he was in favor of get-

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[36]For Shepard's thoughts, see his argument in Shepard v. Wood, printed in the pamphlet Lorenzo B. Shepard against Fernando Wood and Others, Supervisors of the City and County of New York (New York: Bowner & Hasbrouck, 1856) [hereafter cited as Shepard v. Wood pamphlet], esp. p. 37, and his letter to the Board of Councilmen, Sept. 4, 1856, in ibid., pp. 50-53.

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ting rid of all his taxes for once."[37]

To Shepard, it was clear that if no one else was going to act, he would have to do so himself. "I waited until the latest hour of the latest day, for someone to relieve me, but nobody came forward," he said later. "This duty was far from agreeable, and I did not court it, but on the other hand it was plain and imperative, and I did not shrink from it."[38] But how could he take such action? As corporation counsel his hands were tied; he could hardly appear in court as a plaintiff against his own client, and if he were reckless enough to try, the very officers he would be appearing against could order him to stop--if, that is, the judge did not beat them to it by throwing the case out of court.[39]

But it occurred to Shepard that besides being corporation counsel he was also a taxpayer with all the rights of any taxpayer--rights that, since Christopher, had included the right to sue the corporation. Accordingly, represent-

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[37]New York Dispatch, July 20, 1856, p. 4. Obviously, taxpayers would not escape the collector forever; the city would simply make up the deficiency by doubling everyone's taxes the next year. A one-year, interest-free loan in the amount of one's taxes was a tempting prospect, however, even it meant that in the meantime municipal operations would be hampered by lack of funds.

[38]Ibid.

[39]While it is true that two previous corporation counsels--James T. Brady and John Leveridge--had sued the corporation to recover payment due them, they had waited until after leaving office and had sued not in their official capacity but as individuals.

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ing himself as "a taxpayer and owner of considerable property in this city," he went before supreme court justice James R. Whiting on the morning of July 21 and asked for an injunction restraining the mayor and the Board of Supervisors from passing the Central Park levy that same afternoon. In keeping with the customary procedure, Whiting granted a temporary injunction and scheduled a hearing three days later on whether it should be made permanent.[40]

The minutes of the Board of Supervisors note only that a copy of the injunction was received and a motion was passed for an adjournment, but the Times reported, "We learn that much angry feeling was manifested and sundry very emphatic speeches made by the gentlemen interested, as to what they would do, and others should not do in the premises."[41] Recorder James M. Smith, an ex officio member of the board, advised its members that the injunction had been "improvidently granted" and predicted that the court would promptly accede to a motion to dissolve it.[42] Mayor

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[40]Shepard v. Wood pamphlet, pp. 12-14 [temporary injunction], and pp. 17-31 ["Complaint of Lorenzo B. Shepard"]. Naming the mayor and Board of Supervisors in his complaint (rather than "the Mayor, Aldermen, and Commonalty") was not an attempt to get around the strictures against suing the corporation, but only reflected the fact that the complainant had to name the specific officers who were to be enjoined. The fact that they had been acting in their official capacities made the suit a "corporation matter" no matter how it was entitled.

[41]Board of Supervisors, Proceedings and Documents (1856), p. 142, and Times, July 25, 1856, p. 4.

[42]Ibid., July 22, 1856, p. 7.

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Wood refrained from public comment but had plenty to say in private, particularly about Shepard, whom he later accused of being one of "the old enemies of the Central Park who . . . were again in the ascendancy and determined to prevent its consummation, even at this late day."[43]

Looking forward to a showdown with Wood and the supervisors, Shepard appeared before Whiting promptly at ten o'clock on the morning of July 24. To his surprise, no one was there for the city--neither the mayor and the Board of Supervisors nor any counsel representing them.[44] Shepard and Whiting waited over an hour, and when no one else appeared it was obvious that the mayor and supervisors had conceded defeat. Whiting could have granted the injunction by default, but because of the importance of the case he allowed Shepard to present an argument for the record.

Shepard delivered basically an expanded version of the opinion he had sent the Board of Supervisors. Buttressing his argument with case law, statute law, and historical

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[43]Message of Central Park Commissioners, Dec. 10, 1856, in Board of Aldermen, Proceedings, vol. 64, p. 406.

[44]Although technically the mayor and supervisors could have ordered corporation counsel Shepard to represent them in court against taxpayer Shepard, the normal procedure (if anything could be said to be normal in this case) would have been for them to have the Board of Aldermen (that is to say, the supervisors themselves) approve the retainer of outside counsel. This counsel could have been any private attorney of their choice or even, acting in a private capacity, the recorder or another member who was a lawyer. The fact that the corporation counsel was acting on the other side in no way deprived them of legal representation.

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background going back to the days of Dutch rule, he demonstrated beyond any doubt that the mayor and the Board of Supervisors had no authority to impose the Central Park tax on their own. If they were allowed to go forward with this illegal tax, he warned, it would bring into question the legality of the rest of the $3.2 million municipal levy. And even if the rest of the levy were not placed in jeopardy, the Central Park tax would set a dangerous precedent; if the mayor and Board of Supervisors succeeded with this attempt, then there would be no stopping them later from using their new-found taxing power as "a most complete instrument of plunder, without limit or restraint."[45]

Whiting was clearly impressed. If they could assess $200,000 this time, he mused, why not $2 million or $10 million next year? "If they can raise funds in this way, and spend it as they please upon this park, they may raise and expend as much as they please upon any other grand scheme," he declared. Whiting agreed with Shepard on every point he had made, and permanently enjoined the mayor and Board of Supervisors from enacting the $200,000 levy.[46]

Whiting began to leave the bench, then hesitated. It was an unusual case, and he knew that Shepard had gone far beyond the call of duty in bringing it. Recognizing that

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[45]Shepard v. Wood pamphlet, pp. 32-37, quoted at p. 37.

[46]Ibid., pp. 39-49; quoted at p. 46.

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he might well have damaged his political career in the process, Whiting felt moved to add a personal note:

> . . . [W]hatever may be the ultimate result of the case, I am more than pleased that the burthen of this suit has been assumed by a high executive officer of the corporation, and that, whilst he has incurred the risk of giving dissatisfaction to a large majority of the Board of Supervisors, the benefit of his example, so just, so praiseworthy, and yet so novel, will have a tendency to allay an apprehension already strongly pervading this community, that there can be no restraint imposed upon the enormous extravagance and wasteful expenditures that have been so long indulged.[47]

It was well that he did so, for Shepard came in for considerable criticism. To many in city government, it seemed as if he had betrayed the very officers he was pledged to serve. A number of city officials had taken it for granted, reported the Times, that a resolution of the Board of Supervisors imposed upon the corporation counsel "a sort of moral necessity" to support their position. In their view, instead of working to defeat the Central Park levy, he had been duty-bound to defend it with every legal means at his disposal.[48] Shepard respectfully disagreed, and in response to a letter from the Board of Councilmen (inquiring waspishly whether he was engaged in any other suits against the city) he made explicit his understanding of the proper role of a corporation counsel. He had

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[47]Whiting's opinion in ibid., pp. 38-49; quoted at pp. 46, 48-49.

[48]Times, July 25, 1856, p. 4.

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brought only this one suit, he replied, and had done so "entirely in accordance" with his official duties. "It is certainly proper for me to interfere, to protect the Commonalty of the city, whose officer I am, [emphasis added] against plain violations of their official duties by the Mayor or any other public officer," he declared.[49]

Some New Yorkers bought the mayor's story that Shepard was one of the "many enemies" of the Central Park and had brought his suit to obstruct its development.[50] Confusing the Central Park Commission with its advisory board, they asked why the corporation counsel should set himself up in opposition to the good judgment of such eminent citizens as Washington Irving, George Bancroft, and Charles A. Dana. The Herald, forgetting its earlier exposé of the mayor's bogus "commission," succumbed to the same confusion and ran an editorial extolling the board and attacking Shepard. "It [the $200,000] is to be placed in the hands of a board of gentlemen who are independent in their views and pure in their intentions," the newspaper exclaimed, "and now the little chanticleer, with an official crow, stops a proceeding which he does not favor."[51]

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[49]Board of Councilmen, Proceedings, vol. 63, p. 734.

[50]For an expression of this view of Woods', see Proceedings, vol. 64, p. 406.

[51]Herald, July 27, 1856, p. 4.

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The Evening Post provided Shepard with an opportunity to respond to his critics. "I regard the completion of the Central Park as an object which is eminently desirable," he explained in its pages, "but I should regard that result as dearly purchased by the violation of law and the establishment of a dangerous precedent."[52] The Times heaped praise on Shepard, quoting extensively from his argument in court and likening his action to the resistance of the city's Dutch and English forefathers to illicit taxation. It was, the newspaper declared, eminently proper that he and the comptroller should oppose the Central Park tax "with all the force which their influence and position warrant."[53]

Although the reaction to Shepard's injunction was mixed, his action accomplished at least one result: it propelled the mayor's Central Park Commission into the headlines. Most newspapers ran lengthy news stories about the court hearing, with several publishing Shepard's argument in toto.[54] Some editorialized at length on the background of the illegal tax and advised their readers, for the first time, of the distinction between the Central Park Commission and the advisory board. The Dispatch ran a long

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[52]Post, July 22, 1856, p. 3.

[53]Times, July 25, 1856, p. 4.

[54]The newspapers I examined for coverage of the injunction included the Times, Herald, Tribune, Post, Sun, Courier, News, and Dispatch.

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editorial, "Central Park--A Conspiracy to Stop the Wheels of the City Government," explaining all the ramifications of the proposed levy and lambasting the reformers for failing to rally to Shepard's aid.[55] The Times devoted two whole columns of its editorial page to a detailed recitation of the history of the mayor's scheme and concluded by pronouncing the whole idea "monstrous."[56]

The injunction stopped the Central Park Commission in its tracks. After a glum Board of Supervisors rescinded the $200,000 levy, the commission was without funds and, for all practical purposes, defunct.[57] "The thing has come out just where I told you it would," aldermen William Tucker gloated. "I told you it was an illegitimate child. It is now dead--will have a funeral. There is no authority for its proceedings."[58] Street commissioner Taylor agreed with this death pronouncement. Noting that "the want of funds must necessarily render its existence a nullity," he recommended that the Board of Aldermen dissolve the Central Park Commission and apply to the next legislature for a new, permanent body.[59]

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[55]Dispatch, July 20, 1856, p. 4.

[56]Times, July 25, 1856, p. 4.

[57]Board of Supervisors, Proceedings, pp. 164, 171.

[58]Comments during aldermanic meeting of Aug. 4, quoted in Post, Aug. 5, 1856, p. 3.

[59]Quoted in Times, Aug. 5, 1856, p. 4.

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Although his suggestion was not immediately followed (the mayor opposed it, and had the power to veto any such resolution by the Board of Aldermen), for all practical purposes it marked the demise of Wood's Central Park Commission.[60] In 1857 a new Republican-controlled legislature formed a Central Park Commission of eleven distinguished civic leaders--six Republicans, four Democrats (including, to his delight, former corporation counsel Dillon), and one Whig--who developed the park essentially as it is today. Although they have been characterized as "a factious congregation of disparate personalities, political affiliations, and personal views," they shared a vision of the park as a symbol of the city's greatness and as a gift of beauty to its citizens, and while they were not averse to claiming a fair share of the park's patronage for their partisans, it was far from being their primary concern. What the park might have become under Wood's management is a matter of speculation, but it surely would not have been the sublime urban space it is today.[61]

The Central Park controversy was not the only activity preoccupying Shepard in the summer of 1856, and his friends were genuinely concerned that he was working himself to the

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[60] Ibid., and Board of Councilmen, vol. 63, pp. 339-40.

[61] Rosenzweig and Blackmar, The Park and the People, pp. 97-99 [quoted at 99]. For the commission's work in designing and building the park, see ibid., pp. 95-211, and for patronage matters, pp. 153-58, 175, 265-66.

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point of exhaustion. His workload as corporation counsel--the lawsuits, opinions, advice, contracts, deeds, legislative bills, attendance at meetings, and so forth--comprised, in the words of the Board of Councilmen, "a vast amount of incessant, vexatious and worrying labor."[62] He oversaw a staff of a size unheard of in private practice: three "assistants" as they were now beginning to be called (the equivalent of an associate in a private firm), three law clerks, two copyists, and a messenger.[63] It was not unusual for Shepard and his principal assistants to stay in the office far into the night preparing cases or catching up on the backlog of work. In addition, he had begun an ambitious project of digesting all the laws of the state relating to New York City and its concerns.[64] And, considering that as of yet the corporation counsel was not required to relinquish his private practice, it is safe to assume that he gave at least some attention to his own firm, if only to confer now and then with his partner and

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[62]From a report recommending a greater appropriation for clerk hire, in Board of Councilmen, Proceedings, vol. 63, pp. 568-76, quoted at. 570.

[63]The corporation counsel's office included chief assistant M. V. B. Wilcoxson, who tried some cases; Rinaldo H. French, who oversaw office operations; Bernard J. Malone, who managed street openings; P. C. Lee, assisting Malone; Charles Da Costa and James Standford, general clerks; James Butler and Henry D. Johnson, Jr., copyists, and an unnamed messenger [ibid., pp. 570-72]. Corporation attorney George Purser and public administrator Peter Sweeney had small staffs of their own.

[64]Mentioned in Board of Councilmen, Proceedings, vol. 63, p. 875.

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to touch bases with his more important clients.[65]

As if all this were not enough, Shepard also found himself in the thick of Democratic politics in 1856. In April he was elected Grand Sachem of the Tammany Society, a post that was both a signal honor and a position of unusual power. While purporting to be a purely fraternal order, the Society wielded enormous power in Democratic politics, for it owned Tammany Hall and decided who was entitled to claim it as home. By leasing the Hall to one group rather than another, its Council of Sachems determined which body would be recognized by the state democracy as "regular"--that is, entitled to representation in state conventions and to a share in state and national patronage.[66] In addition, as a reward for helping forge an election-year truce between the "Hards" and "Softs," in July he was made chairman of the Tammany General Committee, making him if not the most powerful Democrat in the city certainly the busiest. All through the summer, at the same time that he was battling Wood over Central Park, he was busy speaking at ward meetings, organizing Buchanan-Breckinridge clubs,

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[65]Trow's New York Directory for the Year Ending May 1, 1857 lists two business addresses for Shepard, the first being his private office at 49 Wall Street and the second his Law Department office at 51 Chambers. Shepard's concern about his practice can be inferred from the remarks of a friend in the Herald, Sept. 23, 1856, p. 5.

[66]For the link between the Tammany Society and the Tammany political organization, see Edmund P. Kilroe's pamphlet history, The Story of Tammany (New York, 1924).

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chairing meetings of the General Committee, and speaking at rallies.[67]

The strain took a toll on Shepard. He collapsed in court one morning and had to be carried out, but brushed aside the concern of his friends and was soon back at his desk. When yellow fever threatened the city late in the summer, he sent his wife and five children to Oyster Bay but stayed in the city himself, too busy to worry about his own health.[68]

Early in September the animosity between him and Wood ratcheted up another notch. Everyone had taken for granted that Wood, like most other businessmen who had served as mayor, would serve one term and then return to private life. But on September 3 Wood announced that he had been "drafted" by the city's business leaders to serve a second term. The announcement came as a surprise to the Tammany General Committee, whose members had counted on choosing a

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[67]Shepard's activities may be followed in vol. 2 of the "Tammany Scrapbooks" in New York Public Library, containing unattributed newspaper clippings and miscellaneous Tammany writings and memoriabilia. See the pages for 1856, esp. pp. 82, 88, 100, 105, and 127, as well as others that are unnumbered.

[68]Post, Sept. 19, 1856, p. 3; Times, Sept. 20, 1856, p. 8, and John E. Parsons, "Memorial of Edward Morse Shepard" [son], in The Bar Association of the City of New York, Yearbook (1911), pp. 190-200, at 192. For the yellow fever outbreak, which was largely confined to Brooklyn and Staten Island, see the Times, Sept. 3, 1856, p. 1.

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candidate of their own and were not uniformly happy to have Wood's nomination forced on them.[69]

It soon became apparent that Wood's renomination was far from a certainty. The mayor had alienated two powerful groups in Tammany: its "better element" of business and professional men, who considered him a crook and a demagogue, and its professional politicians, who felt he had given too many jobs to personal friends and too few to loyal party workers. Shepard, who belonged to both camps, instigated a revolt in the General Committee against Wood's renomination. Some of Tammany's most powerful figures (among them, Peter Sweeney and his uncle Thomas Barr, recorder James Smith, port surveyor John Cochrane, and industrialist Edward Cooper) joined in the rebellion, but Shepard was clearly its leader; as Grand Sachem and chairman of the General Committee, he was the one person in Tammany whose own personal power was sufficient to counter-balance Wood's. "It was his wisdom which planned the battle," Sweeney acknowledged, "and it was he who prepared, with so much ability, the address to the Democratic party to vindicate our cause. He felt this to be a fearful

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[69]Times, Sept. 3, 1856, p. 1. Wood claimed that he was acting in response to a petition signed by over a hundred bankers and merchants, among them William B. Astor, William H. Macy, Daniel Drew, Schuyler Livingston, Brown Brothers, and Goodhue & Co.

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crisis to the Democratic party, and day and night he labored to awaken the people to a sense of their danger."[70]

Those labors added to the strain Shepard had been under since mid-summer. In addition to chairing meetings of the General Committee (one of which raged on until four o'clock in the morning), he kept busy behind the scenes working his connections, calling in old political debts, striking deals with patronage-hungry politicians, and dragging his reform friends to the Hall from their comfortable parlors. Wood fought Shepard every step of the way; when Shepard's forces blocked an endorsement by the General Committee, Wood moved the fight into the ward primaries, and while Shepard and his crew busied themselves turning out anti-Wood voters, Wood (recognizing, as Sweeney put it, that "it would not be safe to rely upon the ordinary corruptions of the Primary Election system") bought the election officials who counted the votes.[71] Hardly surprisingly, Wood won by a lopsided majority (140 to 2 in one ward), and was declared the nominee of the party.[72]

Ordinarily the matter would have ended there, but Shepard and his group refused to accept defeat. They

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[70]Quoted in Times, Sept. 17, 1856, p. 1.

[71]Ibid.

[72]Ibid., Sept. 6, 1856, p. 3, and Sept. 12, 1856, p. 1; unattributed newspaper clippings in Tammany Scrapbooks, vol. 2, p. 130. For the election in general, see Mushkat, Fernando Wood, pp. 56-59.

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nominated their own candidate for mayor, hotelkeeper James L. Libby, and laid plans to contest the results of the ward primaries at the next meeting of the General Committee on September 19.[73] Their hopes were still high, and not altogether unreasonably so. While Wood was resting on his laurels confident that he had a "lock" on the committee, Shepard was busy behind the scenes putting pressure on its members and plotting last-minute strategy. He was, in a sense, the only person now standing between Wood and the mayoralty; as chairman of the General Committee, he would be presiding over the meeting and making the crucial parliamentary rulings that would determine the success or failure of the challenge to the ward primaries. And if he failed there, as Grand Sachem he could use his influence to have the Tammany Society deny use of the Hall to the Wood forces and instead designate the Libby wing the "regular" Democratic party.

On the day of the meeting, however, the strain of the last few months caught up with Shepard. Alderman David Jackson came to his home for an early-morning strategy session and discovered him half-clothed, draped over the side of the bathtub with his head submerged in the water, limp and unconscious. Although Jackson made a frantic attempt to revive him, it was useless. Apparently striken by

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[73]"Old Tammany in Trouble Again," Times, Sept. 16, 1856, p. 4.

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another attack like the one that had felled him in court, Shepard had pitched headfirst into the bathtub and drowned.[74] It was a shattering blow for Shepard's family and friends, but an incredible piece of luck for Wood. Even as the mayor issued an official proclamation mourning Shepard as a man of "high intellectual character and personal worth," he knew that his death had removed the last obstacle to his nomination.[75]

The outpouring of grief over Shepard's death was unusual even by Victorian standards. The Board of Aldermen and Board of Councilmen adjourned as soon as they heard of his death, and ordered the flags over City Hall and all municipal buildings flown at half-staff. Both boards held long and emotional memorial sessions, as did the U. S. District Court, whose members remembered him fondly from his term as federal district attorney. Mourners thronged the church for his funeral, and traffic halted from 24th Street

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[74]The press covered Shepard's death in exhaustive, and at times ghoulish, detail; see Times, Sept. 20, 1856, p. 8; Herald, Sept. 20, 1856, p. 8; Post, Sept. 19, 1856, p. 3, and Tribune, Sept. 20, 1856, p. 5. The exact circumstances of Shepard's death are unknown; he died alone, his wife and four small children having not yet returned from Oyster Bay. Lacking an autopsy, the newspapers attributed the drowing accident to heart disease, appplexy, vertigo, or an unspecified "seizure." According to pallbearer John E. Parsons, among his family and friends it was "quite generally believed at the time" that the strain of the political campaign, coming on top of the Central Park case, had brought about the fatal attack [Parsons, "Memorial to Edward Morse Shepard" (Sehpard's son), in The Association of the Bar of the City of New York, Yearbook (1911), p. 191].

[75]Board of Councilmen, Proceedings, vol. 63, pp. 869-70; Mushkat, Fernando Wood, p. 57.

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to 2nd Street for one of the longest and saddest processions in civic memory. The city's newspapers covered the death and subsequent obsequies in exhaustive (and, to a modern reader, obsessive) detail, dwelling on the bizarre circumstances of his death and the tragedy of his premature passing.[76] One memorialist, moved to poetry, lamented that we "calmly mark" the passing of those "gray with length of days,"

> But words cannot portray the grief that spreads from man to man,
> When, full of promise, falls a chief untimely in the van.[77]

Shepard's death, in the words of the Herald, "created an entirely new phase in city politics, and [gave] Mayor Wood the vantage ground and position."[78] Wood moved swiftly to have his own man installed as chairman of the General Committee, depriving the Libby partisans of the

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[76]Ibid., pp. 870-74; Herald, Sept. 23, 1856, p. 5 [verbatim transcript of District Court proceedings]; Tribune, Sept. 20, 1856, p. 5 [funeral], and, in general, Times, Sept. 20, 1856, p. 8; Post, Sept. 19, 1856, 3; Herald, Sept. 20, 1856, p. 8.

[77]By "W.H.C.H.", Daily News, undated, in Tammany Scrapbooks, vol. 3, p. 152. The last word on Shepard's passing belongs to George Templeton Strong, who noted in his diary on December 19 a "hideous story" then current in the city: "It's said [his] vault was opened this morning for another interment and that Shepard's corpse was found out of its coffin and half-leaning-half-lying against the soor of the vault, and that he was buried alive. I trace the story to no authentic source, and am fortunate, as yet, to disbelieve it." [Strong, Diary, vol. 2, pp. 313-14.]

[78]Herald, Sept. 23, 1856, p. 4.

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strategic high ground Shepard had occupied. With that move, opposition within the party to his nomination essentially collapsed. Although Libby stayed in the race, he had no support within the party aside from, as the Herald put it, "a number of nincompoops who call themselves the Young Men's Democratic Committee."[79]

With his death Shepard became a martyr to the cause of reform, and his year in office a shining example of the power for good of an incorruptible corporation counsel. In a sense, he had proved the wisdom of the framers of the Charter of 1849: as the independent head of an executive department of city government, answerable only to the voters who had elected him, he had stood firm against the mayor himself and had safeguarded the interests of the corportion. In another sense, however, his term in office had exposed a basic flaw in the charter's scheme of government. He had defeated the mayor's plans for Central Park only by acting outside his official role and bringing suit as a private citizen, and he owed his strength as corporation counsel not so much to the authority of the office as to hisown personal political power.

It was a lesson that was instantly grasped by Mayor Wood and the officers of city government, including

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[79]Ibid. Chief among these "nincompoops" were Peter Sweeney and Fifth Ward leader John Y. Savage, who gave their side of the story in the Times, Sept. 27, 1856, p. 1. See also Mushkat, Fernando Wood, p. 57.

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alderman William M. Tweed. As the head of an independent executive department, a corporation counsel could be a dangerous man, but only in proportion to his power within the party. There was not much they could do about the authority of his office--that was set by the charter--but there was a great deal they could do about his political power; they could, through their control of the party's nominating process, be very careful that the person who gained the office did not bring with him the political power to make that authority worrisome to them.

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Chapter VII

RICHARD BUSTEED AND THE UPHEAVAL OF 1857

Lorenzo Shepard's death set off a lively scramble for his office. "Hardly had his remains been consigned to their final resting place--hardly had the Sachems of Tammany and the magnates of the party wiped way the last tear," observed the Herald, "than they were ready to tear each other in pieces in a quarrel for the office which he left."[3] The Herald passed along rumors that there were "no less than forty or fifty" eager applicants for the job, and the Times added to their fever by reminding them that "a few years ago Mr. Henry E. Davies is said to have realized $100,000 from it in three years."[4]

Under the terms of the charter Mayor Fernando Wood was to appoint an interim corporation counsel until a successor could be chosen at the next municipal election, only weeks away on November 4, 1856. Considering that the mayor's

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[3]Herald, Sept. 23, 1856, p. 4; see also "Shameless Ghouls," Tribune, Sept. 22, 1856, p. 8.

[4]Herald, Sept. 23, 1856, p. 4, and Times, Oct. 10, 1856, p. 1. The Times acknowledged that the post was no longer worth that much, but noted it was still lucrative enough to attract plenty of "competent and willing" lawyers.

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away on November 4, 1856. Considering that the mayor's appointee would be heavily favored to win the Democratic nomination, there was a great deal of interest in whom he would choose. The leading candidate was Daniel Sickles, who had a large personal following in Tammany and had been Wood's chief lieutenant in the recent struggle with Shepard. Although he was not exactly in the top ranks of the bar, he was a competent enough lawyer and had the advantage of a year's experience in the Law Department as Robert Dillon's corporation attorney.

The mayor was wary of Sickles' ambition, however, and was beginning to think of him more as a potential rival than an ally; both were busy currying favor with presidential candidate James Buchanan and positioning themselves to be chosen as his local power broker.[3] In Wood's mind, having the headstrong Sickles as a corporation counsel might be even worse than having Shepard. Consequently, although he was under heavy obligation to offer Sickles the position, he attached to it a condition that he felt sure would make it unacceptable: Sickles would have to surrender to him all the patronage of the Law Department. It was an offer that Sickles found incredibly insulting; not only would he be giving up the right to choose his own

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[3]An honor that, to the disappointment of both, went instead to the new port collector, Augustus Schell; see Mushkat, Fernando Wood, pp. 65-66.

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staff and to be "remembered" by them for the favor, but he would lose all credibility in Tammany as a power in his own right. In an angry session in Wood's office Sickles turned the offer down, and although nothing was said publicly both men realized their shaky alliance was near an end.[4]

The mayor then turned to someone who had hardly seemed a credible candidate, a short, dapper Irish emigre named Richard Busteed. Busteed was the same age Shepard had been, but considerably less accomplished and--more to the point, as far as Wood was concerned--much less a power in Tammany. He was also something of an oddity, an itinerant Methodist evangelist who had backslid into criminal law and was currently doing the Lord's work defending his countrymen against extradition to Her Majesty's prisons.[5] In choosing extradition defense as a specialty, Busteed had carved out a niche for himself within the larger field of criminal law dominated by such giants as James T. Brady and John Graham, and he had won a legendary string of victories with his aggressive--some said insolent--courtroom manner. He was also not above cutting an ethical corner or two, as

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[4]Ibid., pp. 54-58; Times, Apr. 18, 1857, p. 1.

[5]For a discussion of nineteenth-century extradition law, see J. B. Moore, A Treatise on Extradition (Washington: Government Printing Office, 1890). In the United States it was not enough that there was a case pending against the accused in the other country; the petitioner had to convince a judge that there was at least prima faciae evidence of guilt, while lawyers like Busteed did all they could to discredit that evidence and keep their clients free.

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on one occasion when, according to one story, "Counsellor Busteed not only advised an extradition client to flight, but actually ran with him a certain distance."[6]

Busteed's specialty had not proved as well-paying as he had hoped, his clients having generally fled with only the clothes on their backs, but it had won him a large and enthusiastic following in the local Irish community. It was this following rather than any substantial qualification to be corporation counsel, that caught Wood's eye. But what really clinched his decision was finding out that Busteed and Patrick Lynch, editor of the Irish-American, were old friends. Lynch was one of the most influential opinion-makers in the Irish community, and Wood had been cultivating his support for years. What better way to sew up his support, and the Irish vote, than to appoint Busteed and put him on the November ballot?[7]

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[6]Times, June 20, 1857, p. 4, in a comment on lawyers' ethics in general. Born in Dublin of Protestant parents, Busteed followed his father (a barrister-turned-colonial-bureaucrat) to the West Indies and then to Canada before returning to Ireland as a young man. In addition to the ministry, he had worked as a typesetter and itinerant reporter before turning to the law in 1846 and coming to New York two years later. For his life, see National Cyclopaedia, vol. 3, p. 531; Harper's Weekly, Jan. 18, 1868, p. 44, and Times, Aug. 14, 1887, p. 2, and Sept. 16, 1898, p. 7. For other comment on his courtroom tactics, ibid., Mar. 2, 1857, p. 4, and June 20, 1857, p. 4; Tribune, Mar. 3, 1857, p. 4, and Courier and Enquirer, Mar. 3, 1857, p. 3.

[7]Busteed probably met Lynch during his own days as a journalist, and was not only his friend but his personal attorney as well; see Irish-American, Oct. 25, 1856, p. 2, and Nov. 15, 1856, p. 4.

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When Wood called Busteed into his office and offered him the same deal that Sickles had just turned down, according to a story in the Times, "'Glorious Dick' (first cousin to 'Slippery') then jumped at it, obnoxious proviso and all, stating that, for his own part, he only wanted the $15,000, after which the patronage--and the office itself, for that matter--might go to the dogs."[a]

The details of the story may not stand up to close scrutiny (the salary, for instance, was not $15,000 but $10,000), but it is not hard to imagine that Busteed indeed "jumped at" Wood's offer. Not only was the salary a god-send to him at the time, but as corporation counsel he would move instantly into the higher ranks of a bar whose members had been looking down their Yankee noses at him. There was some question, however, whether the interim appointment would ensure him Tammany's nomination for the general election. A number of other candidates, including Sickles, had been busy striking deals of their own with members of the General Committee, and there was a spirited contest at the October 3 nominating convention before Wood

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[a]Ibid., Apr. 18, 1857, p. 1, by political gossip Charles Graham Halpine, signing himself "A Bird in the Bush" [Chalmers, "Fernando Wood and Tammany Hall," p. 394]. The cousinship with county clerk Richard B. "Slippery Dick" Connolly was a purely figurative one. The Times' routine reference to Busteed as "Glorious Dick" suggests that it was a commonly recognized nickname; see, for instance, ibid. June 23, 1857, p. 1 [suggesting "Dirty Dick" as an alternative], and Sept. 8, 1857, p. 1 [passing reference by nickname only, the underlying assumption being that readers would know who was meant].

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convinced enough members that Busteed was too great an asset to the ticket to be ignored. As one journalist who covered the proceedings reported,

> A little man in a big white coat, who appeared to know the ropes, said at Tammany just after the nomination, that he "know'd all about it--he know'd as how Dick Busteed would get it, because Dick was in with the furriners, and would bring in the furrin vote for Fernando and the rest of the ticket. So ye see," he said, pleadingly, to a Sickles man, "how could we help it? Dick, of course, isn't--hem, hem--but these things must be fixed, you know."[9]

Sickles had to settle for a seat in Congress, and was so bitter at his treatment that he joined the remnants of Shepard's old bloc and took part in the intrigue that, little more than a year later, would drive Wood from the Hall.[10] In the meantime Busteed moved on to the general election, where he faced two opponents: the Know-Nothing Louis Glover, who had lost to Shepard a year earlier and was running a lackluster campaign, and fellow Irishman Robert Emmet, who had bolted the Democratic Party and was running as a Republican. At first glance it would seem that Emmet would have been a formidable opponent, bearing one of the most revered names in the Irish community and

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[9]Ibid., Oct. 4, 1856, p. 4; see also Post, same date and page.

[10]It was while occupying this seat in Congress that Sickles shot his wife's lover and narrowly escaped hanging, as detailed in Brandt's The Congressman Who Got Away with Murder. For the intrigue against Wood, see Mushkat, Fernando Wood, pp. 63-67 and 75-81, and Chalmers, "Tammany Hall, Fernando Wood, and the Struggle to Control New York City."

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offering over forty years experience as a lawyer, including eight as corporation counsel in the 1830's. But times had changed; a new generation of famine-era emigrants identified more readily with the brash young Busteed than the courtly, distinguished Emmet. Moreover, Emmet had taken an outspoken anti-slavery position, a move that found little favor with Irish voters, or indeed with most of the New York City electorate in 1856.[11]

The Irish-American was not far off the mark when it predicted that Busteed would be "carried into office triumphantly, overriding all opposition as completely as the Red Sea overwhelmed Pharaoh."[12] Busteed trounced his opponents, running ahead of Glover by almost 17,000 votes and Emmet by 25,000. With a total of 39,687 votes, he outpolled Wood by 5,000 votes, and ran within 2,000 of Buchanan.[13] As for Wood, his "Irish strategy" worked every bit as well as he had hoped. Running up huge totals in the Irish wards, he won over 34,000 votes and breezed past his strongest opponent, Know-Nothing Isaac O. Barker, with over

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[11]For Emmet's move into the Republican antislavery camp, see Thomas A. Emmet, M.D., The Emmet Family, p. 254, and for the Irish and the slavery question, Florence E. Gibson, The Attitudes of the New York Irish toward State and National Affairs, 1848-1892 (New York: Columbia University Press, 1951), pp. 86-110.

[12]Irish-American, Oct. 18, 1856, p. 2.

[13]A record remarked on by both the Times, Nov. 5, 1856, p. 1, and Irish-American, Nov. 15, 1856, p. 2. For historical voting figures, see Common Council, Manual (1870), pp. 726-57, and for the 1856 election, ibid. (1857), pp. 352-58.

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9,000 votes to spare, while James Libby--the candidate of the anti-Wood faction in Tammany--drew fewer than 5,000 votes.[14]

When Busteed began his three-year term in January 1857, the Law Department had been in operation for seven years and had functioned much as the framers of the Charter of 1857 had intended. Although its first three heads--Henry Davies, Robert Dillon, and Lorenzo Shepard--differed widely in their politics and legal background, they had handled the city's legal business honestly and ably. In particular, they had maintained the integrity and independence of the department and had kept it free from the corruption eating away at other offices of city government. Under their leadership the department had kept pace with the even-increasing volume of business and had carefully protected the city's legal interests.

But when Busteed took office, the performance of the Law Department deteriorated almost immediately, for reasons

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[14]Common Council, Manual (1857), pp. 357-58. Running in a field of five candidates, Wood won with 45 percent of the vote, compared with Barker's 32 percent. The other three candidates finished far out of the running: Republican Anthony J. Bleecker (12 percent), Libby (6 percent), and City Reformer James R. Whiting [the judge in Shepard v. Wood] (5 percent) [figures from Mushkat, Fernando Wood, p. 59]. Wood's critics attributed his victory to election-day frauds and violence and to Buchanan's coat-tails, but the chief reason he won was the overwhelming support he received from the Irish voters. For a thoughtful analysis of the election, see Chalmers, "Fernando Wood and Tammany Hall," pp. 394-400, as well as briefer treatments in Mushkat, Fernando Wood, pp. 57-59, and Pleasants, Fernando Wood, pp. 62-65, and the reformist indignation in Myers' History of Tammany Hall, pp. 178-80, and Lynch's "Boss" Tweed, pp. 160-64.

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that are hardly surprising. Busteed was poorly prepared, both professionally and politically, to serve as corporation counsel; his background in extradition law was about as far removed as one could get from the experience needed to manage the city's complicated legal affairs, and he had come into office with no real power of his own, having pledged it to Fernando Wood and the Tammany General Committee for his nomination. The effectiveness of the Law Department was badly compromised, both in its ability to handle the city's legal business and in its influence over other offices of city government.

Busteed's difficulties began almost at once when, as promised, he handed over the patronage of the office to the mayor. Wood fired everyone in the Law Department except for the corporation attorney and one clerk, and replaced them with friends and the sons of friends.[15] Some were creditable enough appointments--chief assistant Abraham R. Lawrence,[16] for instance, and copyist Andrew T. Campbell[17] --but Busteed needed experienced hands far more than he

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[15]Of the staff that was present when Busteed took office, only corporation attorney George Purser and clerk Rinaldo French were still there in January 1858 [comparing rosters in Common Council, Manual of the Corporation (1857), p. 70, and (1858), p. 101].

[16]Later a prominent reform lawyer and judge; see Times, Feb. 15, 1917, p. 11 [obituary].

[17]Later promoted to chief clerk, the position from which he managed the clerical side of the office for over fifty years and stored much of the information provided to John Greener for his History of the Office of Corporation Counsel; see ibid., p. 27.

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needed bright young novices. In addition to a steady stream of paperwork (contracts, deeds, leases, title searches, bills and memorials, and so forth), the office was swamped by a sudden increase in litigation--amounting, Busteed later estimated, to four times the volume handled a year earlier.[18]

This increase was due in part to disputes arising from complicated new legislation, but much of it was already well underway before these laws had been passed and was related to far more mundane causes: contract disputes, claims for work and materials, and damage to persons or property. Some of the increase was even inspired by the chaotic state of the Law Department itself, as enterprising plaintiffs took advantage of the wholesale turnover of personnel and rushed to bring hundreds of small claims against the city, both legitimate and bogus, in municipal district court. This court--actually a system of eight courts scattered across the city--had jurisdiction over all civil cases involving lesser amounts of money and was the busiest in the entire judicial system.[19]

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[18]Estimate in "Report of the Counsel," Dec. 31, 1857, Board of Aldermen, Documents (1858), no. 13, pp. 222-23.

[19]As a "court of limited jurisdiction" the District Court heard simple civil cases involving small amounts of money (usually, but not always, $100 or less) and disposed of them promptly by operating under special rules of procedure not available in the city's higher courts. See Langbein Brothers [George F. and J. G.], The District Courts in the City of New York: Their Origin, Jurisdiction and Practice (New York: Diossy & Company, 1872), pp. 1-18.

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Covering all the district courts had long been a problem for the Law Department, but this new onslaught of cases practically brought the office to its knees. "It has not unfrequently happened," Busteed complained at year's end, "that upon the same morning, three or more suits would be brought against the city in the Yorkville Court--five or six in the Court in Nassau street, as many as thirty or forty in the District Court at Chambers street and interspersed between the Courts at Jefferson market in the Sixth Avenue, and at the First avenue near Fifth Street." With the corporation counsel and his chief assistant obliged to attend the so-called "courts of record" (Common Pleas, Superior, and Supreme Court), one junior assistant and three clerks were left to dash from one district court to another while the copyists and messengers kept the office open.[20]

Obviously, some of the duties of office were going to suffer neglect--and, unfortunately for the city, it turned out to be the counseling function. Busteed had always been a man of action, not reflection; as a clergyman, he had been an evangelist and not a theologian, and as an attorney he was a trial lawyer and not a jurist. Advising other officers of city government, especially when it

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[20]"Communication from the Corporation Counsel," Dec. 30, 1857, in Board of Aldermen, Proceedings, vol. 68, pp. 657-67, quoted at 658-59 [punctuation slightly changed].

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involved tracking down and making sense of court decisions and then drafting closely reasoned legal opinions, was not his forte. Busteed avoided requests for advice as much as he could, and relegated opinion writing to those odd moments when he was not otherwise occupied--as he put it, "at night at home, or upon Sundays."[21] To the other members of city government, this failing was more than an annoyance. The second Wood administration was unusual in that neither the mayor nor any of the aldermen were lawyers, and they were often in need of immediate legal advice--advice which, to their dismay, was seldom readily available.[22]

On December 18, 1856, for instance, the aldermen asked Busteed whether the city was liable for $40,000 in unauthorized charges incurred by the mayor's old Central Park Commission. They needed the information to draw up the city's budget, which had to be submitted early in the year to the legislature, but it was February 24 before he got around to answering, and then only after considerable prodding.[23] Similarly, on January 29 the aldermen asked

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[21]Board of Aldermen, Proceedings, vol. 68, p. 659.

[22]At least, none listed "lawyer" as an occupation in Trow's City Directory for 1857. The occupations listed included builder (four), architect, baker, coachmaker, hotelkeeper, "boots," measurer, shipbuilder, bookbinder, clerk, "envelopes," coal dealer, "president," and former gun dealer, with three listing themselves only as aldermen.

[23]Board of Aldermen, Proceedings, vol. 64, p. 422, and vol. 65, pp. 151-52, 167-68, 331-43.

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whether the city could break a contract for filling part of the Battery, describing in detail the poor job the contractor was doing. When they had received no reply by March 16 they passed a resolution directing Busteed to report "the reasons, if any," why he had not responded; it was April 8, however, before he finally furnished them an answer.[24] Even worse, in another instance he did not answer at all; asked for an opinion whether the city could allow the federal government to build a post office in City Hall Park, he stalled the aldermen for two months until they gave up in disgust and authorized the mayor to enter negotiations with the postmaster anyway.[25]

Nor were Busteed's opinions all that helpful when they did arrive. In his opinion about the Central Park Commissioners, he completely missed the point of the question and advised the aldermen how--not whether--they should enter the $40,000 in the budget.[26] And in his opinion about the Battery contract, he avoided dealing with the substance of the question (whether an ordinance was legal if passed by the councilmen in one year and the aldermen in another) by

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[24]Ibid., vol. 65, pp. 41, 123-31, 151, 417; vol. 66, pp. 42-46.

[25]Ibid., vol. 65, pp. 366, 386, 498-500, and vol. 66, pp. 266-67. Interrupted by the depression of 1857 and the Civil War, the Post Office project was not finished until 1870.

[26]Ibid., vol. 66, pp. 331-43. Busteed may have been deliberately doing his patron Wood a favor with this opinion, for when the board followed it, it saved him from being held personally liable for the $40,000.

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reporting that he had found two differing precedents in the case law. "I did not feel at liberty to determine which of those opposing views is the best exposition of the law," he explained.[27] The aldermen were taken aback by this answer; it was not at all unusual to find differences in the published cases, and the lawyer's job was to take those differences into account and evaluate his client's options in their light. For Busteed to give up because he found conflicting rulings called his competence into question.[28]

Busteed's deficiencies would have been a serious matter even in ordinary times, but these were no ordinary times. Legal scholars have generally regarded 1857 as marking the beginning of a great change in the legal position of New York City and American municipalities in general. In that year, according to legal historian Hendrik Hartog, the New York legislature "rejected the precedents of half a century and proclaimed that it was free to intervene at will in the affairs of the city."[29] What was new was not that the

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[27]Ibid., vol. 66, pp. 42-46. Busteed vacillated back and forth in his opinion, then in the end advised that the Common Council could void the contract because the contractor had violated certain of its provisions.

[28]See the section "The Tradition of Precision by Precedent," in David Mellinkoff, The Language of the Law (Boston: Little, Brown and Company, 1963), pp. 374-76. "The sense in the search is that precedent deals not only with principle but with context," he writes, noting that the lawyer's art consists of dealing with nuance, subtle distinctions, and the so-called "surrounding circumstances" of different cases [p. 374].

[29]Hartog, Public Property and Private Power, p. 237.

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state was legislating on behalf of the city--it had done that to a greater or lesser extent ever since 1783--but that it was doing so contrary to the wishes of the city. It was one thing for the city to request legislation (for new taxes, for example, or the authority to engage in some new undertaking) but quite another to have laws passed over its objections--laws that imposed unwanted changes in its charter and stripped the city of some of its most important offices and put state-appointed agencies in their place.[30]

Much of the impetus for the new laws came from local individuals and interest groups who had been unable to achieve their goals through the local political process and had turned to the state legislature as an alternative.[31] But the Republican-dominated legislature took what began as

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[30]Ibid., p. 238. Hartog emphasizes that the state had always had authority to legislate on local matters but up to this point had done so only in response to the city's own requests. The city's legal position--that is, its subservience to the state--had not changed, but awareness of that position had, both by the legislature and by the city.

[31]To at least some extent the situation in 1857 is an example of what legal scholar Joan C. Williams calls "political forum shifting." Williams disputes the traditional view of nineteenth-century cities as victims of rural-dominated state legislatures, arguing that legislative intervention was actually urban-inspired; that is, it occurred because a variety of urban interest groups, thwarted by their local governments, began pursuing their goals through state action. See Williams, "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law," Wisconsin Law Review (1986), pp. 83-153, esp. pp. 87-88. Support for her argument may be found in the Cities and Villages report in New York State Assembly, Documents (1857), no. 125, pp. 1-2; editorials in the Times, Jan. 6 and Feb. 26, 1857, and Tribune, Jan. 26, 1857, all p. 4, and Wood's remarks in Board of Aldermen, Documents (1857), no. 1, p. 8, and Proceedings, vol. 66, p. 297.

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well-meaning reform measures and used them to take partisan revenge on a city that had long been a Democratic stronghold.[32] The new Central Park act, for instance, was a reform aimed at saving the park from mismanagement by Wood's bogus Central Park Commission. It took development of the park completely away from the city, however, and gave it to a partisan (seven Republicans, four Democrats) state-appointed commission with practically unlimited powers. The board could develop the park as it saw fit, borrow on the city's credit, enter contracts obligating the city without its consent, build streets and sewers not just in the park but in the surrounding neighborhood as well, and pass ordinances superseding those of the Common Council.[33]

The City Hall act appointed a similarly sovereign board of five members (all Republicans) with power to design and construct a new City Hall at city expense and, if it wished, sell part of the surrounding park to the federal

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[32]This process can be traced as the Times moved from enthusiastic support of the bills [Jan. 6 and 7, 1857, both p. 4] to wariness [Jan. 24 and Feb. 12 and 26, 1857, all p. 4] and finally dismay [Apr. 16 and 21, 1857, both p. 4].

[33]New York, Laws (1857), ch. 771. For Wood's comments, see Board of Aldermen, Proceedings, vol. 66, pp. 309-14 and for formation of the commission, Rosenzweig, The Park and the People, pp. 97-99. Fortunately for the city, the members of the commission took the public trust seriously and did not abuse the extraordinary powers given them.

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government for a new post office.[34] The Port Warden's act created a state-appointed all-Republican commission with extensive powers over the navigation and commerce of the port, including the authority to settle legal questions without court or jury.[35] Another act stripped the mayor and aldermen of their authority to sit as a county Board of Supervisors and established a new twelve-member body elected by a complicated formula ensuring that half of its members would be Republicans.[36]

There were a number of other acts as well, but the two most controversial were the new city charter and the Metropolitan Police act. The new charter was well-intentioned and contained many long-needed reforms, but the legislature passed it over the official objections of the mayor and Common Council and put it into effect without the customary local referendum. Some of its provisions were transparently partisan; for example, it reduced the Board of Aldermen to 17 members and the Board of Councilmen to 24, gerrymandered the districts from which they would be elected, and called a new election for December even though

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[34]New York, Laws (1857), ch. 318.

[35]New York, Laws (1857), ch. 119.

[36]New York, Laws (1857), ch. 590.

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the mayor and half the aldermen had another year remaining in their terms of office.[37]

The new charter also abolished, consolidated, and rearranged executive departments and bureaus, while creating others, in a way that seem deliberately designed to hurt Wood's supporters and aid his opponents. And although it granted him one of the powers he had asked for--the authority for the mayor to appoint department heads--it exempted the two officers he most wanted under his control, the comptroller and the corporation counsel. The reasoning behind this omission was made explicit by the Cities and Villages committee itself. "The purse and the sword ought not to be intrusted to the same person," its majority report explained. "And the legal opinions of the Corporation Counsel should not be subjected to the caprices, whims and prejudices of the parties who most need them, and are sometimes distastefully influenced by their views and conclusions."[38]

The new Metropolitan Police act was just as well-intentioned and just as intrusive. It was passed in

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[37]For its provisions, see New York, Laws (1857), ch. 444, and for official opposition, Board of Aldermen, Proceedings, vol. 65, pp. 13-14, 28, 79 and 141, and vol. 66, pp. 300-04 and 324-25. Useful summaries of the charter are given in Mushkat, Fernando Wood, pp. 68-69, and Spann, New Metropolis, pp. 385-86.

[38]"City and Villages Report on Charter," in Board of Aldermen, Proceedings, p. 285. This reasoning made sense in light of Shepard's opposition to Wood but failed to recognize that, just as easily, a reform mayor could be hindered by an intransigent corporation counsel.

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response to Wood's subversion of the existing three-man police commission to his own ends and in the desperate hope that a better-administered police force could do something about the city's growing crime rate.[39] It replaced one form of partisanship with another, however, and imposed state control over what had traditionally been a local function. Using the highly successful London Metropolitan Police as a model, the new act established a police district encompassing New York, Kings, Richmond, and Westchester counties, under the administration of five state-appointed commissioners (all Republicans) and the mayors of New York City and Brooklyn. The act required the city to support the commission financially and to give it the use of all property belonging to the police force, but it deprived the city of any control over its operations or personnel. And, in a provision aimed at curbing the Democratic grip on the city, it gave the commission extraordinary powers over elections; its members were to appoint poll clerks, guard the ballot boxes, and keep party workers 200 feet away from the polling places.[40]

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[39]James F. Richardson, "Mayor Fernando Wood and the New York Police Force, 1855-1857," The New-York Historical Society Quarterly, vol. 50 (Jan. 1966), pp. 5-40.

[40]New York, Laws (1857), ch. 569, and Wood's message in Board of Aldermen, Proceedings, vol. 66, at pp. 304-08. A detailed analysis of the bill is given in Richardson's "Mayor Wood and the New York Police," pp. 25-31.

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Once the laws were passed, the mayor and Common Council had to made some difficult decisions. Should they accept defeat and allow the new laws to be implemented? Should they accept some and oppose others? If so, which? Or should they, on principle, oppose them all? If they chose opposition, what form should it take--political or legal? That is, should they try to have them repealed by the next legislature, or overturned by the courts? And in addition to these questions of strategy, there was the most basic all: What, exactly, was in the new laws, and how did they affect not just the city in general but its incumbent officers in particular?

The office of corporation counsel had been established to handle precisely this sort of situation. The corporation counsel was expected to have a broad grasp of what the city's legal interests were, to warn the mayor and Common Council against any threat to them, and to provide advice and leadership in meeting that threat. But the officers of New York City received very little help from Busteed; in the face of crisis, he stuck resolutely to his work in court and provided advice grudgingly, if at all. It was as if the city had been struck by an epidemic and its chief health officer never raised his eyes from his morning teaching rounds at Bellevue. The city needed advice and leadership, but it got very little of either. As a result, its response to the threat from Albany was haphazard,

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uncoordinated, and poorly thought out. Instead of uniting behind a well reasoned defense of the city's legal interests, the mayor and the Common Council acted impulsively and independently--and instead of bringing the best possible test case, they brought probably the worst.

As soon as news arrived that the laws had been passed, the Board of Aldermen began considering what action it should take. Without as much as a nod toward the corporation counsel, on April 16 the board charged one of its committees with responsibility for testing the legality of the new acts. The committee had no idea how to proceed, however, and reported back to the board only with a feverish denunication of the Republican legislature. For lack of any better plan, on April 27 the board adopted a resolution directing the officers of city government to consider the new laws null and void "until the validity of the same shall have been established by competent authority." How this validity would be established or by whom was left vague; rather than initiate a lawsuit, the aldermen seemed to be inviting one.[41]

The Board of Councilmen, on the other hand, was disposed to work through the corporation counsel. On April 20 its members passed a resolution directing Busteed to report "without delay" what acts had been passed and what

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[41]Board of Aldermen, Proceedings, vol. 66, pp. 116, 170-74, 183-85.

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their provisions were. They asked him to furnish a detailed opinion about the validity of the laws and, if anyone tried to enforce the new laws, "immediately to institute proper legal process to prevent the same and protect the rights of the city"; prudently, they allowed him $5,000 for enlisting the help of outside counsel. In the meantime, all city officials were to refrain from any action that might be deemed as recognizing the validity of the acts.[42]

While the aldermen and councilmen were engaged in this waiting game, Wood was quick to seize the initiative. Of all the new laws, the one he could least afford to accept was the Metropolitan Police act. His political machine was powered by his control of the police force; he used its patronage to reward his supporters, levied its members for campaign contributions, drafted patrolmen as election day "enforcers," and obtained selective enforcement of the laws for his friends. "The police, trained as I have them now are a political engine," Wood had bragged earlier. "Every man of them I regard as a political prize-fighter in my cause."[43]

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[42]Board of Councilmen, Proceedings, vol. 66, pp. 1060-61 [quoted], 1100-04, and 1295.

[43]Quoted in Chalmers, "Fernando Wood and Tammany Hall: The First Phase," p. 396. Wood's subversion of the the police had been the subject of numerous editorials and official investigations; see ibid., pp. 386-87, 395-96, 398-400, and Richardson, "Fernando Wood and the New York Police, pp. 8-24.

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As a result, when Wood heard on April 22 that the new board was meeting that afternoon to take over administration of the police, he felt compelled to act at once. After ordering all police captains to refuse to recognize the new board, he went before the New York Supreme Court and obtained a temporary injunction restraining Simeon Draper and the other appointees from assuming their duties as commissioners. It was an action he had obviously been planning for some time, because sweeping into court with him were six of the city's most prominent attorneys--the famed trial lawyer Charles O'Conor, former Supreme Court judge John W. Edmonds, Democratic attorney-general Samuel B. Cushing, newly appointed U. S. district attorney Theodore Sedgwick, and Wood's personal attorneys, J. T. and T. D. Sherwood. No one had thought to invite the corporation counsel of the City of New York.[44]

With this action Wood rendered moot most of the discussion going on the Board of Aldermen and Board of Councilmen; while they were debating what action should be taken, he had already taken it. And, significantly, he had taken it in his own name--Wood v. Draper--not that of the corporation.[45] It was an important distinction because it

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[44]Times, Apr. 23, 1857, p. 1.

[45]By the time the case made its way to the Court of Appeals, it had, for technical reasons, become People ex. rel. Wood v. Draper, the name under which it is reported in 15 New York 532 (1857).

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meant that he alone--not the aldermen, not the councilmen, not his fellow police commissioners, not the corporation counsel--would be making all the decisions in the case. Over the next few days the case picked up momentum and, as the Times reported, made its way through trial court in "a shower of motions, counter-motions, injunctions, dissolutions, quo warrantos, mandamuses, and appeals."[46]

It was May 4 before the mayor sent a message to the Board of Aldermen explaining his action and urging their support. He had felt, he explained, "a sacred duty" to resist the Metropolitan Police act, and he had acted only after being advised to do so by "some of the ablest legal counselors in this state." Yet he made it clear that he did not intend his lawsuit to be "the" test case for the city. He identified ten other laws as equally "repugnant to the constitution and to our dearest rights and liberties," and urged the aldermen to bring legal action of their own against them. In particular, he thought, they should challenge parts of the new charter and the City Hall and Central Park acts.[47]

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[46]Times, May 2, 1857, p. 4. For the progress of the case, including arguments of counsel on both sides, see ibid., Apr. 24, 1857, p. 1; Apr. 27, 1857, p. 2; Apr. 29, 1857, pp, 4, 8; May 1, 1857, p. 5; May 2, 1857, pp. 2, 8, and May 4, 5, and 7, 1857, all p. 4.

[47]The message is printed in full in Board of Aldermen, Proceedings, vol. 66, pp. 297-317; quoted at 297-98, 308.

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The aldermen responded by calling a special meeting for two days later to consider the mayor's message and to plan the action he had urged. And, inasmuch as they still had no idea how to proceed with a legal challenge, they passed a resolution directing the corporation counsel to furnish them with an opinion in time for the meeting. When they arrived at City Hall, however, the clerk informed them that he had received no word from Busteed. Annoyed, they adjourned for another week but had no better luck then; feeling unable to proceed, they adjourned again. When they met again on May 14, Busteed still had not responded, but it no longer mattered. By this time Wood's case was on its way to the Court of Appeals, and the aldermen decided to wait and see what happened to it.[48]

In the meantime the Board of Councilmen took up its own consideration of the lawsuit. Although the councilmen had also failed to receive a reply from Busteed, they were reluctant to turn control of the city's test case over to the mayor. On April 29 the board took up debate of a resolution challenging Wood's action:

> Whereas, the charter of the City of New York vests in the Law Department thereof the control and direction of all suits at law in which the city is interested, therefore, Resolved, That the Mayor of the City of New York be, and he is hereby forbidden to commence any such suits in relation to any acts of the legislature, unless the same be commenced and carried on by and

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[48]Board of Aldermen, Proceedings, vol. 66, pp. 319-22, 324-27.

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under the direction of the Counsel to the Corporation.[49]

The resolution was narrowly defeated by a vote of 18 to 20, and Wood's action was allowed to stand. And when shortly afterward the Board of Aldermen took up the councilmen's earlier resolution authorizing Busteed to retain outside counsel and treated it as authorizing payment of Wood's lawyers, this action (and the councilmen's grudging acquiescence in it) amounted to an acceptance of the mayor's lawsuit as the corporation's test case.[50]

Thus it was that, without conscious intent on the part of anyone, Wood v. Draper became the city's challenge to the legislature's intervention in its affairs. The officers of city government could hardly have made a worse choice. First of all, the particular law it sought to have overturned, the Metropolitan Police act, had been written with meticulous care on the assumption that it would be tested. Its authors were David Dudley Field, probably the nation's premier legal draftsmen, and New York County district attorney A. Oakey Hall, who, for all his peccadilloes, was an expert on criminal law. Of all the new laws,

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[49]Board of Councilmen, Proceedings, vol. 66, pp. 1349-50.

[50]Board of Aldermen, Proceedings, vol. 66, p. 217. In view of the number of lawyers involved, counsel fees were increased to $10,000.

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it was the least vulnerable to legal challenge.[51] Secondly, it was difficult to show any harmful impact to the city from its implementation, or to claim any over-reaching by the state. It addressed a problem that was far more than a local concern. Inasmuch as New York City was, in the words of governor John A. King, the "commercial capital" of the state, crime there was a concern "not only of those who dwell within its limits, but all the citizens of the State who attracted to it by social ties, or by the demands of business of trade."[52] Moreover, as the Times pointed out, the chief purpose of the police was to enforce the criminal laws of the state, not local laws and ordinances. "Why should we not have a State Police?" its editors asked logically.[53]

The main reason that Wood v. Draper was a poor choice for a test case, however, was Wood himself. Although his attorneys tried to focus the court's attention on the con-

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[51]Committee on Cities and Villages, "Majority Report on the Bills Relating to the Police Departments of New York and Brooklyn," in New York State Assembly, Documents (1857), no. 127; Times, Feb. 18, 1857, p. 4, and Herald, Apr. 29, 1857, p. 4. Although Hall is chiefly remembered for his later connection with the Tweed ring, in 1857 he was a crusading young Republican district attorney. For his life, see Croswell Bowen, The Elegant Oakey (New York: Oxford University Press, 1956), and National Cyclopaedia, vol. 3, pp. 389-90, and for a glimpse of his expertise as a criminal lawyer, the 14-volume collection in the New York Public Library, Briefs and Arguments for Criminal Cases in Which Abraham Oakey Hall was Interested.

[52]Annual message of the governor, New York State Assembly, Journal (1857), pp. 10-33; quoted at 28.

[53]Times, Feb. 26, 1856, p. 4.

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stitutional issue of state interference, the mayor's actions and personality dominated the case from beginning to end. Rather than cooperate with Draper in the interest of public safety, Wood defied the new commission and insisted on keeping his own police force on the beat. The result was that for some months the city had two competing police forces who seemed bent more on fighting each other than enforcing the law. The city's criminals had a field day, some being arrested by one side only to be rescued by the other.[54] Tensions in the city came to a bloody climax on June 16 when Wood mustered his "municipals" to support him in a dispute with the governor over appointment of a new street commissioner. When the governor's appointee tried to serve a court order with a bodyguard of fifty "metropolitans," some five hundred of Wood's policemen, aided by eager spectators, fell on them with clubs, knives, and fists. Blood streamed down the steps of City Hall, and rioting began spreading out into the surrounding streets; order was restored late that afternoon when a national guard regiment on its way to a Boston parade was pressed into service.[55]

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[54]The effect on law enforcement is described by Richardson in his "Wood and the New York Police," p. 34. In fairness to Wood, it should be noted that Draper was equally at blame for the impasse.

[55]Ibid., pp. 34-37. See also Mushkat, Fernando Wood, pp. 73-74; Spann, New Metropolis, pp. 392-93, and Myers, Tammany Hall, p. 182. For a running account of the clash, rich in detail, see the Times, June 16, 17 and 18, 1857, all p. 1, as well as editorials, p. 4, same dates. Ironically, in a case decided after Wood left office and thus too late to do him any good, the Court of Appeals upheld his right to

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The "police riot" could not have come at a worse time for the mayor. The Court of Appeals had just assembled to hear Wood v. Draper when the rioting broke out, and news dispatches from the city were the backdrop against which the justices heard the lawyers' arguments on June 16 and 17. Draper's attorneys hammered away at the mayor's responsibility for "the anarchy now prevalent in New York City," and the justices found it difficult not to agree.[56] The precise legal point on which the case turned was a portion of the state constitution which a reasonable person might have construed either way, and the justices chose--understandably enough--to construe it against Wood.[57] In an opinion that was more an exercise in semantics than legal philosophy, Chief Justice Hiram Denio held that the

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make the appointment; see People ex rel. Devlin v. Conover, 17 New York 65 (1858).

[56]Arguments of both sides were given practically verbatim in the Times, June 19, 1857, p. 3.

[57]At issue was Article 10, section 2 of the Constitution of 1846, which contained three sentences. The first dealt solely with county officers, and the second (in almost identical language) stated that, with certain noted exceptions, all "city, town, and village officers" should be locally elected or appointed. The third sentence declared that "all other officers," including newly created ones, would be elected or appointed as the legislature saw fit. Wood's lawyers argued that the third sentence, including the clause referring to newly created officers, pertained only to officers other than county or municipal ones--i.e., state officers. Draper's lawyers argued that the sentences were not mutually exclusive and that the clause governing newly created officers was meant to cover county and municipal officers as well. See arguments of counsel in the Times, June 19, 1857, p. 3, and the court's discussion in People ex rel. Wood v. Draper, 15 New York 532, at 536-40.

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legislature did indeed have the constitutional power to replace the city's own police commission with a regional board. A concurring opinion by William H. Shankland seconded his construction of the passage in question and concluded with a stinging criticism of Wood's management of the police.[58]

Wood v. Draper was in fact a very narrow ruling, and was neither presented nor received as a declaration of legislative supremacy over the corporation of New York City. It was seen instead as a personal blow to "King Fernando's" ambitions, the outcome of a lawsuit "waged with the regular constituted authority of the State . . . for his own personal aggrandizement."[59] Although Denio did declare that the state might make special laws relating to localities, he hemmed in his assertion with such qualifiers as "if from exceptional causes" and "[if] the public good requires."[60] The ruling in Draper still left the door open for the mayor or Common Council to pursue other suits that might have "distinguished" the state-local issue more

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[58]15 New York 532, 533-48 [Denio] and 548-56 [Shankland]. The 5-2 decision against Wood is remarkable considering that according to the Times six members of the court were "political friends of the Mayor" [July 3, 1857, p. 4].

[59]Times, July 4, 1857, p. 4.

[60]15 New York 532, at 544.

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clearly.[61]

It was largely Busteed's fault that they did not open that door. In the months during and immediately after the mayor's case, it was due to his lack of leadership that the city missed one opportunity after another. At one point, in the midst of all confusion about what they should do, the aldermen passed a resolution authorizing Busteed to bring a suit testing the validity of the City Hall act. There is no indication that he ever acted on the resolution, however, and when Wood v. Draper picked up steam, the board lost interest and never pressed him on the matter. Busy with other cases, Busteed treated their resolution as a suggestion rather than a directive and never pursued it.[62]

It was a grievous lapse, because a challenge to this law might have had a far different outcome than Draper. The City Hall act was much clearer usurpation of municipal rights than the Metropolitan Police act, and offered far better legal grounds for the city. The two houses of the

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[61]A large part of the work of appellate judges and counsel consists of "distinguishing" similar cases from one another; typically, the citation notes in appellate briefs and decisions make copious use of "cf.", or "compare with." See "distinguish" in Black's Law Dictionary and the discussion on "precision and precedent" in Mellenkopf, Language of the Law, pp. 293-94.

[62]Board of Aldermen, Proceedings, vol. 66, p. 242. The resolution "authorized and directed" him to test the constitutionality of the act; it was passed hastily without debate and never discussed again, apparently lost in the crush of other business before the board.

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Common Council were already actively pursuing plans for a new municipal office building and had even drawn up tentative architectural plans. The only matter not yet resolved was whether to locate the building behind the old City Hall or to follow the march of business uptown and put it in Madison Square.[63] For the legislature to step in and take the project out of their hands was an intrusion that the commission would have had trouble justifying to the courts. There were no extenuating circumstances, such as the threat to the public safety that had inspired the police act, and no clear state interest at stake. Moreover, in giving the commission the power to sell part of City Hall Park, the act fell on the wrong side of the public/private distinction; that is, it dealt not just with the public, governing side of the corporation (the sort of intrusion the courts had become willing to accept) but with its private, property-holding side (interference that the courts were far more reluctant to approve).[64]

Busteed allowed other opportunities to slip past as well. When the Board of Councilmen began drafting

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[63]See the majority and minority reports of the joint committee on City Hall in ibid., pp. 27-37, and "Report of the Committee on Buildings and Supplies, Submitting Plans and Specifications, &c., for a New City Hall" (1856) [pamphlet in New York Public Library].

[64]The distinction was weakened three years later when the Court of Appeals ruled that a valuable public property--the city's ferry franchise--was not a vested right free from state interference [People v. Mayor, 10 Barbour 233 (1860)].

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ordinances to organize the new departments provided in the charter, the aldermen asked Busteed whether such action would constitute acceptance of the charter and its constitutionality.[65] Busteed answered with uncharacteristic promptness, but with an opinion that, while technically correct, was misleading. If the act of the legislature was in fact unconstitutional, he wrote, then "no action that the Common Council might take thereunder could give to the void law any legal effect," or prevent the city from overturning it later.[66] In a literal sense, he was right; nothing the Common Council might do could make an invalid law valid. As a practical matter, however, such action was at odds with previous resolutions by both boards declaring that the new charter should be treated as null and void until the courts determined its constitutionality. If they busied themselves implementing it, how did they suppose it would get brought before the courts? Who, if not they themselves, would start the ball rolling? By answering as he did, Busteed encouraged the Common Council to continue drifting with events. The two boards enacted first one provision and then another; no one stepped forward to challenge their action, and eventually they reached the point that it no longer made sense to maintain any pretense of

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[65]Board of Aldermen, Proceedings, vol. 66, p. 231.

[66]Ibid., pp. 231-32.

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opposition.[67]

Most of Busteed's advice, in fact, consisted of throwing cold water on any contemplated court action against the new laws. An opinion he gave the Board of Supervisors about a new law regarding the district courts is particularly revealing of his attitude. The supervisors--at this time, still consisting of the mayor and aldermen--wanted to know whether a law taking the appointment of court clerks away from them was valid. It was obvious that they wanted to know whether there were grounds on which the act might be overturned by the courts (the mayor had just suggested as much) but Busteed ignored this very real possibility and answered simplistically, "I have to say, that every act of the legislature of the state, duly passed, and which does not palpably and in express terms, violate constitutional law, is prima facie, a legal enactment." True enough, but was this particular piece of legislation such an act, or did it conflict with the constitution in some way? Rather than examine the law and determine whether there might grounds for a court challenge, Busteed gave the

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[67]The chairman of the Committee on Cities and Villages had pointed out earlier that four-fifths of the charter was identical to one proposed by the Common Council itself [Board of Aldermen, Proceedings, vol. 66, p. 278]. Once that four-fifths had been accepted and implemented, the Common Council lost interest in making a constitutional issue of the rest.

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supervisors a quick brush-off.[68]

In another instance the aldermen asked his opinion about the law removing them as supervisors and replacing them with an elected board. After giving a sketchy overview of the act, he ignored the aldermen's main concern--Was it valid? Did they have to abide by it?--and dispensed advice that was really no advice at all. "The law is a short one, and has been, together with others . . . relating to this city, published in document form (No. 9) by the Board of Aldermen," he declared. "Its perusal and study will furnish the only needed guide to an understanding of the duties it imposes."[69]

Because of Busteed's deficiencies, the city was left essentially without legal counsel when it was most needed. The fault lay not so much with Busteed himself; he was struggling with a crushing caseload and doing the best, considering his personal limitations, that he could. He had never pretended to be more than what he was: a successful trial lawyer within his chosen specialty of criminal law. The blame for his general failure as corporation counsel lay instead with Wood and the Tammany leaders who,

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[68]Board of Supervisors, Proceedings (1857), pp. 338-39. There was in fact a distinct possibility that the act violated the constitutional requirement that a local bill not embrace more than one subject; see ibid., pp. 317-19.

[69]Ibid., pp. 185-86; quoted at 186.

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for solely political reasons, had put someone so obviously unsuited into such an important office.

Whether someone of broader legal experience--a Davies, say, or a Shepard--would have made any difference in 1857 is sheer speculation. He would have been bucking a general judicial trend at mid-century toward upholding the authority of the state over that of the cities, and New York City might have fared little better. It would at least not have gone down without a fight, however; Wood v. Draper would have been only the first skirmish of a long battle--not the crushing defeat it was allowed, by default, to become. Left unchallenged by other cases the city might have brought, Draper became a precedent for a whole series of later "ripper" cases both in New York and in other states--cases which ripped away what little protection remained of the cities' ancient "charter rights" and made them more and more agencies of the state. When the Court of Appeals made its ruling in Draper, in the words of Hendrik Hartog, "the dam burst. An era of state-local comity ended. From then on, 'domination over the affairs of New York City went merrily and perniciously on from session to session of the legislature."[70]

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[70]Hartog, Public Property and Private Power, p. 238 [quoting McBain, Municipal Home Rule, p 8].

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Busteed's ineptness in the city's controversy with the legislature was his most serious failure as corporation counsel, but it hardly stood alone. If any one case typifies the disarray in the Law Department during his term, it is Lowber v. Mayor, a case that led to one of the most bizarre moments in the city's history and effectively blighted Busteed's political career. The affair began in March of 1857 when a Wall Street speculator named Robert Lowber drew Wood and a group of aldermen into a scheme to have the city pay him $196,000 for a tract of land on the East River for use as a public market. The Common Council passed a resolution to buy the land, and Wood approved it. Lowber promptly submitted his title to the Law Department, where in the crush of other business it was examined by a harried assistant and duly certified by Busteed. But when Lowber delivered his deed to the comptroller--the reform gadfly Azariah Flagg--he was rebuffed; outraged at what he considered an exorbitant price for the land, Flagg refused to pay it and to accept the deed. Lowber immediately sued to force the city to honor its contract.[71]

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[71]"Communication from the Corporation Counsel" in Board of Aldermen, Documents (1857), no. 16, gives Busteed's explanation of events. Flagg's version is given both in "Annual Report of the Comptroller" in ibid., no. 20, pp. 16-17, and more extensively in a pamphlet Communication from the Comptroller in Relation to the Claim of Robert W. Lowber (1857), available in the New York Public Library [hereafter cited as Lowber Claim].

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Citing suspicions of fraud, Flagg urged Busteed to defend the suit "at all cost and hazard." Busteed demurred; Flagg could offer no evidence other than his own conviction that the aldermen were "a set of swindlers and thieves," and he had no wish to go into court with yet another indefensible case. In the end, a compromise was reached. With the agreement of all parties and with Flagg represented by counsel of his own choosing, in July the matter was submitted to a referee--interestingly enough, Daniel Sickles. After a short hearing, Sickles rendered judgment for Lowber and would forever after, rightly or wrongly, be suspected by Flagg and his reform allies of having been "reached" by Wood and the aldermen.[72]

The matter did not end there. Furious at having been hoodwinked into a what he now felt certain was a sham case, Flagg still refused to pay. Lowber headed back to court and had execution placed in the hands of the sheriff, who attached all the property of the Corporation and placed it on the auction calendar. Word that the city itself was up

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[72]Board of Aldermen, Documents (1857), no. 16, pp. 15-18 [Flagg quoted at pp. 15, 16]; "Report of the Referee," in ibid., pp. 22-27, and Lowber Claim, pp. 1-3. A referee was an officer appointed by the Supreme Court, at the request of both parties, to hear a case in which complicated facts (rather than the law itself) were at issue; the advantage of a "reference" was that the case did not have to wait its turn on the court's crowded calendar, and like any other case it could be appealed to a higher tribunal. In this case, referee Daniel Sickles had been accepted by the comptroller in the belief that his previous service as corporation attorney would be an advantage to his understanding of the issues involved.

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for sheriff's sale created a sensation in the press and placed an unwelcome spotlight on the corporation counsel's office. To add to his discomfiture, Busteed was bombarded with contradictory orders from his fellow officials. The comptroller insisted that he immediately appeal the referee's judgment, threatening that if he did not, he--Flagg--would go to court for a mandamus forcing him to perform his duty. On the other hand, the aldermen passed a resolution, approved by the mayor, directing "that the Counsel to the Corporation be, and he is hereby instructed, to institute such proceedings as are necessary to enforce the payment of the said execution by the Comptroller."[73]

For Busteed, the choice was a simple one: party regularity, or defection to the maverick comptroller. Moreover, there was no question in his mind that he was responsible to the corporation, which he, like most New Yorkers, equated with the Common Council. He was not, he emphasized, "the slave of a fellow servant"--i.e., a department head such as the comptroller.[74] In the absense of any proof of fraud, the suit remained as indefensible as ever, and he was bound to abide by the resolution of the Common Council to honor the judgment without further ado.

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[73]Ibid.; Times, Sept 10, 1857, p. 2; Board of Aldermen, Proceedings, vol. 72, pp. 128-29.

[74]Board of Aldermen, Documents (1857), no. 16, p. 28.

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Rebuffed by the corporation counsel, Flagg went to court as a taxpayer on September 9 and asked the justices to set the judgment aside and to issue a mandumus forcing Busteed to appeal the decision of the referee.[75] In the hearing that followed, Busteed was put in the awkward position of joining with Lowber's counsel, with Lowber and the corporation jointly opposing Flagg's motion. Flagg's lawyer was James Whiting, who had been the judge in Shepard v. Wood and thus found Busteed's concept of his office deplorable. Sitting on the bench was James Roosevelt, who in the DeBaun case had delivered prophetic musings about the future of a city government steeped in corruption. With Whiting scolding him at the bar and Roosevelt delivering fatherly lectures from the bench, Busteed felt control of his temper slipping. When Whiting made an impassioned argument attacking him for "the most gross negligence in the conduct of a case ever found in any officer who ever served the city," Busteed uncorked the sort of verbal blast seldom heard in the decorous precincts of the Supreme Court. As the press reported breathlessly the next day,

> He accounted for his opponents remarks on the ground of inbecility of age. He considered the remarks "slimy" and "filthy." He imagined he saw his honorable

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[75]For the case itself, see the comptroller's report in ibid. (1858), no 10, which contains "Opinion of Justice Roosevelt on Preliminary Objections" at pp. 60-61; "Opinion and Decision of Justice Roosevelt," pp. 61-69, and "Supreme Court Order, Sept. 18, 1857," pp. 69-70.

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> friend at the Bowery Theater, near the foetid footlights, with the placard raised--"The friends of Mr. Whiting meet here." He looked upon him as a briefcase barrister and a disappointed politician. The remarks he considered as the "meanest falsehoods which ever fell from his filthy mouth."[76]

The aristocratic Roosevelt, his voice icy with disappoval, interrupted to advise "a strict attention to the dry questions of law."[77]

In the end, Busteed's legal grounds availed him little more than his outburst. To the argument that he was bound by the resolution of the Common Council, Roosevelt ruled, "It is an error on the part of the Corporation Counsel to assume . . . that he is 'responsible only to his client' and that that client is the Common Council, as distinguished from the 'commonalty.'" He went on to define in unmistakable terms what comprised the corporation:

> Although in the loose language of ordinary discourse, the Aldermen and Assistant Aldermen [or, as they were now called, councilmen] are commonly called the "Corporation," they are in fact, only its legislative, as distinguished from its executive organs. The Corporation of the city, as we have seen, consists of the whole body of the citizens. The citizens are the quasi stockholders. The "charter officers," whether legislative or executive, including the "Head of the

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[76]"A Spicy Episode," Times, Sept. 10, 1857, p. 2. For the sordid reputation of the Bowery Theater and its denizens at mid-century, see Luc Sante, Low Life: Lures and Snares of Old New York (New York: Farrar, Strauss, Giroux, 1991), pp. 75-77.

[77]Ibid.

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> Law Department," are merely the agents and trustees of the citizens, and are ultimately responsible to them.[78]

Roosevelt set the judgment and its execution aside and ordered the corporation counsel to prepare an appeal acceptable to the comptroller, unless Flagg wished to continue the action in his own name. Still wary of his colleague, Flagg took the latter course with a case which moved through several court hearings over the next year and continued to embarrass Busteed--particularly when it came to light that in the Law Department's hasty title search, no one had consulted a city map showing two-thirds of Lowber's tract to be part of the city's own corporate estate.[79]

Surprisingly, Flagg's counsel Whiting argued the case not on grounds of fraud (which, if proved, would have been an effective bar to recovery) but on the constitutional issue of the Common Council's authority to make the purchase without prior permission from the legislature, and on "neglect of duty" by the corporation counsel. They were

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[78]"Opinion and Decision of Justice Roosevelt," in Board of Aldermen, Documents (1858), no. 10, p. 68.

[79]Ibid., pp. 66-67. The tract would have been either part of the old "Commons" or land gained from filling along the river; for a surveyor's report and a plat of the property, see Lowber Claim, pp. 10-12. Roosevelt noted that a Superior Court case shortly before the "deal" between Lowber and the city had found the title questionable. In fairness to Busteed, it should be noted that case had not yet been published when he certified the title. Roosevelt graciously excused Busteed's error as being the result of illness (he had been convalescing from scarlet fever), the press of other business, and the necessity of relying on untrained assistants.

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arguments that ultimately did not convince the courts. Justice Thomas Clerke, in the December 1857 General Term, essentially upheld Roosevelt's vacation of the judgment but went to considerable pains to caution against any assumption that the corporation counsel had "intentionally betrayed the city." It required stronger proof than had been presented by Flagg to induce him to believe that Busteed "for a moment contemplated any injury to his constituents."[80]

Clerke ordered certain modification to the action, which in September 1858 moved into Special Term of the same court before Justice Daniel Ingraham. Ingraham professed himself personally unhappy with the aldermen's actions but declared that the court had no power to interfere in a purchase--"however unwise, improvident, extravagant, or unnecessary"--that was within the discretion of the Common Council, particularly since there was no fraud charged in the complaint. Nor did he find the corporation counsel at fault in obeying the lawful resolutions of the Common Council. Ingraham dismissed Flagg's complaint and affirmed the judgment on behalf of Lowber--a judgment which now, with interest and court costs, amounted to $228,000.[81]

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[80]Lowber v. Mayor, 26 Barbour 262, quoted at 266.

[81]For the full text of the decision, see Board of Aldermen, Proceedings, vol. 71, pp. 427-40; quoted at p. 431.

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Those who assumed that the matter was now at an end did not reckon with the obstinacy of Flagg, who defied the court's final ruling and still refused to pay Lowber. To satisfy the judgment, the court renewed the earlier order directing the sheriff to seize the city's property and sell it at auction. Busteed and the new mayor, reform-minded Daniel Tiemann, objected strenuously, but they were helpless to stop the forced sale. On October 13, 1858, the sheriff of New York County conducted the largest art sale that had ever taken place in the city, auctioning the treasured portrait collection hanging in the Governor's Room of City Hall, including works by Thomas Sully, John Trumbull, and John Singleton Copley.

The Times covered the event as the public calamity it was, describing the scene as one famed portrait after another fell under the gavel: "There was the sturdy-looking Peter Stuyvesant, the last Dutch governor, frowning indignantly upon his degenerate descendants, and the majestic form of DeWitt Clinton . . . the sad-looking countenance of America's Vespucci gazing down from his tarnished frame upon the strange scene, and the swarthy features of the liberator Bolivar, stiff with contempt at finding himself put up at auction." The auctioneer's voice droned on, calling for bids "as indifferently and dismally as though he were selling off the kitchen furniture of a bankrupt stock speculator." A crowd of the curious milled

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around, respectfully silent. Other bidders dropped out as Tiemann resolutely bid his own personal funds to save the collection, gambling that before the one-year grace period ran out, a new comptroller would allow the city to buy back the masterpieces.[82]

In December a disgruntled electorate turned on Flagg and voted in a new comptroller--calm, steady Robert Haws, who was anxious that any sales of city property be redeemed within the statutory period. As a result, few bidders bothered to attend when on Christmas Eve the sheriff sought to collect the remaining debt by auctioning some of the corporation's piers and river lands. Property estimated to be worth over a million dollars was knocked down to Lowber for $178,000.[83] As expected, as soon as Haws took office the next month the city redeemed both the portraits and the land, and the whole shameful episode was at an end.[84]

Overshadowed later by the gaudy excesses of the Tweed years, the Lowber affair has been all but forgotten, but it had a profound effect on the government of New York City and on the Law Department in particular. It defined judicially who the corporation was, a definition that endured

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[82] Times, Oct. 14, 1858, p. 4.

[83] Ibid., Dec. 25, 1858, p. 4.

[84] On January 20, 1859, at the direction of the comptroller, the Board of Aldermen put $235,000 into the budget to pay the judgment. See Board of Aldermen, Proceedings, vol. 73, pp. 262-63.

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even as it was being ignored. The corporation counsel was now understood to be charged with safeguarding the interests of the commonalty, not simply with acting as lawyer for the current officeholders. Unfortunately, as the Lowber affair showed only too painfully, it was an ideal made meaningless by the realities of government under the 1849 charter, even as amended in 1857.

The framers of the 1849 charter had expected to make the corporation counsel independent by making him answerable only to the electorate. They failed to anticipate that professional politicians would capture the election process and thus the electorate. With the corporation counsel responsible not so much to the voters as to the party bosses who put him on the ticket, the office became more political rather than less. Fernando Wood and the Tammany executive committee put Busteed in office, and it would have taken a conscious act of betrayal on his part to have gone against their wishes. When it came to recognizing corruption, party regularity produced a terrible case of self-inflicted blindness on the part of the corporation counsel.

Between the Lowber case and a growing string of losses in other cases, by the end of Busteed's term public confidence was eroding not only in him but in his very office. "As a legal protection of the interests of the city, it is a humbug," a disgusted New York Herald declared, "because

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the Corporation never pay the slightest attention to his opinions, nor is the public purse saved a dollar in the year by his services."[85] The Times flayed Busteed mercilessly for his poor record in defending claims against the city, a record that had grown steadily worse throughout his term.[86] In fairness to Busteed, the fault was not his alone. The Common Council refused to allow him the assistants he needed to deal with the crushing caseload in the city's district courts, in large part because many of its members were guilty of colluding with plaintiffs in the same suits. When served with notice of a suit, the mayor and aldermen had a disconcerting habit of "losing" or "forgetting" the papers until it was too late for the corporation counsel to enter a defense; Busteed was furious each time this happened but, lacking any political power of his own, he had no way to discipline them when it did.

To an outside observer, however, it was easy to blame the corporation counsel for the situation. "It is one mass of fraud and robbery from A to Z," the Times reported indignantly. "There is fraud in every step of it; every transaction reeks with official collusion or neglect." Enumerating one losing case after another, the editors knew whom to blame. A street inspector won $526 on a bogus

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[85]Herald, Nov. 11, 1859, p. 4.

[86]Times, Sept. 6, 1859, p. 4.

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claim in Marine Court for work he had not done. "The Marine Court had no jurisdiction in this case, but what cared the Corporation Counsel?" asked the Times. A contractor, awarded pay for a job done by another and already paid for, "walked off with his booty, blessing God and the Corporation Counsel." John Dunning won a claim for inspecting a street that did not yet exist. "The Corporation Counsel knew this; but could a man so kind-hearted stand between a poor creature like Dunning and a beggarly $370 from our plethoric civic Treasury?" In case after case the Times found the same attitude prevailing: "'Take it,' said the Corporation Counsel generously. 'My client is rich, and another judgment by default can't hurt her.'"[87]

Busteed's political hopes, so high when he accepted the office, were instead destroyed by it. After 1859 he never again held political office in New York. When he volunteered for the Union forces in 1861 and Lincoln tried to make him a brigadier-general, political enemies shot down the commission. When he finally got a long-coveted seat on the bench, it was a thankless post as a federal district judge in Reconstruction-era Alabama. But the years had changed Busteed; perhaps he had learned something from his experiences as corporation counsel. At any rate,

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[87] Ibid.

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he ran his court with a firm hand and a reckless disregard for personal political consequences. He upheld the law and the Constitution with a firmness and impartiality that earned him enemies on both sides, alienating the military by upholding habeas corpus and the ex-Confederates by enforcing the 14th and 15th Amendments. It must have been with a wry sense of deja vu that he opened his newspaper one morning in Mobile to learn that he was "the most obnoxious man in all the state."[88]

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[88]National Cyclopaedia, vol. 4, p. 531; Times, Sept. 16, 1898, p. 7 [obituary]. For the virulence of the feeling against him, see John W. DuBose, Alabama's Tragic Decade, 1865-1874 (Birmingham: Southern Publishing Company, 1940), pp. 95, 255, 259. Busteed returned to New York City in 1874 and resumed the practice of criminal law, dropping out of politics entirely.

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CHAPTER VIII

BRONSON, DEVELIN, AND THE DECLINE OF THE OFFICE

Fernando Wood was defeated for re-election in December of 1857 by a "fusion" candidate, businessman Daniel Tiemann. Tiemann was a disappointment as a reform mayor; his self-proclaimed crusade against corruption was thwarted by a hostile Common Council, an indifferent corporation counsel, a lethargic municipal bureaucracy, and his own lack of a strong political organization. By 1859 the voters were disillusioned with non-partisanship and ready to return to the party fold--the only question being, which one? Angry at the back-stabbing against him in Tammany Hall, Wood had taken his forces and left to form a rival Democratic organization, the Mozart Hall Democracy. In 1859 both organizations claimed to be the "regular" Democratic party and nominated rival slates of municipal candidates. The Republican party disparaged both and claimed to be the only national political party worthy of the name. For an off-year election, the 1859 contest began

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generating considerable interest.[1]

To the surprise of absolutely no one, Mozart Hall chose Wood as its candidate for mayor. Wood had one big obstacle to overcome, however--the distrust that many voters felt toward him. He dealt with this problem in ingenious fashion by putting Greene C. Bronson on the ticket with him as corporation counsel. Bronson was a state political figure with an unblemished reputation for honesty and integrity. He had served seven years as state attorney-general and eleven years as a Supreme Court justice; elevated to chief justice in 1845, he was named one of the original members of the Court of Appeals in 1847 and served on its bench the next four years. Bronson was highly regarded for his work in court, with his judicial opinions considered "remarkable for their great vigor and originality, a strong sense of right and justice, and, in many instances, for elaborate research."[2] After retiring from the court, he served briefly as collector of the Port of New York and made an unsuccessful run for the governor's office in 1855.[3]

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[1]Mushkat, Tammany Hall, pp. 309-17; Chalmers, "Tammany Hall, Fernando Wood, and the Struggle to Control New York City," pp. 7-24, and Mushkat, Fernando Wood, pp. 75-97.

[2]"Memorial of Greene C. Bronson," 40 Barbour (1863), Appendix, pp. 663-68; quoted at 667.

[3]McAdam, Bench and Bar, vol. 1, p. 280; National Cyclopaedia, vol. 3, p. 387; Irving Browne, "The New York Court of Appeals, Part I," The Green Bag, vol. 2 (1890), pp. 277-91, at 279-80; Mushkat, Tammany, pp. 274 and 277, and Roy Franklin Nichols, Franklin Pierce: Young Hickory of the Granite Hills (Philadelphia: University of Pennsylvania Press, 1931), pp. 255, 284-89.

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Few seem to have questioned why "an honest man, an honest lawyer, and an honest judge" should attach himself to such a scoundrel as Wood, but the answer is quite simple: Bronson was seventy years old, in failing health, and broke.[4] He had never amassed much on his salary as a justice (judicial salaries were notoriously low; the Court of Appeals paid only $2,500 a year) and he had lost even that in the crash of 1857. In 1859 Bronson was drowning in debt, and Wood tossed him a lifeline. What private understanding they came to when he grasped it is anyone's guess.[5]

It was at any rate a stroke of brilliance on Wood's part. "The nomination of Hon. Greene C. Bronson as Corporation Counsel on the Wood ticket, and his acceptance of the nomination, gives to Mr. Wood's movement a consistency and respectability in the public estimation which it had not before possessed," declared the Tribune.[6] As Wood's own political organ, the Daily News, explained to the voters, "It would secure the services of the first lawyer of the State . . . and place in the most responsible legal

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[4]Quotation from "Memorial," 40 Barbour, Appendix, p. 664.

[5]For the fiscal straits in which the state's highest court was kept, see Francis Bergan, The History of the New York Court of Appeals, 1847-1932 (New York: Columbia University Press, 1985), pp. 45-46.

[6]Tribune, no date given, quoted approvingly in the Times, Nov. 26, 1849, p. 4.

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municipal office a man of the first ability, of unflinching honesty, and unimpeachable integrity."[7]

The luster that Bronson gave Wood's ticket made it incumbent upon Tammany to spruce up its own slate of candidates. The leadership was interested primarily in winning control of the Common Council and the departments of city government; they were the key to the contracts and patronage jobs that were the lifeblood of the Hall. To elect this slate, the organization needed a respectable "front man" running as mayor, and this it found--after considerable searching--in the person of former mayor William F. Havemeyer. "Every decent man refused to have anything to do with them, and even Havemeyer at first declined 'the honor,'" reported the Herald. But after "smelling around" the Hall and deciding that he could stand enforced association with its denizens, Havemeyer agreed to accept, on one condition: he had to have his trusted friend, Samuel Jones Tilden, as corporation counsel. The demand put the party bosses in an awkward spot because they had already promised the nomination to a popular Irish lawyer, John E. Develin; but Develin was a loyal party man, and he graciously agreed to wait his turn until the next election.[8]

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[7]Daily News, Nov. 25, 1859, p. 4.

[8]The machinations behind the selection of Havemeyer and Tilden are detailed in the Herald, Nov. 29, 1859, p. 4; Tribune, Dec. 3, 1859, p. 4, and Evening Post, nov. 21, 1859, p. 2. According to Chalmers [in his "Tammany Hall, Fernando Wood, and the Struggle to Control New York York City," pp. 27-28], in a sense Havemeyer was forced on Tammany; , the powerful "Fifth Avenue Democrats," of which he was a member,

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The 45-year-old Tilden did not have quite the stature of Bronson, but he was still a well-known and respected public figure. Related through his mother to the wealthy Jones family, he was one of the city's leading corporation lawyers and civic leaders, and for some years had played a prominent role in state and local politics. He had been corporation attorney during 1843 and 1844, had failed in a bid for the attorney-general's office in 1855, and was interested in the corporation counsel's office as a springboard to higher office. Active in the reform wing of the party, he was a candidate well calculated to reassure those who had reservations about voting for Tammany. Even such an old foe of the Hall as the New York Times was impressed by his choice. "Mr. Tilden is an able lawyer, has had large experience in public business, is of unquestioned integrity . . . and is certain to second Mayor Havemeyer in every effort at City reform," the newspaper declared. "For the sake of the City, we hope he will be elected."[9]

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announced they would withhold their campaign contributions unless the Hall nominated a mayoral candidate acceptable to them.

[9]Times, Nov. 24, 1859, p. 4. For a scholarly biography of Tilden, see Alexander C. Flick, Samuel Jones Tilden: A Study in Political Sagacity (Port Washington, N. Y.: Ira J. Friedman, 1939), and for his writings, John Bigelow, ed., Letters and Memorials of Samuel J. Tilden, 2 vols. (New York: Harper Brothers, 1908). Tilden's papers (those that survived winnowing by his conservator Bigelow) are in the New York Public Library.

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In contrast, the Republicans made a major blunder. They nominated a strong mayoral candidate--George P. Opdyke, a wealthy banker and civic leader--but paired him with an utterly unknown young lawyer, Solomon Hull, as corporation counsel. In the weeks before the election the city buzzed with one question: Who was Solomon Hull? Tammany littered the streets with campaign fliers, similar in appearance to wanted posters, headlined "Who is Solomon Hull?" At a huge Tammany rally, speaker John Van Buren repeatedly brought gales of laughter by invoking his name. "Perhaps there may be somebody present who knows Solomon Hull," he drawled. "I am sure I do not. I have asked a quantity of lawyers of this City--Republicans and others--who is Solomon Hull? and I never could find but one who knew him."[10] The newspapers knew little more than the public. According to the Times, he had been chosen on the recommendation of the wealthy state senator Samuel Wadsworth of Geneseo, for whom he had done legal work.[11] The Tribune, which generally supported the Republican ticket, had little more knowledge and gave him only the limpest of endorsements, reporting that he had lived five

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[10]Times, Dec. 5, 1859, p. 1.

[11]Ibid., Dec. 3, 1859, p. 5.

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or six years in the city and had an "extensive business" with several mercantile houses.[12]

The amount of ink devoted by the press to the race for corporation counsel--almost equal to that given to the mayoral candidates--shows more clearly than anything else how important the office had become. "Neither the Mayoralty nor the Comptrollership are offices of more importance than this," commented the Times. "Nearly every effort to swindle the treasury through favoritism, jobbing and the miscellaneous chicanery of the contracting interest, can be arrested and thwarted by vigilant and vigorous action on the part of the Corporation Counsel."[13] The Tribune declared that it was "of the highest importance" that a reliable Corporation Council be elected and called for "a man who will not sell his opinions in behalf of any Aldermanic plunder."[14] After a great deal of soul-searching, the Post came out editorially for Opdyke but urged its readers to split their ticket rather than put an untried man like Hull in such an important post.[15]

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[12]Tribune, Nov. 30, 1859, p. 4.

[13]Times, Nov. 24, 1859, p. 4.

[14]Tribune, Dec. 3, 1859, p. 4.

[15]Post, Nov. 30, 1859, p. 2, suggesting Tilden as an alternative. The only discordant note was struck by the Herald, which dismissed the office contemptuously as "only a rich placer to be bestowed upon some individual who is certain to dig a hundred thousand dollars worth of gold out of it in one term" [Nov. 21, 1859, p. 4].

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The election was a strictly municipal one, with no state or national races on the ballot, but the passions raised by John Brown's raid in October spilled over into the local contest. Most New Yorkers were apprehensive of anything that threatened to upset the delicate balance of peace between the sections, and to an extent their votes were influenced by this concern. Opdyke and Hull suffered from their ties with Seward and the Republican Party, and Havemeyer and Tilden were equally suspect because of their past support of the Free Soil party. In contrast, Wood and Bronson had long supported compromise with the South; Wood had fought vigorously against the free soil faction in the state party, and Bronson had run for governor on the "Hard," or a pro-slavery ticket. Voters who wanted to demonstrate their abhorrence of the type of fanaticism preached by Brown had no place to go except to Wood and Bronson.[16]

Among them were the Irish, who had a special loathing for the Yankee abolitionists and their Republican allies. They were additionally unhappy with Tammany in 1859 because its leaders had doublecrossed them and, instead of nominat-

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[16]The Daily News asserted that "it is indeed a National question that is at issue" [Nov. 29, 1859, p. 4], and the Herald called on voters to choose between "conservatism, union, law and order on one side, and black Republicanism, disunion, sedition, treason, and insurrection on the other" [Dec. 6, 1859, p. 4]. Not so, protested the Post: "The City of New York is its own world, [and] its own interests are too immense to be sacrificed to party prejudices or doubtful schemes of party policy" [Nov. 23, 1859, p. 2].

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ing William Kennedy as mayor and John Develin as corporation counsel as they had been led to believe, had kowtowed to the Fifth Avenue Democrats and nominated Havemeyer and Tilden instead. It might seem that Mozart had scarcely treated them better; Wood was no Irishman, and Bronson's lineage was pure New England Puritan. But Wood had long displayed a special friendship for the Irish, and they understood his necessity for nominating Bronson. He picked up endorsements from the Irish-American and most of the leading Irish politicians, with the result that the "Bloody Ould Sixth" and other immigrant wards turned out with huge votes for "Fernandy" and Mozart Hall.[17]

As a result of all these factors, Wood and Bronson swept to an easy victory in the three-way race.[18] Exactly how much Bronson's presence on the Mozart ticket, or Develin's absence from the Tammany ticket, contributed to the result is difficult to assess, but both the Post and the Tribune thought it considerable. Opdyke was hurt by

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[17]The Irish-American denounced the Tammany ticket as one that "might suit the role of Tammany managers, but . . . will not stand before the people" [quoted in Mushkat, Fernando Wood, p. 92], and in its issue of Nov. 26, took umbrage at the fact that the only citywide nomination Tammany had given the Irish was governor of the Almshouse [p. 4]. For the role of the Irish in this election in general, see Chalmers, "Tammany Hall, Fernando Wood, and the Struggle to Control New York City," p. 32.

[18]Wood drew 29,940 votes to Havemeyer's 26,913 and Opdyke's 21,417. Bronson ran ahead of the ticket with 33,202 votes, far more than Tilden's 23,979 or Hull's 21,651. See Manual of the Corporation (186), pp. 449 and 461.

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his selection of an unknown as a running mate, they noted, and Havemeyer by his choice of one who was objectionable to many voters for his radicalism on the slavery issue.[19] Now, the Post mourned, the city was saddled with the demagogue Wood. "Yet there is hope in the worst fortunes," its editors concluded. "The gentleman chosen Corporation Counsel with him, Judge Bronson, is a man of capacity and character, and will prove a check, to some extent, upon any bad designs that Wood may have in his head."[20]

The Post was overly optimistic. "The voters of this metropolis succeeded on Tuesday in electing the vilest and most rascally Corporation we have ever had," the Herald reported soberly. In addition to Wood ("a notorious corruptionist"), the new government included a Tammany Common Council which boasted among its members three indicted criminals--one charged with murder, another with stealing public funds, and a third already sentenced to the penetentiary for felonious assault.[21] And this was only the most visible part of the city's government; hidden from view, scattered in rooms in out-of-the-way reaches of the commercial district, were departments, agencies, and commissions burdened by party hacks, petty crooks, and incom-

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[19]Tribune and Post, both Dec. 7, 1859, p. 4.

[20]Ibid.

[21]Herald, Dec. 8, 1859, p. 4.

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petents. And, operating in deliberate obscurity since 1857, William Tweed had completed his takeover of the new and powerful--but little known or understood--Board of Supervisors.

It was Tweed, in fact, as much as Wood who was now the man to watch. He had grasped the utility of the Board of Supervisors, with its control over city spending, before anyone else had, and by 1859 he had the votes of seven of its twelve members and was running from its chambers what would later be known as the "Supervisors' Ring." Much of the Ring's time was involved with penny-ante schemes--taking kickbacks on contracts and selling $5 benches to the city for $600--but by the time Bronson took office Tweed was itching to go after bigger and richer game.[22]

He was also quietly accumulating a great deal of political power, having risen from leader of the Seventh Ward to chairman of the Democratic County Central Committee, and he had begun to surround himself with the cast of characters who would later become famous as the central figures of the Tweed Ring: Peter B. ("Brains") Sweeny, Richard B. ("Slippery Dick") Connolly, and, somewhat later, A. Oakey ("The Elegant Oakey") Hall. Using his power as county chairman, he had already eased Sweeny into the district attorney's office and Connolly into the post of

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[22]Alexander B. Callow, Jr., The Tweed Ring (New York: Oxford University Press, 1966), pp. 21-24.

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county clerk, and in the fall of 1860 he would put his good friend, recorder George Barnard, onto the bench of the Supreme Court. Barnard had been a gold prospector, gambling shill, and minstrel showman, and, according to his brother, "knew about as much law as a yellow dog." This did not stop Barnard from gleefully ascending to the bench or, somewhat later, swearing in Tweed as a member of the bar.[23]

Keeping such a varied and unsavory crew in check would have been a challenge for anyone, but for Bronson it was especially daunting. For one thing, he was physically not up to the task; he had been too ill even to campaign during the election, and his health was getting worse instead of better.[24] For another, he was accustomed to being a judge and to issuing orders that had, by law, to be obeyed. He had no experience in heading an executive department of municipal government and having to wheedle, threaten, and horse-trade to get the cooperation of his fellow officers. And, for yet another reason, he--like Busteed--owed his office and a good part of his soul to Fernando Wood. He was not going to go out of his way to make trouble for the man who had put him in office and rescued him from ruin.

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[23]Ibid., pp. 24, 31, 135-38 [quoted at 136]. Tweed's law practice was a sham by which he charged hefty "retaining fees" to businessmen for his political favors; Callow notes, at p. 31, that the Erie Railroad paid Tweed over $100,000 for his political influence.

[24]Herald, Nov. 27, 1859, p. 1, and Times, Nov. 29, 1859, p. 1.

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Within the scope allowed him, however, he forged a creditable record as corporation counsel. When he came into office in January of 1860, he rescued it from the shambles into which it had fallen under Busteed. Appalled by the poor recordkeeping he found, he began for the first time a register of street openings and a catalogue of the Law Department library. He began the practice of keeping careful records not just of court actions but of letters written and received, titles examined, deeds prepared, and other office work. He mended fences with comptroller Robert Haws, who had had a sometimes testy relationship with Busteed, and kept a channel of communication open between the two offices. Bogus claims against the city became easier to spot and consequently harder to win.[25]

In fairness to his predecessor Busteed, it should be pointed out that not all this improvement was due to Bronson's efforts alone. Under pressure from citizens' groups, the legislature plugged some of the loopholes that had allowed fraudulent claims to flourish. For instance, a new law limited actions against the corporation to only three courts--Supreme, Superior, and Common Pleas--so that cases no longer popped up all over the city in the district courts. Another law gave the comptroller more oversight of

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[25]Most of these reforms are detailed in the Law Department's annual report, in Board of Aldermen, Documents (1861), no. 23, pp. 1-6. The catalogue of the library is published in full in ibid. (1862), pp. 45-50.

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claims and allowed him special counsel for contesting them. Largely as a result of these laws, in one year alone Bronson and Haws were able to gain reversal of ten judgments amounting to more than $650,000.[26]

Despite his many years of experience in the law, Bronson came into office with practically no experience as a trial lawyer. A history of a old New York law firm, one of whose founders was his chief assistant Henry H. Anderson, relates that Bronson "was at this time purely an office lawyer, never going into court. Mr. Anderson tried all the City cases and received a really tremendous training in trial work."[27] For the most part, Bronson did exactly as he had enjoyed doing as a justice on the Supreme Court and Court of Appeals: he wrote opinions. Reams and reams of opinions. Unlike Busteed, who had to be badgered into answering requests for opinions, Bronson delighted in being asked for advice and deluged the other officers of

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[26]See the corporation counsel's annual reports in Board of Aldermen, Documents (1860), no. 23; (1861), no. 23, and (1862), no. 18; also, the comptroller's report in ibid. (1860), no. 14, pp. 54 and 173.

[27]George Wellwood Murray, Murray, Aldrich & Webb: Random Jottings from a Long Memory, Part 1 in Histories of the Predecessor Firms of Milbank Tweed Hope & Webb (New York: Privately printed, 1937), pp. 7-8. Such concentrated experience proved invaluable to Anderson, who later became counsel to some of the wealthiest clients in the city, including two generations of Vanderbilts. The firm he founded--Anderson, Adams & Young--was a predecessor of the Murray firm, which in turn became a predecessor of today's Milbank Tweed.

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city government with long, finely crafted opinions on every conceivable topic.

Many involved complicated questions of contract law--whether, for instance, opening the lowest bid constituted "acceptance" (and was binding) or merely "offer" (and was not), and whether the city might accept "the most worthy" street-cleaning bid rather then the lowest.[28] He also held that a street assessment did not constitute a contract between the city and the lot owners; thus, the city was not guilty of breach of contract when, after paving the street poorly, it assessed the property owners again to repave it.[29] He wrote a complicated five-page opinion on tax law holding that the tax exemption for St. Luke's Hospital did not apply to the assessment levied against it for the construction of Central Park. Disagreeing with a previous opinion by Busteed, he decided that the hospital was not being taxed but simply required to pay for the enhanced

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[28]In the first instance, Bronson held that it did not become a binding contract until signed by the department head [Board of Councilmen, Proceedings, vol. 86, pp. 370-72]. In the second, he ruled that a statute authorizing the mayor and Common Council to use their own judgment in street-cleaning contracts overrode the general law requiring award to the lowest bidder [Board of Aldermen, Proceedings, vol. 81, pp. 236-239].

[29]Ibid., vol. 78, pp. 882-83. Bronson emphasized that he had reached this conclusion "upon the strict legal ground that there was no valuable consideration for the promise held out to the owners of real estate by the [assessment] ordinance, and not upon the ground that it is either expedient or moral for the Common Council to disregard its own ordinances" [p. 885].

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value of its property.[30] And in another long opinion, heavily documented with citations to case and statutory law, he untangled some of the seemingly conflicting responsibilities of the Common Council and the Board of Supervisors.[31] Altogether, in his three years in office Bronson wrote 262 formal opinions, bringing to most of them the same degree of intellectual rigor he had applied to his Court of Appeals rulings.[32]

In general, Bronson confined himself to the business at hand and did not meddle in the affairs of other officers of city government. He was essentially an ivory-tower corporation counsel, closeting himself in his office and composing finely crafted opinions while outside his door the corruptionists were taking over the city. During his term in office he sat by while Wood walked away, unmolested, with graft that has been estimated at $250,000 to $400,000.[33] He did nothing to interfere with the Hackley street-cleaning contract, a $279,000 plum bestowed on a

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[30] Ibid., vol. 77, pp. 468-72.

[31] Opinion dated Jan. 31, 1860, in Filed and Approved Papers of the Board of Aldermen (Law Department), Municipal Archives.

[32] See "Schedule H," covering his three-year record, in "Annual Report of the Corporation Counsel," in Board of Aldermen, Documents (1862), no. 18, p. 44. In the same time he--or, more accurately, Anderson and his other assistants--had argued 381 cases and had secured decisions in all but 70; the number not yet argued and thus still pending was not given.

[33] Lynch, "Boss" Tweed, p. 238; Myers, History of Tammany Hall, pp. 197-98, and Mushkat, Fernando Wood, pp. 120-22.

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favored contractor despite the existence of twenty-three lower bids.[34] Like most of his predecessors, Bronson took a narrow view of the responsibilities of his office, handling the city's legal business to the best of his ability and leaving judgment of its officers up to the voters.

On two occasions, however, he took a stand against the malefactors--not so much because he wanted to, but because he had furnished an opinion and was determined to stand by it. Both instances pitted him against Tweed, who was flexing his muscles and taking on increasingly larger schemes. The largest public works project at the time was the construction of Central Park, which since 1857 had been the exclusive domain of the state-appointed Central Park Commission. Hoping to get his hands on it, Tweed argued that it was a local park and thus belonged under control of the local Board of Supervisors, and, obedient to his wishes, the board began laying plans to assume control of the project and its millions of dollars in jobs and contracts.[35]

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[34]In fact, he helped to make it possible by furnishing, however reluctantly a favorable legal opinion. The opinion [already mentioned, in Board of Aldermen, Proceedings, vol. 81, pp. 236-239], was correct as a statement of the law; the legislature had indeed given the mayor and Common Council discretion to disregard a low bid for street-cleaning if they found another more in "the interest of the city." But this was a "judge-answer" rather than a "lawyer-answer"; rather than simply give a neutral statement of the law, he had a duty to help his client, the corporation, protect its interests within the workings of that law. In this instance, he might have pressed the mayor and Common Council to show that their decision complied with the requirement that it be "in the interest of the city."

[35]Board of Supervisors, Proceedings (1860), pp. 188-91.

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The scheme was stopped in its tracks, however, by an opinion Bronson sent the board at the request of one or two of its dissident members. In it he warned that the board was bound by the decision in Wood v. Draper regarding the legislature's right to create local offices; if the legislature wanted a state-appointed commission in charge of Central Park, then there was nothing the local Board of Supervisors could do about it. The supervisors were left with no doubt that Bronson's position was right, and that if they proceeded, the Central Park commissioners would take them to court and win. But his high-handed tone rankled with many of them, and they wondered aloud whether Bronson was their advocate or their adversary.[36]

Tweed then lowered his sights to the second-largest project on the horizon, the new City Hall authorized by the legislature in 1857. There had been several changes since the establishment of the original state-appointed commission. During Tiemann's reform administration the legislature had authorized the mayor to appoint the commissioners, and had empowered the Board of Supervisors to raise $250,000 for the project, the notion of paying for it by selling off part of the City Hall Park having proved universally popular. But the commission had made very little progress; its members had been unable to agree where to put

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[36]Ibid. The complete text of Bronson's opinion is given at pp. 190-91.

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the building, and the city--in the grip of a fiscal crisis after the Panic of 1857--had not raised the promised money. With the return of prosperity, however, the City Hall project was revived, and in 1861 the legislature authorized the Board of Supervisors to use a site behind the old City Hall and spend $50,000 on start-up costs.[37]

Tweed glimpsed an opening for himself in the fact that the 1861 law failed to make any mention of the City Hall Commission. Seizing on this omission, he argued that it meant that the legislature had transferred control of the project to the Board of Supervisors. It was a dubious argument, but it impressed his colleagues on the board enough that they appointed a special committee (composed, naturally enough, of Tweed and three of his friends) to let contracts and submit bills to the comptroller. The supervisors held a ground-breaking ceremony early in the fall of 1861, awarded two large contracts for materials, and sent the bills to comptroller Robert Haws.[38]

Suspicious of Tweed's part in the project, Haws defered paying the bills until he could obtain the advice of the corporation counsel. Who was in charge of the project, he

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[37]The complicated history of the project up to 1863 is given in the New York Daily Transcript [forerunner of the City Record], June 10, 1863, p. 1, and July 13, 1863, p. 2. See also Board of Aldermen, Documents (1857), no. 9, pp. 176-77, and New York, Laws (1857), ch. 318; (1858), ch. 318, and (1861), ch. 161.

[38]Board of Supervisors, Proceedings (1861), pp. 113, 200, 247, and 324.

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wanted to know--the City Hall Commission or the Board of Supervisors? It was a question with far-reaching implications. The commissioners, even though they were now locally appointed, would be bound by the terms of the law of 1857, whereas the supervisors would be free to define their responsibilities for themselves and to run the project however they saw fit.

It was one of the most important opinions Bronson had ever been called on to write, and he gave it even more than his customary thorough attention. In an opinion forwarded to the comptroller early in October, he explained that a statute could repeal another in one of two ways: either expressly, or by implication. The 1861 law had not stated an express intention to repeal the 1857 law, but had it done so implicitly? By failing to mention the existence of the City Hall Commission, had it transferred its responsibility to the one body it did mention, the Board of Supervisors? Bronson declared that it had not. The commission depended on the Board of Supervisors for its financing, and the law had simply authorized the Board of Supervisors to raise certain funds for its use. "The Supervisors have not the power to build," he concluded. "It should be done by the Commissioners under the Act of 1858."[39]

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[39]The text of this opinion in given in ibid., pp. 573-74.

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Bronson's opinion dashed Tweed's plans. He tried to go around Bronson and have the board retain its own counsel, only to discover that by law the supervisors could be represented only by the corporation counsel or someone acting under his authority.[40] The Board of Supervisors reluctantly turned the project back to the City Hall Commission, where it languished during a political deadlock engineered by Tweed; under his orders, the Common Council simply refused to confirm the mayor's appointees. In the meantime, Tweed began using his influence in Albany to secure legislation that increased the authority of the Board of Supervisors over public works projects in general. In 1862, with a new mayor, Republican George P. Opdyke, in office, Tweed renewed his campaign to recover the project--which by now was being seen not as a new City Hall but as an "annex" to house courtrooms and other offices for which there was no room in City Hall.[41]

Late that year the Board of Supervisors passed a resolution formally returning the project to themselves, and Opdyke, who was unfamiliar with the matter, turned to Bronson for advice. Bronson explained the situation to him and furnished a re-statement of his earlier opinion, with the result that Opdyke vetoed the resolution and returned

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[40]New York, Laws (1857), ch. 590.

[41]Board of Supervisors, Proceedings (1861), pp. 575, 583-84, 636-37.

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it with a sharp rebuke.[42] Tweed interrupted the reading of the message to demand that the board pass the resolution over the mayor's veto, but the supervisors hesitated, concerned about their shaky legal position. The board engaged in a sharp debate for several weeks, in the course of which a notable exchange took place between Tweed and supervisor Elijah F. Purdy. This exchange is worth quoting at length because of its revelation of the attitude of Tweed, and many other officers as well, toward the office of corporation counsel.

Purdy: Does the gentleman pay any attention to the opinion of the legal advisor of the Board?

Tweed: I would state as a member of the legal profession that I am satisfied that the position taken by him is not tenable. I have not only consulted with him but with others . . . and I am perfectly satisfied myself that the resolution adopted by us is proper and correct.

Purdy: In case of a difference of opinion as to the legality of a measure, does not the law require us to ascertain and obtain the legal opinion of the adviser of this Board? and after having obtained that opinion, should we set up our opinions in opposition to it? I do not believe the action taken by the Mayor is correct by any means; but we must comply with the law.

Tweed: I would reply that the Legislature probably supposed that we would desire to consult the legal adviser of this Board. That has been done and his opinion has been received. It does not coincide with the opinion of a majority of the members present. . . . His experience is not to be supposed to be as extensive as ours, for every three years the legal adviser of the board is changed. . . . We

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[42] Ibid. (1862), pp. 656-61.

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> desire to go at times a great deal farther than the legal adviser of this board.[43]

Tweed added, somewhat later in this exchange, "I believe at the present time that the legal adviser has been the least consulted, and when consulted the least obeyed, of any legal gentleman we have employed."[44]

Tweed was referring to Bronson, but the office was already in the process of changing hands. Because of his increasingly poor health (he would die the following year), Bronson declined to run again, and the field was thrown open to a new crop of candidates. It was an election, however, that attracted very little interest. There were no state or national contests on the ballot, the voters were distracted by the Civil War, and the Democrats seemed certain to win anyway, having settled their differences and reunited under the Tammany banner. "Our citizens do not seem to be aware that we are to have an election for City officers within a month," the Times remarked. "There seems to be an absolute lull in the political field."[45]

For corporation counsel the Democrats nominated John Develin, who had stepped aside in 1859 for Bronson, and the Republicans chose Alexander W. Bradford, judge of the sur-

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[43]Daily Transcript, Jan. 20, 1863, p. 2.

[44]Ibid.

[45]Times, Nov. 11, 1862, p. 4.

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rogate's court.[46] The Times did not bother to endorse either one, describing them as "two good men, the election of either of whom will insure to the City the faithful service of a capable officer."[47] Although it had nothing but scorn for the local Democratic party, the Herald endorsed Develin over Bradford, believing him the better qualified, and urged all thinking Republicans to do the same.[48] Of the city's three most influential newspapers, only the Tribune stuck by the Republicans and endorsed Bradford, but could think of little to say about him other than that he "enjoyed the esteem of the best men of New York."[49] The results of the election were a foregone conclusion. Develin was elected, along with a Democratic comptroller, Matthew Brennan, and a scattering of aldermen, councilmen, and minor officials.[50]

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[46]Ibid., Dec. 1, 1862, p. 2, and Herald, Nov. 23, 1862, p. 7. Develin was popular among the Irish emigrant community even though his own forebears had been in this country since 1659. Born in 1821 in New York City, he was a graduate of Georgetown University and had distinguished himself as one of the city's top corporation lawyers. Active in Tammany politics, he had served in the legislature and as counsel for the Commissioners of Emigration, and was considered to have bright prospects for higher office. A detailed sketch of his life is given in the New York World, Feb. 23, 1888, p. 8.

[47]Times, Dec. 1, 1862, p. 2.

[48]Herald, Nov. 26, 1862, p. 4.

[49]Tribune, Nov. 27, 1862, p. 4. The previous day the Tribune had admitted that both Bradford and Develin were worthy of support [p. 2].

[50]Ibid., Dec. 3, 1862, p. 4; Herald, Dec. 4, 1862, p. 4, and Times, Dec. 3, 1862, p. 8. The 1857 charter had provided that half of the aldermen and councilmen would be elected in one year and half in another.

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The Tribune dismissed the election as "the most tame and uninteresting in the history of the City."[51] Yet it, as well as the city's other newspapers, had missed the real story, the back-stabbing and deal-making for places in the Law Department. As part of the bargain to bring Mozart back into the Tammany fold, Wood was given a nomination to Congress and the right to name candidates for certain city offices, among them the corporation counsel. Wood, always one to make the most of his opportunities, began peddling nominations to the highest bidders. He sold the office of corporation counsel to John K. Hackett, a lawyer of somewhat dubious repute, and then turned around and re-sold it to Develin, who had the backing of many of Tammany's wealthiest contributors and was able to offer him more money. Hackett was understandably angry, but he was mollified when Wood offered to make him corporation attorney. He could do so, Wood explained, because as part of his deal with Develin, he had been given all the patronage in the Law Department. Grudgingly, Hackett accepted the deal, and paid Wood the price he demanded for the office: $5,000 in cash, his first year's salary, and half the perquisites of office. Then, only days later, he learned that Wood had

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[51]Tribune, Dec. 3, 1862, p. 4.

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doublecrossed him again and had re-sold the office to lawyer N. Hill Fowler.[52]

At this point Hackett lost his temper, seized a revolver, and burst into Wood's house. Waving the pistol before an ashen-faced Wood, he reminded him of the "deal" they had made, in the presence of witnesses, in a smoke-filled hotel room: "On a certain night in a room in the Astor House, were four gentlemen: Mr. D., Mr._____, Mr.____, and yourself. One of the four is a scoundrel, a rascal, a perjured villain and a hound. It is not Mr. D., or Mr.____, or Mr._____. Who it is, I leave to you to imagine."[53]

Although the story became considerably embellished in its telling and re-telling, it is more than simply an entertaining yarn about one of the "characters" of the New York of this era. The episode tells a great deal about the state of the Law Department at the time. Both the office of corporation counsel and the lesser positions in the department had become lucrative enough to be sold and traded like commodities--in a sense, not so much positions of public trust as part of the stock in trade of the city's

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[52]The story did not come out until nine years later when Fowler testified to it in court; see the Herald, May 20, 1871, p. 5. Part of the testimony is also given in Werner, Tammany Hall, p. 81.

[53]The story, which is at least loosely based on an actual event, was published in the anti-Wood tract, A Condensed Biography of a Candidate for Speaker: Fernando Wood, His Forgeries and Other Crimes (New York, 1867), from which it had been reproduced in Werner's Tammany Hall, at p. 30.

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political bosses. No matter how honest and competent an aspiring corporation counsel might be, he could not become corporation counsel without compromising that honesty and competence; and, for the most part, he had to accept an office staff chosen for him by others, with the chief criteria being not ability in the law but ability to pay for the office. Hardly surprisingly, the corporation counsel found it difficult to hold himself aloof from the pervasive corruption around him, and--also hardly surprisingly--the performance of the Law Department suffered as a result.

Develin's record in office is a perfect example. His first test came almost immediately when Tweed and the Board of Supervisors resumed their attempt to take over the City Hall project--or, it was now being called, the Court House project. Tweed and his colleagues conferred with Develin several times in the first few months of 1863, and on June 4 Develin furnished them with the opinion they needed. This opinion may or may not have been part of the payment for his office, but it is almost asking too much to suppose that it was not. In this long opinion, rambling almost to the point of incoherence, Develin recited the tangled history of the controversy and purported to re-examine the question "in light of subsequent legislation and court cases." In particular, he examined whether an act of the 1863 legislature authorizing the Board of Supervisors to

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erect "local buildings" superseded the act of 1857 authorizing the City Hall Commission to erect the new City Hall. This act, like the one Bronson had examined previously, did not expressly repeal the authority granted the City Hall Commission--but did it do so by implication?

Unlike Bronson, Develin held that it did. In a concluding sentence, typical of the tortured syntax of the entire opinion, he declared:.

> The Act of 1863 therefore being in my judgment constitutional and in thorough inconsistency with such provisions of the Act of 1858 [amending that of 1857] as authorizing the Commissioners to direct and superintend the erection of a County Court House, repeals by implication the last-named provisions, and the new Court-House should be erected by the Supervisors of the County and not by the Commissioners under the Act of 1858.[54]

In a notable reversal of attitude toward following the advice of counsel, the supervisors forwarded Develin's opinion to the mayor with a note piously urging that he "imitate the example of the Board of Supervisors and yield his personal opinions to those of the legal adviser of this Board and Corporation."[55] Opdyke was not amused; he returned it with a note of his own, notifying the board that he would go to court before accepting such advice.

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[54]Daily Transcript, June 10, 1863, p. 1, in a report covering the recent activities of the board on the matter and giving the full text of Develin's opinion.

[55]Ibid., July 25, 1863, p. 1.

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The supervisors professed themselves to be scandalized by the mayor's attitude. "For him to set himself up in defiance of the legal adviser of this Board and Counsel of the Corporation and other eminent legal advisers, I say is too much," one member marvelled.[56]

The controversy seemed headed for a long court fight. Opdyke refused to sign the first warrants submitted to him for work on the project, and on June 25 Develin went before a judge in the Special Term of the Supreme Court and obtained a mandamus ordering the mayor to honor the warrants. It was an action Opdyke welcomed, intending to use it as a test case and carry it all the way to the Court of Appeals. Retaining his own counsel, he appealed the order to the General Term of the court, the next step in the appeals process, and prepared for a long battle. The General Term, which was packed with Tweed judges, seconded Develin's opinion and upheld the Board of Supervisors.[57]

The timing of the case was unfortunate, for it came just as the mayor was distracted by one of the most ghastly events in the city's history. The court handed down its ruling on Saturday, July 11--the first day of military conscription for the Union Army--and on Monday the great Draft

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[56]Ibid.

[57]For an account of the case [People ex rel. Tucker v. Opdyke], see ibid. July 6, 1863, p. 2; the opinion of the court is printed in the July 13 issue at p. 2.

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Riots of 1863 broke out. For the remaining few months of his term, which expired at the end of the year, Opdyke was preoccupied with governing a city barely pulled back from the brink of anarchy, and with coping with a flood of damage claims filed against the city. Any thoughts he gave to the controversy over the Court House must have been fleeting, for he never followed through with his plans to carry the case to the Court of Appeals.[58]

While he was thus distracted, Tweed and the Board of Supervisors bided their time and waited for the election of a mayor who would be more congenial to their plan. They did not get the man they wanted, fellow supervisor Francis Boole, but the mayor who was elected in December of 1863--C. Godfrey Gunther, candidate of the "McKeon wing" of the party--served their purpose just as well.[59] He was new to the controversy, and as far as he was concerned, the decision of the General Term had settled the matter. The Board of Supervisors assumed control of construction of the Court

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[58]The riot was one of the most serious urban insurrections in American history, resulting in at least 108 deaths, countless wounded, and extensive property damage. For a scholarly account of the riot and its causes, see Adrian Cook, Armies of the Streets: The New York City Draft Riots of 1863 (Lexington, Ky: University Press of Kentucky, 1974).

[59]In his Tammany, Mushkat describes the faction as "an odd collection of anti-Wood Peace Democrats, reform-minded businessmen, independent Irishmen, and disappointed office-seekers [who] coalesced around John McKeon's leadership" [p. 353]. For the next dozen years or so, the "McKeon Democracy" would be a factor to be reckoned with in local Democratic politics.

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House in 1864, and the Tweed Ring was launched onto its glory days. "Of all the Ring's achievements in what could be called graftsmanship, this yielded over $9 million in graft," writes Alexander Callow. "It was the Tweed Ring's masterpiece."[60]

To a great extent, the Draft Riots also monopolized the attention of the corporation counsel's office, which found itself defending hundreds of claims for damages against the corporation. New York City was no stranger to civil disorder, suffering sixteen major riots between 1834 and 1874, including the bloody Astor Place Riot. The rural members of the state legislature tended to pin part of the blame for this urban unrest on the leaders of the city's government, and in 1855 they passed a law aimed at forcing some sense of responsibility on them. Chapter 253 of the Laws of 1855, "An Act for Compensating Parties Whose Property May be Destroyed in Consequence of Mobs and Riots," broke new ground by making the corporation of New York City liable for damages done by rioters. The law attracted little attention at the time, but as the smoke cleared in July of 1863, its implications began to dawn on the mayor, the Common Council, and the corporation counsel: the city

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[60]Callow, The Tweed Ring, p. 197. For an account of the graft involved in its construction, see ibid., pp. 198-206.

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faced potentially millions of dollars in claims against it.[61]

After consulting with Develin, the mayor and the Board of Supervisors (who would have to raise the money to pay the claims) decided to contest the law of 1855. In retrospect, it was probably a bad decision, for it forced an issue before the court for adjudication that would have better been left alone. By this time the New York courts had given the legislature a free hand to intervene as it saw fit in the city's governmental affairs, but it was still assumed that there was a line drawn somewhere that protected its corporate property, or "private estate," from the reach of the legislature. That is, the legislature might dictate how the municipal government should run its affairs, but it could not step in and deprive it of any of its corporate real estate. It was a narrow line, but an important one; as long as the city had a private estate, it still had a sphere free from legislative interference.

It was on this principle that the corporation counsel chose to stand in challenging the law of 1855. The outside counsel that he chose to try the case in court, John Hackett and William Fullerton, argued almost their entire case on the fact that the law operated to deprive the city of its private estate. They based their argument on the

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[61]Cook, Armies of the Streets, pp. 18, 176, 193-94, 276.

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grounds that the city had been given this private estate in its colonial charter, which constituted a compact, or contract, with the sovereign government. The state, having succeeded to this contract and having pledged to honor all royal grants of property, could not now breach that contract; it could not take private property vested in the city (the funds in its treasury, as well as real estate that might well have to be sold to raise these funds) and award it to persons who had suffered damage in the riots. To do so would amount to abrogating the original grant itself, which the state's own constitution forbade it to do.[62]

Counsel for the plaintiffs argued otherwise. In their mind, the legal being known as the "Mayor, Aldermen and Commonalty" was a strictly public corporation and "every dollar of its property is public property." The corporation was only a trustee, created for specific purposes defined by the legislature and having no powers or rights of its own, except the duty to execute that trust. Its only claim to the property of which it was a trustee was that it should be "appropriated by the legislature" for purposes of the public good. And by whom were these purposes to be judged, they asked: "By the corporation alone, the creature, or are they to be defined and specified by

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[62]Darlington v. Mayor, 31 New York 164, 166 (1865).

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the Supreme power?" Clearly, they concluded, by the latter.[63]

Justice Hiram Denio, writing for the court's majority, agreed with the plaintiffs. The policy on which the 1855 law was based, he wrote, was to make good at public expense the losses of those who had their property damaged by "acts of lawless violence of a particular kind which it is the general duty of the government to prevent, and to make it in the interest of every person liable to contribute to the public expense to discourage lawlessness and violence."[64] Was taking such public funds, though, a taking of property for public use without compensation? No more so, he ruled, than taking them to build streets and bridges or to support the poor. What about the claim that New York City was a corporation, with a private estate free from state interference? Its corporate status conferred no special distinction on it, Denio replied. And as for its private estate, this property was held--as the plaintiffs had argued--solely for public purposes; while vested in the corporation for technical reasons and for convenience, it was "not thereby shielded from the control of the legislature as the supreme law-making power of the state."[65]

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[63]Cephas Brainerd and James S. Stern, counsel, in ibid., at 182-83.

[64]Ibid., at 187.

[65]Ibid., at 192-93.

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The Darlington case was the final blow to any freedom the city claimed against interference by the state legislature. The earlier distinction, in such cases as Bailey v. Mayor, between its public, governmental side and its private, property-owning side had been rendered meaningless; the city could no longer shield itself from interference by claiming that a certain activity came under the "proprietary" side of its personality. The legislature could intervene as it saw fit in either the city's government or its property, or in both at the same time, and the city was powerless to prevent it. Darlington was, in the words of Hendrik Hartog, the "final step in the judicial subjugation of the corporation of the City of New York."[66]

To say that New York City was judicially subjugated, however, is not to say that it was practically and politically subjugated. What it meant was that the various interest groups who wanted to get their way in New York City now had to pursue their agenda on two fronts at once, both City Hall and Albany. No one proved more adept at this than Tweed, who had himself elected state senator in 1867 and applied to the legislature the same methods that had proved so successful in the city. He took over a corrupt band of legislators known as the "Black Horse Cavalry" and used it to advance his own ends--and occasionally, to

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[66]Hartog, Public Property and Private Power, p. 259.

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an extent that is still debatable today, the interests of the city. Likewise, the reformers who worked against him found it useful to pursue their crusade as much in Albany as in Manhattan. Darlington and its predecessor cases did not so much to give control of the city to rural upstate interests as they made the contest between local interest groups for its control one that had to waged on both state and local levels.[67]

Quite aside from its effect on constitutional law, the Darlington decision was a blow to the City of New York, which not only had to issue $1.5 million in bonds to pay the claims but also had to stretch the already strained resources of the Law Department to sort through them.[68] Technically, a special committee of the Board of Supervisors was supposed to process the claims, but as a practical matter most of the work was done by the corporation counsel and his staff, who were charged with advising the committee. Several legal questions arose, all of which required research and writing by Develin and his assistants. Some of the questions were maddeningly technical: Could the holder of a mortgage claim damage to per-

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[67]For a mostly negative treatment of Tweed and the Black Horse Cavalry, see Callow, The Tweed Ring, pp. 207-21, and for a most positive treatment, Leo Herskowitz, Tweed's New York: Another Look, pp. 152-53. The concept of "forum shifting" by local interest groups comes from Williams, "Constitutional Vulnerability of Local Governments," pp. 87-88.

[68]Cook, Armies of the Streets, p. 176.

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sonal property as well as real estate? Could store owners claim for their loss of time, trade, and profit? Could workers claim for lost wages?[69] But by far the heaviest burden on the lawyers was the task of handling the endless stream of lawsuits. Claimants who were unhappy with the committee's offer of a settlement had the option of suing the city for more money, an action some 1,695 of them took. These lawsuits sent the total number of actions pending in the department up to 2,024 by the end of 1864, forcing Develin to take two assistants away from other duties and assign them to doing nothing but handling riot claims.[70]

Develin felt that he was doing the best he could under the circumstances, but a number of influential New Yorkers were becoming increasingly unhappy with his performance in office. His reputation suffered additional damage early in 1865 when it came to light that one of his bureau chiefs, public administrator Robert B. Bradford, had been helping himself to some of the probate funds in his care and had absconded with $41,000 in negotiable securities from the office safe. To his credit, Develin immediately made the

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[69]The answer to the first was yes, and to the others no; see Board of Supervisors, Proceedings (1863), p. 508, and Cook, Armies of the Streets, p. 176.

[70]"Annual Report of the Corporation Counsel," in Board of Aldermen, Documents (1864), no. 23, p. 350, and letter from Develin to Board of Supervisors, Aug. 1, 1865, in Common Council, Filed and Approved Papers (1865), Law Department folder, in New York City Municipal Archives.

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matter public and retained a special investigator to conduct a thorough audit of the bureau. It was hardly Develin's fault; Bradford had been foisted on him by Wood, and the public administrator had traditionally run his bureau with little or no supervision from the corporation counsel. Even so, the scandal brought Develin and his department under a cloud of suspicion and at the very least raised questions about why he did not know what was going on in his own office.[71]

In the summer of 1865 the Citizens' Association, a reform club composed of some of the city's wealthiest citizens, began an investigation into rumors of corruption involving some of the city's most prominent officials.[72] Before long the investigation focused on a ten-year street cleaning contract supposedly "rigged" at the highest levels of government by a new street-cleaning commission made up of mayor C. Godfrey Gunther, recorder John T. Hoffman, comptroller Matthew T. Brennan, city inspector Francis I.

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[71]See Develin's report, dated Dec. 29, 1865, in the Common Council's Filed and Approved Papers (1965), Law Department folder, New York City Municipal Archives.

[72]For formation of the association, see "A New Movement for Municipal Reform," Times, Mar. 25, 1864, p. 4. Its members (who included Peter Cooper, Hamilton Fish, William E. Dodge, the mercantile Brown brothers, and J. D. Wolfe) were motivated in equal parts by "moral indignation" (their words) and the increasing municipal taxes they had to pay.

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A. Boole, and corporation counsel Develin. In addition, the Citizens' Association claimed that two commission members, Brennan and Develin, had cooked up a complicated scheme with the president of the Broadway Bank to obtain collusive judgments against the city. Determined to make an example of them, lawyers for the association lodged formal charges against them before Republican governor Reuben E. Fenton.[73]

Fenton had mixed feelings about coming down from Albany to hold impeachment hearings. He had no particular sympathy for New York City's local Democratic officials, but he did not like being dragged into a political circus, which is what he suspected the proceedings would be. He was right. When he entered the chambers of the Board of Aldermen to preside over the hearing on October 4, he found it packed to capacity with Citizens' Association members and their attorneys, the accused officials and their attorneys, reporters, politicians, lawyers, and other avid spectators. As the hearing unfolded, it soon became apparent that the Citizens' Association's case was stronger on sensationalism than on substance. The Association's lawyers offered a great deal of hearsay and conjecture but no hard evidence of wrongdoing; their basic strategy seemed

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[73]The Times, Sept. 27, 1865, p. 1. The governor was involved because the charter of 1857 gave him the power to hear charges against the mayor and department heads and to remove them for cause.

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to be to introduce a few already well-known facts and then hint at their implications. Their "case," if it could be called that, was a story that had been in the newspapers for some months: that is, that the five officials, acting in their capacity as a Street Cleaning Commission, had thrown out the first batch of bids without opening them, had re-written specifications in a way that obfuscated rather than enlightened, and ultimately had awarded a $500,000-a-year contract to one of the higher bidders, a company named Brown, Devoe & Knapp.[74]

The implication was of a bribe or kickback, but Fenton listened in vain for any proof, and instead got second-hand gossip. One lawyer vaguely remembered Gunther's urging him to have a client bid for the job, cheerily assuring him that "$150,000 would probably buy it."[75] A witness claimed to have overheard contractor Brown joking that the reason the commission threw out the first bids was because he had not got his bid in yet.[76] Someone else repeated a rumor he had heard that Brown's surety had been made by "a gentleman

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[74]The Times had run several stories on the Street Cleaning Commission and its actions; see, for instance, May 6, 1865, p. 8 [explaining the law, newly enacted, establishing it]; May 24, 1865, p. 4 [commission meeting]; June 3, 1865, p. 2 [specifications amended]; July 19, 1865, p. 8 [summary of happenings so far], and August 23, 1865, p. 8 [update]. The hearing itself can be followed from a transcript that the Times ran in four successive issues, Oct. 4 through 7, 1865, all p. 1, except Oct. 6, p. 8.

[75]Ibid., Oct. 6, 1865, p. 8.

[76]Ibid., Oct. 7, 1865, p. 1.

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connected with the Corporation Counsel's office." In summation the lawyers argued that the specifications had been changed purposely to suit Brown, Devoe & Knapp, and that there were secret partners in the contract whom "it would be interesting to know."[77]

But the lawyers for the officials had logical explanations for everything. They explained that after advertising for bids, the commissioners discovered they needed to change the specifications, and decided simply to return the bids unopened with a copy of the changes. The lawyers offered several reasons for the commission's rejecting bids that were lower than those of the Brown firm. Not all met the new specifications, for instance; one company had to be rejected because it was not yet incorporated, and several contractors offered lower prices but were too small, too inexperienced, or unsuitable in other ways. And as for insinuations that they had personally profited from the contract, the officials flatly denied that such was the case.[78]

A second charge was brought against two of the members of the commission, comptroller Brennan and the corporation

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[77]Ibid.

[78]Affidavits of Brennan and Gunther, printed in full in in ibid., Sept. 25, 1865, p. 8, and Sept. 26, 1865, p. 2; see also ibid., Oct. 6, 1865, p. 8, and Oct. 7, 1865, p. 1.

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counsel.[79] At first glance, it seemed even more damning than the first; they were accused of conspiring with the Broadway Bank president, Francis A. Palmer, to allow a $650,000 judgment against the city. Purportedly, they had Palmer take (or pretend to have taken) assignment of claims from street cleaners who were owed money by the city in 1864 and part of 1865. As assignee of a large number of such claims, Palmer than sued for payment and, in agreement with the comptroller, Develin did not contest his claim, allowing judgment by default against the corporation. With this much established, the Citizens' Association lawyers did not have to draw a picture of what must surely have happened next: Brennan and Develin meeting Palmer in a back room somewhere and splitting the $650,000 three ways.[80]

But again the officials had a logical explanation. In a misguided effort at reducing the city budget, the 1864 session of the legislature had not approved nearly enough money to clean the streets, which in time became indescribably filthy. Facing a threat to the public health, the mayor and other responsible officials held a meeting and devised a simple way around the problem. They hired contractors to clean the streets and paid them with promissory notes amounting in the end to $650,000; when the notes came

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[79]For specifications, see ibid., Sept. 15, 1865, p. 2.

[80]Ibid.

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due the next year, Palmer--by prior agreement--paid the contractors and took assignment of their claims against the city. Then, also by prior agreement, he sued the comptroller for payment, the corporation counsel failed to enter a defense to the case, and the judge--who understood the situation perfectly--awarded judgment by default to Palmer. It was an irregular way of doing business, and there is no doubt that some graft crept into it along the way, but it had one great advantage: it worked. The streets were cleaned, and the city escaped an almost certain outbreak of disease.[81]

By the end of the hearings it was obvious that the Citizens' Association had no hard evidence against any of the officials. Fenton returned to Albany, and on October 11 announced a decision that surprised no one. Noting that the power to remove officials should be exercised only upon "clear, positive, and undoubted proof" and that the evidence offered had been "wholly insufficient," he declared that he had no choice but to retain the accused in office.[82] The officials were jubilant at their exoneration. Gunther soon left politics and returned to a prosperous business, and Boole stayed on as city inspector

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[81]See affidavits of Brennan and Gunther in ibid., Sept. 25, 1865, p. 8, and Sept. 26, 1865, p. 2, and the transcript of the hearing in ibid., Oct. 6, 1865, p. 8, and Oct. 7, 1865, p. 1.

[82]Ibid., Oct. 6, 1865, p. 1 [end of hearing], and Oct. 14, 1865, p. 4 [text of governor's statement].

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until laid low by another scandal. Brennan went on to be elected sheriff, and Hoffman was elected mayor two months later and then governor in 1868.

Develin was not so fortunate. Although he was cleared along with all the others, the hearings left many New Yorkers with the impression that there had been some shady dealings in the city's street cleaning and that the corporation counsel was somehow responsible. It is easy to understand why: whenever any of the officials had been pinned down and pressed for an explanation for their actions, they had invariably pointed the finger of blame in one unwavering direction.

For instance, Brennan: "Now, for all this I am in no way responsible . . . . I had nothing to do with the conduct of the suits. My first knowledge of the litigation was that transcripts of the judgment were presented to me, certified for payment by the Counsel to the Corporation."[83]

And, Brennan, again: "It is not my duty to show that the advice given or the course taken by him [Develin] in either of the instances . . . was the best that could be furnished."[84]

Gunther: "I have . . . heretofore at all times been engaged in active business as a merchant and . . . had no

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[83]Ibid., Sept. 25, 1865, p. 8.

[84]Ibid.

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acquaintance or knowledge in the practice or profession of the law." Thus, as mayor, he did not "at any time deem it right, proper, or consistent with his duty as a public officer to dispute or act in opposition to the united opinion of the corporation counsel and recorder upon any question of law."[85]

Other protestations ran through his testimony: "relying implicitly upon the legal opinion of the said Counsel to the Corporation," for instance, and " distrusting his own ability intelligently to criticize the verbal construction and legal effect of a law paper."[86]

Equally damaging was the constant repetition of Develin's name in the minutes of the meetings of the Street Cleaning Commission, as read into testimony by its clerk. It had been "the Corporation Counsel" who had moved adoption of most of the resolutions of the Commission, who had taken notes on all the changes, and who had drafted the final specifications. It had been "the Corporation Counsel" who suggested throwing out the initial bids and starting all over, who had opened the new bids, and who had furnished legal opinions for the rejection of many. By the time the clerk had droned his way through the minutes and

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[85]Ibid., Sept 26, 1865, p. 2.

[86]Ibid.

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reached the actual awarding of the contract, it almost seemed that he had been the only one in the room.[87]

The Citizens' Association added to the damage by bringing further impeachment charges against Develin alone. The matter of his surrendering the patronage of his office to Wood was dredged up as something sinister. Rather than doing it as the price of his own nomination, the reformers hinted, he had done so in return for a kickback from Wood; the positions in the department were sold for an average of $10,000 each, "all or a large amount of which was received by the said John E. Develin." They charged him also with taking part in the notorious Fort Gansevoort swindle, in which one Board of Aldermen bought back for $500,000 a piece of property sold by the previous board for $160,000. After the purchase had been upheld by a lower court, Develin--"full knowing that the City had a good defense"--refused to appeal the case and have the sale voided.[88]

Develin protested his innocence to a public increasingly grown deaf to such protestations. He swore under oath, his voice breaking, that he never taken part in the sale of offices. As for the Fort Gansevoort matter, it was a question of judgment whether the appeal could have been won, and Develin showed that he had three Supreme

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[87]Testimony of clerk J. B. Auld, in ibid., Oct. 4, 1865, p. 1.

[88]Ibid., Sept. 15, 1856, p. 2. Several other minor charges are also mentioned.

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Court justices and two eminent lawyers on record as agreeing with his estimation of the chances.[89]

The governor dismissed these charges along with the others, but he could not undo the damage that had been done merely from bringing them.[90] Develin was branded in the public mind as one who had constantly to deny charges against himself. He had not been found guilty, but then neither had he been proved innocent; the Citizens' Association had simply not had enough proof to satisfy the governor that he was justified in removing him. He may have been innocent as he claimed, the victim of "loose charges proceeding from unknown or irresponsible sources."[91] He may have been the wily mastermind of the whole swindling crew, as the Citizens' Association was convinced he was. Or he may have been simply a hapless public official who, finding himself in a corrupt government, did the best he could but cut a few corners here and there and got caught. Whatever the case, he was finished as an officeholder. He would dabble in politics the rest of his life, but would never against hold public office. With the Citizens' Association in full cry by the end of 1865, Tammany did not even consider renominating him but instead

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[89]Develin's defense is printed in ibid., Oct. 28, 1865, p. 1.

[90]Fenton's dismissal is in ibid., Dec. 16, 1865, p. 4.

[91]Ibid., Oct. 28, 1865, p. 1.

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turned to a candidate whom the reformers had embraced as one of their own--the great Irish orator, Richard O'Gorman.

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THE NEW YORK CITY CORPORATION COUNSEL AND THE DEVELOPMENT OF MUNICIPAL LAW, 1801-1898

by

JUDITH A. GILBERT

VOLUME II

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CHAPTER IX

O'GORMAN AND THE REFORMERS

By the time the election of 1865 rolled around, John Develin had become political poison. Although he dropped broad hints that he was available for a second term, his old friends in Tammany studiously avoided him. "Those who 'rule the roost' in the Old Wigwam have decided that the Corporation Counsel is too weak and unpopular a candidate and would hurt the ticket," the Irish American reported on October 21. The editors were not dismayed, however, for they knew a perfect replacement for Develin--a "real" Irishman, Richard O'Gorman, who had fought with the dashing band of young rebels known as "Young Ireland" in 1848. Born into a prominent Dublin family in 1820, he had thrown aside a life of wealth and ease (not to mention a budding legal practice) to wage revolution alongside the famed William Smith O'Brien, Thomas Francis Meagher, Michael Doheny, and other young idealists.[1]

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[1]The Young Ireland party took over the movement begun by the patriot Daniel O'Connell and radicalized it. Like O'Gorman, many of its members were "educated and highly positioned men who abandoned every personal prospect, hope, and ambition to work for the salvation of their native land" [ibid., Sept. 25, 1852, p. 3]. The movement was memorialized in Sir Charles Gavan Duffy's Young Ireland: A Fragment of

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Unlike the stereotypical Irish emigre politician, O'Gorman was urbane, polished, and more at home in a Fifth Avenue drawing room than a Five Points saloon. He took part in civic and cultural affairs, and was much in demand as an after-dinner speaker. In an age that prized its orators, O'Gorman--a massive, handsome man with a thick mane of hair and a rich, musical brogue--cut a striking figure. Detractors dismissed him as "a huge, hairy, eloquent Irishman" and George Templeton Strong maliciously entered his name in his diary as "Richard O'Gor-r-rman," but he was eagerly sought after by audiences ranging from "monster" Democratic rallies in Union Square to exclusive charity dinners.[2]

O'Gorman was--oddly enough for an Irish Democratic politician--a particular favorite of the Citizens' Association. He was a shrewd corporation lawyer, and many of clients became his friends. He was a Democrat, but one who was more interested in national issues than ward politics. An outspoken "Peace Democrat," he had delivered a fiery and

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Irish History, 1840-1850 (New York: D. Appleton and Company, 1881), and is discussed at length, including O'Gorman's part in it, in Robert Kee's The Green Flag: The Turbulent History of the Irish National Movement (New York: Delacorte Press, 1972), pp. 218-63.

[2]McAdam, Bench and Bar, vol. 1, pp. 437-38; Times, Mar. 2, 1895, p. 8; Strong, Diary, vol. 3, p. 265, and Callow, Tweed Ring, p. 242 [quoted]. Typical of his speaking engagements is one of 1857, at the annual dinner of the American Dramatic Fund Association; a review noted that he had delivered "a very beautiful, very elegant and picturesque address on Shakespeare" [Citizen, May 2, 1857, pp. 281, 286].

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widely reprinted address--"The National Crisis"--and had campaigned across the state for Horatio Seymour in the 1862 governor's race.[3]

Consequently, when local leaders began mulling over possible potential nominees for corporation counsel in 1865, O'Gorman's name turned up on several lists. He was, in many ways, the ideal candidate for corporation counsel: he was Irish, and everyone knew you needed an Irishman on the ticket; he was a Democrat, but not one encumbered with the baggage of ward politics; he was a busy lawyer, but not too busy to tear himself away from his practice for three years. Add to these qualities a winning personality and a flair for oratory, and one could hardly imagine a more attractive candidate. In little more than a week's time, O'Gorman was nominated by the Mozart Democracy, the McKeon Democracy, the German Democratic Association, and--most gratifying of all to him--the Citizens' Association. In an emotional letter of acceptance, O'Gorman pledged to the board of the Citizens' Association that he would serve the city to the best of his ability and be "as earnest as yourselves to defend its rights, assert its honor, and protect

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[3]Irish-American, Nov. 15, 1862, p. 2. Seymour was, strictly speaking, a "constitutionalist" rather than a Peace Democrat, but he owed his election in large part to the support of that faction of the party in New York City; see Mushkat, Tammany, pp. 331, 338.

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its finances." [4]

The Irish-American reported all these nominations and declared, "A prudent respect for public opinion should motivate Tammany Hall to do the same."[5] But the Tammany convention, which had met the previous week, had adjourned without making a nomination. Many of the delegates favored O'Gorman, but Tweed and the Central Committee were uneasy about accepting him. True, he was a great Irishman and a fine speaker and maybe even a good lawyer, but what good was that if he was in cahoots with the Citizens' Association? The Irish-American put its finger on Tammany's problem: "An honest Democrat, who will not allow himself to be managed by its members, is more dreaded than the most virulent abolitionist."[6]

In the end, however, Tweed and his associates had little choice but to go with O'Gorman; all the other Democratic organizations had already endorsed O'Gorman, and Tammany could hardly hold itself out to the voters as a "reformed" body unless it did likewise. Besides, the main contest in the election was a close four-way race for mayor, and having O'Gorman on the ballot would neutralize

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[4]Letter to Citizens' Association, Nov. 6, 1865, published in Times, Nov. 23, 1865, p. 8. For coverage of the nominating conventions, see ibid., Nov. 22 and 23, 1856, both p. 8, and Irish-American, Nov. 25, 1865, p. 2.

[5]Irish-American, Nov. 25, 1865, p. 2.

[6]Ibid.

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any advantage the other Democratic mayoral nominees gained from having him as a running mate. As a result, Tweed and the Central Committee stifled their misgivings and nominated O'Gorman, leaving as his only opponent the Republican candidate, Murray Hoffman.

A former Superior Court judge, Hoffman was a gifted legal scholar who was considered by many to have succeeded James Kent as the leading authority on the the corporation of New York City. Often consulted as "chamber counsel" by other lawyers, he had written a definitive and often-cited treatise on the charter and rights of New York City. There is no doubt that he was better qualified than O'Gorman in his knowledge of municipal law, but he was dull as dust and lacked O'Gorman's energy and popular appeal. And as the nominee of only one party--and a struggling one at that--he was all but written off by the press, which concentrated all its attention on the more suspenseful race for mayor.[7]

In this contest the Tammany nominee, Tweed's friend John T. Hoffman (only recently cleared of charges in the street-cleaning contretemps) was fighting an uphill battle against a popular Republican candidate, Marshall O.

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[7]Hoffman was a brother of Ogden Hoffman, who had run against Dillon in 1852. For his life, see McAdam, Bench and Bar, vol. 1, p. 360, and Times, May 8, 1878, p. 5. He is best known for his Treatise on the Estate and Rights of the Corporation of the City of New York, as Proprietors, 2 vols. (New York: McSpedon and Baker, 1853; rev. ed.,1862), a work commissioned by the city and used for decades as a reference in the Law Department.

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Roberts. The McKeon and German Democratic nominees had no realistic chance themselves of winning, but every vote they took away from Hoffman helped Roberts. Having an acknowledged reformer like O'Gorman as a running mate gave Hoffman some small edge; it helped stem some of the drift to the other Democratic tickets, and it signalled to the voters that Tammany was just as committed to reform as the Citizens' Association. It may, in fact, have contributed the margin by which Hoffman in the end eked out his victory: a close 32,952 to 31,591, with the other Democratic candidates drawing some 17,000 votes. If little more than one percent of the total vote had gone the other way, Roberts would have been elected; O'Gorman's own landslide--47,531 to 30,249--quite probably swung many of these votes Hoffman's way.[8]

O'Gorman was particularly gratified that his support had crossed party and factional lines. "The office of Corporation Counsel is a purely civic office, having no necessary concern with political parties or with the great political issues which agitate society," he had earlier assured the Citizens' Association.[9] He supposed now that he would free to run the office as he saw fit, free from any personal or partisan entanglements. Considering the

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[8]Returns from Times, Dec. 7, 1865, p. 4.

[9]Ibid., Nov. 23, 1865, p. 8.

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Tweed Ring's grip on New York City municipal government at the time, his attitude seems incredibly naive. Yet O'Gorman was, to his way of thinking, his own man when he took office. When he was elected, he barely knew the members of the Ring. He had known Richard Connolly casually for around three years, but he was not introduced to Tweed himself until a few days after the election. In his own words, he vaguely recognized Tweed, Connolly, Sweeny, and Hall as "potential persons in the Democratic Party."[10]

As a reform candidate, O'Gorman had some inkling of the corruption in municipal government, but no comprehension that it could be pervasive enough to undermine his ambitious goals for the Law Department. Successful in his own private practice, O'Gorman intended to re-mold the floundering department into a model of professionalism and efficiency. He began asserting his control shortly after the election when he was taken on a courtesy tour of the rooms leased for the department. "I thought the rent exorbitant and rooms unsuitable," he would later recall, unable to imagine operating a major law firm from such cramped and shabby quarters. He was unmoved by the explanation given him, with a knowing wink, that it was part of a long-standing "deal" with landlord Fernando Wood, and launched an immediate search for something more fitting. Within

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[10]A remark made much later in court testimony reported in ibid., Mar. 3, 1876, p. 1.

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days he located nearby much larger quarters for half the rent, and promptly paid $3250 from his own pocket for a year's lease in the expectation the city would soon reimburse him.[11]

Satisfied with the physcial arrangement of the office, he turned to making his appointments. Unlike Develin, he was generally able to keep the patronage of the Law Department in his own hands and to choose his staff members more for their ability than their politics. He appointed two unusually able bureau chiefs, Martin T. McMahon as corporation attorney and Henry E. Davies, Jr., as public administrator. Both were highly regarded lawyers and had held command as generals in the Civil War, and O'Gorman was confident that they would be strong administrators who would not be easily cowed by local politicians. In addition, he took care in selecting his young assistants, searching for the most promising in the fresh crop of new lawyers rather than appointing the sons of friends. The most outstanding of these was David J. Dean, who began a career in the Law Department that lasted 31 years and ended with a part in writing the Great Charter of 1898.[12]

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[11]Letter, O'Gorman to Citizens' Association, Nov. 20, 1876, published in Tribune, Nov. 22, 1867, p. 2.

[12]McMahon went on to serve as an assemblyman and state senator, ambassador to Paraguay, judge of the Court of General Sessions, and president of the Society of the Army of the Potomac; for his life, see National Cyclopaedia, vol. 4, pp. 129-30. Dean, who will be discussed elsewhere in this work, is cited as an example of the professionalism of nineteenth-century municipal government, in Jon C. Teaford, The Unheralded Triumph: City Government in America, 1870-1900 (Baltimore:

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O'Gorman was determined that his bureau chiefs and assistants would be free to operate without political interference. Within weeks of taking office, he was put to a test when complaints began pouring in that McMahon was "indiscriminately prosecuting" innocent citizens. The matter, once O'Gorman looked into it, turned out to be nothing more than that the new corporation attorney was refusing to "fix" fines for the friends of aldermen. To the complaints against him, McMahon answered, "I have only to say that persons are prosecuted indiscriminately who indiscriminately violate the ordinances."[13]

Individually, a violation of these city laws might not seem to have mattered a great deal--obstructing a sidewalk, using illegal weights and measures, failing to protect an open freight elevator shaft, and the like--but collectively they amounted to an important protection of the public. O'Gorman agreed with McMahon that as long as these ordinances were on the books, the corporation attorney should enforce them. In his support he wrote a strongly worded letter to the Board of Aldermen warning them not to

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Johns Hopkins University Press, 1984), p. 63.

[13]McMahon to O'Gorman, Jan. 15, 1866, in Filed and Approved Papers of the Common Council (1866), Law Department Folder, in New York City Municipal Archives.

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interfere with the Law Department. The aldermen had made these ordinances, he pointed out, and could amend or repeal them if they liked, but they were not to meddle with their enforcement. He was right, of course, and the aldermen knew it--but this did not stop them from exacting a petty revenge by burying his request to be reimbursed for his office rent.[14]

"The lawyer who has the City of New York as his client and endeavors honestly and efficiently to discharge his duties to that client will have his hands full," O'Gorman had predicted during his campaign.[15] He was beginning to discover how right he had been, as the limitations of his office became increasingly evident. Between 1850 and 1865 the city's population had jumped from 515,000 to nearly a million, with the municipal budget rising from around $7 million to $15 million. The business of city government had expanded accordingly, placing heavy demands on the corporation counsel. At the beginning of 1850 there had been around 200 cases pending in the office, but in January of 1866 there were some 900 awaiting O'Gorman, along with a much greater demand for other legal services. Yet the

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[14]See the following letters: McMahon to O'Gorman, Jan. 15 and 16, 1866; O'Gorman to McMahon, Jan. 16, 1866, and O'Gorman to Board of Aldermen, Jan. 18, 1866, in Filed and Approved Papers of the Common Council (1866), Law Department folder, New York City Municipal Archives. The controversy can also be followed in Board of Aldermen, Proceedings, vol. 94, pp. 184-96.

[15]Times, Nov. 23, 1865, p. 8.

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office had no more lawyers than in 1850, and only a modest increase in its clerical staff. Despite the pleas of one corporation counsel after another, the Board of Aldermen had steadfastly regarded each new increase in legal business as something extraordinary and certain soon to pass. Its members grudgingly dealt with each fresh emergency by authorizing the corporation to retain outside counsel under special appropriations for "office contingencies."[16]

As the situation facing him slowly sank in, O'Gorman reluctantly tried to make the best of it. The sort of clean sweep of the office envisioned by himself and the Citizens' Association was clearly not practical. The press of business made it essential to keep a few people around who were familiar with pending cases in a way which, as O'Gorman acknowledged, "no amount of labor on the part of the incoming official would enable him to obtain."[17] He not only kept three of Develin's law clerks but also left undisturbed many arrangements he had made with outside counsel. He kept John Hackett, for instance, to wind up the hundred or so riot cases still pending, and retained

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[16]For a backward glance at the operations of the office, see "Annual Report of the Corporation Counsel," in Board of Aldermen, Documents (1865), no. 23, pp. 1-2. The increased spending on "office contingencies" since 1862 is detailed in Citizens' Association of New York, Analysis of the Comptroller's City Budget for 1869, pp. 8-9 [pamphlet, dated 1869, in New York Public Library].

[17]O'Gorman to Citizens' Association, Nov. 20, 1867, in Tribune, Nov. 22, 1867, p. 2.

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the departing William C. Trull for several cases involving complicated questions of corporation law. Like his predecessors, O'Gorman found himself relying heavily on outside counsel instead of, as he would have preferred, directing his own subordinates. Ambitious to make the Law Department a prestigious law firm in its own right, he chafed under the restrictions to his power but found some consolation in taking some of the city's biggest cases for himself.

An example of the way he worked can be seen in three tax cases that went to the U. S. Supreme Court, involving millions of dollars and affecting the interests not just of New York City but of other state and local governments as well. Through the 1800's American state and local officials struggled with finding the revenue to finance the increasing demand for government services. New York City was one of the first to move away from the traditional but inadequate sources of revenue like ferry tolls, market fees, property rents, and occupational licenses and toward reliance on a general property tax. The real estate tax became the single largest source of revenue, but as years went by it became clear that holders of other forms of property were escaping paying their fair share. A whole new capitalist economic order was rising with much of its wealth not in land and buildings but floating around in some tantalizing, intangible form--stocks, bonds, interest,

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premiums, accounts receivable, debts due from solvent debtors, jottings in a ledger somewhere. New York City, rising during this time to become the nation's center of banking, finance, and insurance, had a special interest in gaining access to this wealth. Along with other states and municipalities, its government began experimenting with tapping it by use of a personal property tax on "intangibles." The results were mixed, with success often coming only after long and complicated litigation in which New York City, as usual, led the way; but by mid-century it was generally established that capital in its various forms was fair game for the personal property tax.[18]

Holders of this wealth naturally became intensely interested in ways to shelter it from the property tax, a desire that fostered endless litigation. O'Gorman found himself defending some of the most hard-fought of these cases. During the Civil War, Congress found that it could attract investors to government bonds and other securities by making them exempt from state and local taxation, effectively making the Civil War one of the greatest tax shelters of all time. Stricken by this blow to its revenues, New York City mounted a counter-attack during

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[18]A brief but excellent analysis is given in John C. Schwab, "History of the New York Property Tax," in American Economic Association, Publications, vol. 5 (1890), no. 5, pp. 73-88.

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Develin's term in office, but lost in the 1865 Bank Tax Case in the U. S. Supreme Court.[19]

In the wake of this decision, eager taxpayers rushed to stretch the exemption to cover as many of their assets as possible. O'Gorman's task was to turn back as much of this assault as possible. Bank stockholders, for instance, were asserting that their shares of bank stocks were exempt from local taxation to the extent that the bank had its capital invested in government securities. Despite congressional legislation on the subject in 1864 and a case unsuccessfully argued by the city of Albany in 1865 before the U. S. Supreme Court, there were complicated legal and constitutional questions still in dispute in 1866. O'Gorman assumed defense of a test case, People v. Commissioners, that embodied issues in twelve separate suits and involved around $2 million in immediate revenue and the liability to taxation of $70 million in bank stocks.[20]

It was, O'Gorman declared with only slight exaggeration, "probably the most important case, in amount and effect, ever argued in an American court."[21] It was at any rate of enormous interest to New York City and other state

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[19]Reported in 3 Wallace 200 (1865). Develin retained three outside attorneys for the case.

[20]The Albany case is Van Allen v. Assessors, 3 Wallace 573 (1866). New York City's People v. Commissioners is found in 4 Wallace 244 (1867).

[21]Quoted in Tribune, Nov. 22, 1867, p. 2.

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and local governments, and the Board of Aldermen and the mayor backed O'Gorman in his determination to spare no effort or expense in fighting it. Against an impressive array of talent on the other side, he retained Charles O'Conor, the acknowledged dean of the New York City bar, to assist him, along with other specialized counsel.[22] But there was no doubt, especially considering the feeble state of O'Conor's health for much of the time, that it was O'Gorman's case from start to finish.

He achieved, if nothing else, an unheard-of triumph of management. With the city anxious to incorporate the results in the next tax levy, he managed to push an unusually complicated case from its first hearing in the June 1866 General Term of the state Supreme Court in New York City, through the Court of Appeals in Albany in the summer, and all the way to the U. S. Supreme Court in December. It was one of the high points of his career when the Supreme Court handed down a decision in January upholding the city's right to tax bank shares regardless of how

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[22]In addition to O'Conor, O'Gorman retained Waldo Hutchins, a leading tax lawyer, and Amasa J. Parker, counsel for Albany in Van Allen; he also gave his young assistant David Dean considerable responsibility in the case. Among counsel for the stockholders was Benjamin Silliman, one of the leading lawyers in practice before the U. S. Supreme Court, and William Evarts, who had argued the "prize cases" that allowed the federal government to keep seized merchant vessels.

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the bank's capital was invested.[23]

O'Gorman's elation was dampened only slightly by two losses that followed. Against his advice, the Board of Supervisors insisted in 1867 on testing a supposed right to tax federal "certificates of indebtedness," a class of securities scarcely differing from government bonds, which were not taxable. O'Gorman had to be talked into taking the case and was not particularly surprised when the U. S. Supreme Court decisively rejected the Board of Supervisors' reasoning.[24] He was more optimistic about the city's grounds in Bank v. Supervisors, which tested the right of the city to tax legal tender notes, the famous "greenbacks' of the Civil War. Because Congress had issued them not to borrow money but to circulate as currency, O'Gorman among others believed that legally they were just as taxable as so much gold or silver or coin. But in a surprising decision, the high court ruled them to be obligations of the federal government and thus exempt from the personal property tax just as were bonds and other securities. As a result, taxpayers rushed to shelter part of their capital in the form of currency, giving the once dubious paper

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[23]For O'Gorman's views of this case, see his annual report in Board of Aldermen, Documents (1866), no. 21, and (1867), no. 18, p. 4.

[24]Banks v. Mayor, 7 Wallace 17.

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money a new lease on life and removing a major source of revenue from reach of the tax collector.[25]

In addition to these cases, O'Gorman managed a number of other important suits. In McCotter v. Mayor in 1867, he gained reversal of a $141,000 judgment against the corporation arising from the purchase of Ward's Island. The same year he also pursued a case against the failed Columbian Insurance Company and won a ruling that gave the city's personal property tax priority over all other claims against insolvent corporations. His annual report also mentions a curiously named case, Blind Mechanics Association v. Mayor, purportedly involving the state's right to dispose of real estate belonging to the city. Since it appears in no case reports, it was likely settled out of court and the question not addressed.[26]

O'Gorman felt with considerable justification that he was making a distinguished record as corporation counsel. Yet for all his accomplishments, serving the city while it lay in thrall to Tweed and his crew put him in a awkward position. There is no evidence that he was ever part of any crooked dealings, and his name is not among the two dozen key figures in the Ring listed by Tweed in testimony

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[25]Bank v. Supervisors, 7 Wallace 26.

[26]All these cases are discussed in his annual report in Board of Aldermen, Documents (1867), no. 18, pp. 4-5.

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he gave shortly before his death.[27] Unfortunately, however, representing the city in court in a era of rampant corruption seldom put him on the side of the angels, and in taking whatever cases the city's officers became involved in, he inescapably found himself now and then opposing old friends among the reformers.

O'Gorman took it for granted that the duties of his office obligated him to do so; he was, after all, legal counsel for the entire corporation, charged with representing in their official capacities the mayor, both boards of the Common Council, the Board of Supervisors, and the various city departments and "metropolitan" boards. He might not always agree with their actions, and on occasion dissented voluably in private.[28] At the same time, however, he felt bound, whenever called on by one of the city's officers, to became his advocate in court and to present the strongest case possible on his behalf. That was the way he had run his private practice, and the way he thought he was supposed to run his public office as well.

Within days of taking office, however, he was given the first inkling that this view would drive a wedge between

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[27]"Report of the Special Committee of the Board of Aldermen, Appointed to Investigate the 'Ring' Frauds," in Board of Aldermen, Documents (1877), part 2, no. 8, pp. 255-56.

[28]He argued strongly against taxing the certificates of indebtedness, for instance, and against letting contracts in excess of appropriations; see Board of Supervisors, Proceedings (1867), pp. 44-46 and 122.

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him and his old reform colleagues. As a routine matter he had received a request from the Board of Aldermen to appoint commissioners of assessment to widen Ann Street and a part of Church Street. Unfortunately, both projects had stirred considerable controversy, with some property owners eagerly in favor, others opposed, and many reformers seeing only the prospect of more graft.[29] A member of the Citizens' Association paid a call on the new corporation counsel in his office and asked gravely what he intended to do. Mystified, O'Gorman supposed that he would obey the request and appoint the commissioners. But, his visitor objected, he had been the Citizens' Association "reform" candidate, and its members intended to fight the matter in court. What would he do then?

To O'Gorman, the question was absurd. "Why, I will beat them if I can," he said genially.[30] As lawyer for the city, what else could he do? To his astonishment, he was given to understand that the Citizens' Association was deeply affronted by such an answer and had expected better of their candidate. It was an idea entirely foreign to O'Gorman, who took a prosaic view of his rule as chief lawyer for the corporation and did not trouble himself with

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[29]See Citizens' Association, The Legal Bureau of the City of New York, Misc. Publ. No. 10 (1867), pamphlet in New York Public Library; also printed in full in Times, Nov. 30, 1867, p. 2.

[30]Quoted in ibid.

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philosophical questions of the sort that had occupied Shepard a decade earlier. The question of whether he was responsible to the whole body of citizens or the current officeholders was not the sort of musing that interested O'Gorman. To him it was plain that he was counsel of whoever happened at the moment to be in charge of the corporation, but certainly not of the Citizens' Association. If he happened to oppose the reform group's lawyers in court, it would not be the first time he had opposed lawyer friends in court. It was part of the adversary system, hardly worthy of remark, that lawyers fought ferociously against each other in court and then later could be seen in the nearest watering hole buying one another drinks. The thought that anyone--especially another lawyer--would hold a grudge against a lawyer simply for representing his client was foreign to O'Gorman's experience.

He failed to take into account, however, the bitter feelings stirred up by politics in Tweed's New York. The Citizens' Association managed to scotch the two street projects for the time being, but its members never forgave O'Gorman's failure to side with them. In the next two years he disappointed them further. At the request of the aldermen, he defended the sitting board against a demand by James O'Brien that he be declared winner of a disputed election and seated with them. Contested elections were a staple of city politics at the time and ordinarily this one

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would have attracted little attention, but "Jimmy" O'Brien had run as a reformer with the endorsement of the Citizens' Association. O'Gorman's successful defense against his challenge went down as another black mark against him in the Association's books.[31]

His reputation suffered more damage when he defended the corporation in Pullman v. Mayor, a case involving the decision of the aldermen to award a group of friends a generous contract for supplying the city with gas. Christopher Pullman, a leader of the board's beleaguered minority of honest members, did not have the votes to defeat the contract, so he asked the state Supreme Court for an injunction to restrain the Board of Aldermen from even discussing, let alone voting on, the resolution to award the contract. O'Gorman opposed the injunction on orders from the mayor and Board of Aldermen, but also because he was eager to make a legal test of whether the courts could interfere so radically with the city's right to govern itself. When he won the court fight, he was elated at the victory for the corporation's rights, but the reformers viewed it quite differently as another defeat for

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[31]For the episode, see Citizens' Association, How the Money Goes: A Letter from the Citizens' Association to Richard O'Gorman Relative to His Office, Misc. Publ. No. 12 (1867), pamphlet in New York Public Library; also printed in full in Tribune, Nov. 17, 1867, p. 2.

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the forces of honesty.[32]

They were also disappointed with his role in thwarting an attempt to expose fraud in the Street Department, Tweed's own particular domain. In 1867 lawyers for the Citizens' Association applied for a mandamus to force street commissioner Charles Cornell to allow them to examine all his records and papers.[33] On the request of Cornell, O'Gorman opposed this unusually broad order, but then worked out in court a compromise that allowed inspection within specified limits. It had to take place during normal working hours and under supervision, for instance, and could not disrupt the work of the department. But if O'Gorman expected any praise for his efforts, he was disappointed. Arriving at the compromise took several days--time, the Citizens' Association was convinced, that the Street Commissioner put to good use with some hasty housecleaning. At any rate, the inspection turned up nothing incriminating, and the Association blamed O'Gorman for abetting a coverup.[34]

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[32]Pullman v. Mayor, 49 Barbour 57, and 54 Barbour 169. O'Gorman discussed the case at length in the Tribune, Nov. 22, 1867, p. 2.

[33]Counsel of record for the Association in this case was Charles O'Conor, but he was aided by other members of its "Legal Bureau." A roster of the bureau in 1866 included O'Conor, Daniel Lord, Jr., Murray Hoffman, Benjamin Silliman, Charles Tracy, Dorman B. Eaton, and James R. Whiting [Citizens' Association, Report of the Executive Council (1866), pamphlet in New York Public Library].

[34]Citizens' Association, "How the Money Goes," in Tribune, Nov. 17, 1867, p. 2, and O'Gorman's reply in ibid., Nov. 22, 1867, p. 2.

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Its members also held O'Gorman responsible for blocking another attack against fraud. Despairing of local action, their lawyers lobbied the 1867 legislature for a bill removing all the city's public works from local control and putting them under a new state-appointed "Metropolitan Board of Public Works." It was a measure local authorities found alarming, for if successful it would have put the state in control of all the city's public buildings, docks and wharves, and other structures. (It also, although they did not mention it, would have cut off their main source of graft.) Attending the session on behalf of the city on several matters, O'Gorman opposed the bill vigorously, seeing in it another blow to the city's claim to its own corporate property. The bill failed. "I helped to beat it, and I am glad that I did so," he boasted. The Citizens' Association was not so glad, and its lawyers departed from Albany smarting with hostility toward him.[35]

These incidents were only a small part of O'Gorman's larger practice for the corporation, and he seems to have been oblivious to the personal damage they were doing to him. At any rate he was not prepared at all to open the Tribune on November 15, 1867, and find himself the subject of a sensationalized indictment entitled, "How the Money

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[35]Ibid.

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Goes."[36] In the form of an open letter from the Citizens' Association president, Peter Cooper, he was publicly called to account for extravagance, neglect of duty, and betrayal of the city's interests. The lengthy document sprawled across several columns of newspring and leveled one damning accusation after another. It began by reminding O'Gorman reproachfully of his campaign pledge; he had been elected with their help as a "reform" corporation counsel, and how had he repaid his supporters? By blocking all attempts to bring corrupt officials to justice, by abetting frauds in city government, by advising public officials how to get out of obeying the law, by deliberately neglecting to appeal vital cases, by allowing huge and illegal judgments against the city, by hiring his cronies at enormous fees, by overcharging for his own services in blatant violation of the law, and finally by going to Albany at public expense to lobby for more money for himself.

As examples of O'Gorman's attempts to thwart reform, the letter cited his refusal to oppose the Ann and Church Streets projects, his siding with the aldermen against O'Brien, and his defeat of the Pullman injunction and the Street Department mandamus. In addition, it brought up his

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[36]The letter was also printed by the Times, but it did not pick up editorially on it as did the Tribune, which at this time was the unofficial organ of the Citizens' Association. The quotations which follow are all taken from the text as printed by the Tribune on Nov. 17, at p. 2.

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poor record in defending judgments against the city, which in less than two years had amounted to $475,000. He had "allowed" over half this amount to be "unlawfully entered"--$194,000 in claims for publishing the city's official proceedings and legal notices, and another $93,000 for printing and stationery.

In the view of the Association, O'Gorman had been a financial disaster for the city. In addition to lavishing $45,000 in fees on his friends in less than two years, he had taken an "extra counsel" fee for himself in the Supreme Court bank case. His expenditures in office were laid out in stupefying detail, with the picture emerging of a gigantic spending spree. The letter held up as scandalous the $8,330 spent on "miscellaneous office expenses" in the past two years, citing everything from $844 for coal to $8.25 for spitoons. Nothing was too trivial to be listed: $9 for pins, $6 for twine, $8 for sealing wax. In all, counting salaries and everything else, the city had spent $152,974.32 on the Law Department in 22 months.

And what had it got for its money? A corporation counsel who bungled its cases, neglected its interests, and abetted thieving officials, according to the Citizens' Association. The letter ended with a barely veiled threat: "The Association sees, with pain, that you have closely imitated even that one of your predecessors whom it was

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forced to impeach before the Governor of the State of New York."

It was altogether one of the most damning indictments of a public figure ever to appear in the city's press, and O'Gorman's heart must have sunk when he read it. It would take days to begin to answer all the charges, and in the meantime a great many people would already have accepted the Citizens' Association's version of events as gospel. Indeed, even as O'Gorman was toiling on a reply, the Tribune weighed in with an editorial, "Advice to Our Legal Adviser," that confirmed his worst fears.[37] The writer--Horace Greeley or one of his minions--took for granted the truth of all the accusations and had a little fun at the corporation counsel's expense. "Cannot the city get beaten in its lawsuits at a cheaper rate than $500 a day?" the editorialist lamented. He took the corporation counsel severely to task for "drawing on the Treasury for every Yankee notion and Irish nicknack needed for his office, from walnut desks to papers of pins." By some haphazard arithmetic he transmuted the $8,330 in office expenses into $30 a day, and under the mistaken impression it had not been itemized, mused aloud what it had been spent on.

"Thirty dollars a day would buy a very exhilerating supply of champagne and cigars," he speculated, "and under

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[37]Tribune, Nov. 19, 1867, p. 4.

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the intense fatigues incident to the office of Corporation Counsel, we have not the heart to veto any little stimulants that may be needed by 'classic and eloquent' barristers for their 'stomach's sake and other infirmities.'" A tolerant public hoped merely that such funds had been used only for "cigars that are smoked ex-officio and champagne that is drunk by the learned counsel in his municipal capacity as the legal adviser of the Corporation, and not in his individual and private relations as the Hon. Richard O'Gorman." After wringing all possible whimsey from the situation, the editorial concluded tartly, "We advise Mr. O'Gorman to vindicate his purity as a reform candidate, or the reformers may nominate a cheaper man next time."

O'Gorman's reply to the Citizens' Association appeared three days later, his hurt and outrage clear to all who read it.[38] Above all he objected to being publicly charged with such serious accusations without any warning. If the Citizens' Association had complaints about his performance, the decent thing to do would have been to have complained to him personally and asked for an explanation--not to have smeared his name with sensational charges in the press. Toward Peter Cooper, the distinguished civic leader under whose signature the letter had been written, he felt a spe-

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[38] Ibid., Nov. 22, 1867, p. 2, and Times, same date, p. 2. All quotations which follow are from the text in the Tribune.

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cial bitterness: "If you as a merchant suspected the honor of one of your clerks or your porters, I doubt much if you had not treated him with more candor, consideration, and courtesy than you have toward me--the chief law officer of the City of New York."

Moreover, O'Gorman went on, the charges themselves were false. "Your account of what my official record shows is a gross slander, an utter perversion of the truth," he declared. "I am not in the habit of speaking or writing much in praise of myself, but I do now claim that my official record shows industry, fidelity, and eminent success."

To set the record straight, O'Gorman presented a detailed, point-by-point answer to every charge or insinuation in the Association's letter. He discussed at length his role in the Ann and Church streets controversy, the disputed O'Brien election, the Pullman injunction, and the Street Department mandamus. He justified his actions in each of them in considerable detail, and reminded his readers that as corporation counsel he was charged by law with the duty of representing all city officials in legal matters involving the corporation.

As for the large amounts of judgments against the city, he went into even more detail to explain a matter that the letter had, in his view, grossly oversimplified. "I did all I could and all any lawyer could to prevent their being recorded," he asserted. In fact, contrary to the accusa-

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tions against him, he had put forth a vigorous effort to defeat the claims. When Edmund Jones Printing Company brought its claim for $93,000 for printing and stationery, he had overruled the comptroller, who wanted to settle, and instead contested the claim in Superior Court. When the court ruled against the city, he refused to give up and began an immediate appeal. However, while the appeal was in progress, the Board of Supervisors put the judgment into the city budget and got the legislature to provide funds for it in the tax levy. Because the only legitimate grounds for his defense of the case was that there was no appropriation for the claim, O'Gorman's case collapsed before his eyes, and he had to abandon his appeal. While admittedly he had lost the case, it was a far cry from the charge that he had "allowed" a judgment to be entered in defiance of the law.

As for the claims for publishing the city's proceedings and legal notices, he had fought the cases successfully in state Supreme Court only to have them crop up in a different form in Common Pleas and Superior Court. There the judges ruled that the limit on appropriations was illegal and unconstitutional, and he had strong doubts the decision could be successfully appealed. True, it was a matter of judgment whether to appeal or not, but he was willing to put his professional judgment up against that of any of the Citizens' Association lawyers. In his opinion, the courts

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had been correct in finding the law poorly drawn and improper. However well intended, it had set a dollar limit so low that to have complied, the city would have been forced before the year was over to break a long-standing law and cease publishing its proceedings and notices.

But at any rate, in all these cases he felt that it was wrong to blame the corporation counsel for their outcome. "In complaining of these judgments, your complaint should have been directed against the law," he argued, "against the courts which have interpreted the law, and not against the corporation counsel, who has done all that was proper and possible to procure the enforcement of the law."

Some of the other accusations left O'Gorman incredulous. "I think your charge against me of extravagance in rent is about as unjust, unfair, unfounded, and shameful as any charge that I have ever read or heard of," he wrote. He had, after all, turned down as too expensive the rooms leased from Fernando Wood, and for almost two years paid rent from his own pocket for cheaper quarters. The charge that he had traveled to Albany at public expense to lobby for more money for himself was particularly annoying. He had been sent by the city to represent it on several pending bills, including proposed tax relief for banks and the Citizens' Association plan for a metropolitan public works board. He had been successful in saving the city a great deal of money, and while in

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Albany had, almost incidentally, managed to get money appropriated for his office rent, the apparent origin of the whole charge. Would it have pleased the reformers more, he inquired, if he had taken the Wood offices?

O'Gorman defended himself as well against the other charges of extravagance. The much deplored $8,330 in office expenses had been spent over two years' time for necessary items, none of them particularly over-priced and many of them intended as permanent furnishings for the office. Everything had been bought and furnished by the city's Bureau of Repairs and Supplies, and he had had nothing to do with any of the prices. As for charges that he had hired friends as special counsel and paid them lavish fees, the facts were quite otherwise. He had taken on the best qualified man he could find for each particular case, not caring whether they were, like William Trull, the law partner of a political opponent or, like Charles O'Conor, on the Law Committee of the Citizens' Association. His spending of around $30,000 a year on outside counsel was in line with what had been allowed his predecessors; Bronson, for example, had spent $25,000 on outside counsel in 1860 when the office had been handling 300 instead of 900 cases.

He was on somewhat weaker ground in defending taking a $10,000 fee for himself in the bank tax case. The fact is that O'Gorman had been carried away by the importance of

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the case and his role in it. When O'Conor charged a $10,000 fee commensurate with the stature of the case, he wondered why he should not do the same, having carried most of its burden himself. Knowing that on occasion his predecessors had received "extra counsel fees," he asked O'Conor for a legal opinion that he now cited as his defense. After a "thorough and exhaustive" study, O'Conor had concluded that it would be entirely legal and proper, and O'Gorman had billed the city accordingly. The fee would not have raised any eyebrows if, like O'Conor, he had been in private practice. But coming from the city's own corporation counsel, already compensated by a $12,000 sslary, it took on quite a different character. To his chagrin, O'Gorman discovered now that the mere appearance of impropriety could be as damning to one in public life as an outright illegality.

Indeed, as he was shortly to find, in public life appearances were everything. By and large the Citizens' Association accusations were unfounded or at least exaggerated and oversimplified, but they had the appearance of serious charges made in sorrow by an impartial, civic-minded body of prominent citizens. His reply was, generally speaking, a thorough refutation of the charges against him, but it had the appearance of a long, rambling, self-serving attempt to explain away the facts. There were two things wrong with it. First, it was so long and set in

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such excruciatingly small type that few readers had the stamina to struggle through it to the end. Second, it unfortunately was cast in the format of yes, but. Yes, a $194,000 judgment had been entered against the city despite the law, but it had not been his fault. Yes, he had opposed the Pullman injunction and the Street Department mandamus, but that was his job. Yes, he had hired $65,000 worth of outside counsel, but that was how the office had always been run, and they had not been his friends anyway. And so on, for charge after charge.

Some gleeful soul within the Citizens' Association recognized in this reply the perfect opportunity to turn denial into admission. What reader, daunted at the length and detail of O'Gorman's reply, would not be grateful if the Citizens' Association simplified it for him? Consequently, the group offered through the press its own summary of the charges and the corporation counsel's answers, bereft of bothersome details. In the form of another open letter to O'Gorman, it summed up in condensed form their entire dialogue.

The charge: Paying $65,000 for extra lawyers' fees. The answer: "This you admit." The charge: Allowing $194,000 in judgments to be entered illegally against the city. The answer: "You admit this, but lay the blame on the Courts." The charge: He had paid himself an extra fee of $10,000. The answer: "This you admit." The charge:

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He had attended Albany to increase the appropriations for his office. The answer: "This you admit." In all, the letter listed twelve charges, ten admissions, and two weak denials--all uncluttered by any wearisome explanation. The inescapable conclusion, if the reader were incapable of drawing it himself, was spelled out by the Citizens' Association: "Never were pledges so sadly violated; never was confidence so greatly misplaced."[39]

And if the modest length of this piece was too taxing for the reader, the Tribune gave a condensed summary in an editorial that oversimplified the matter even further, picking up the "charge and reply" format and using it to damning effect. The Tribune underscored the same conclusion that the Citizens' Association had reached about O'Gorman's unfitness for a place of public trust, warning darkly, "Mr. O'Gorman should understand that law and order must again reign in New-York, and that the people will not suffer themselves to be wronged forever."[40]

Two years previously O'Gorman had believed that the post of corporation counsel was "a purely civic office" utterly divorced from the mean strivings of politics. The attack on him by the Citizens' Association destroyed this

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[39]Citizen's Association, The Legal Bureau of the City of New York, Misc. Publ. No. 10 (1867), pamphlet in New York Public Library; full text published in Tribune, Nov. 30, 1867, p. 2. See also Times, same date, p. 8.

[40]Tribune, Nov. 30, 1867, p. 4.

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naive picture and left him angry, bitter, and suspicious. He knew beyond a doubt that professionally he had built a creditable record and had served his office well, but the reformers had ignored this truth and distorted his record beyond recognition. It all came down to a matter of politics. No matter how well he served the city's government, he could never satisfy the members of the Citizens' Association because it was a government they were determined to bring down. By associating himself with it, he had made himself their political enemy, to be brought down as well.

The fact was that corruption in New York City was so pervasive that no one could belong to its government without irreparable damage to his name. "It has fallen into complete contempt," James Parton declared in the North American Review in late 1866. "It is a dishonor to belong to it. Persons of good repute do not willingly associate with the rulers of the city, unless they are known to be of the small number who hold their offices for the purpose of frustrating iniquitous schemes."[41] The members of the Citizens' Association had thought O'Gorman intended to be one of that small number, and they had expected him to serve them, like Lorenzo Shepard, by leading in suits against the city. When O'Gorman instead stuck stubbornly

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[41]James Parton, "Government of the City of New York," North American Review, Oct. 1866, pp. 415-16.

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to his notion that he was lawyer for the city and not for the Citizens' Association, they had been outraged by the betrayal, and in time came to believe that no tactics were too underhanded against such a turncoat.

As it turned out, the campaign against him soon collapsed. Despite threats of bringing him up on charges before the governor, the Citizens' Association lawyers knew they had no case and never pursued the case beyond their posturing in the press. The accusations damaged O'Gorman's standing with the "better element" of society, but a public already surfeited with scandal soon forgot this relatively minor one. It was something, however, that O'Gorman could neither forget nor forgive. The eager candidate who once believed that his office was beyond politics had learned otherwise. Now thoroughly politicized and with all ties severed with the reformers, he cast his lot with the party "regulars" and soon became one of Tweed's most wholehearted supporters. When the "Ring" scandals broke, there would be no question which side the corporation counsel was on.

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CHAPTER X

A DEFENDER OF THE RING

"It is a good 'Ring,' and I, for one, am in favor of it," Richard O'Gorman declared in a widely published speech on October 13, 1870.[1] The path by which a "reform" corporation counsel came to be chief apologist for the Tweed Ring is one of the more bizarre twists taken by city government in that era. Yet O'Gorman's progress from a favorite of the Citizens' Association to a bosom friend of William Tweed is so logical as to seem inevitable under the circumstances. It also tells a great deal about how Tweed came to have such enormous power: not just because he was a clever and industrious crook, but because otherwise honest New Yorkers found it in their interest--as well as, they often believed, in the city's interest--to support him.

Most writers date the beginnings of the "Tweed Ring" (as opposed to the earlier Supervisors' Ring) to 1866.

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[1]The address was printed in its entirety in the Times, Oct. 14, 1870, p. 5, and more or less completely in most of city newspapers of the same date. General extracts are printed in Matthew Breen's Thirty Years of New York Politics, Up-to-Date (New York: Arno Press, 1974; orig., 1899), pp. 326-28, and in Callow, The Tweed Ring, pp. 240-41.

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Tweed himself said that the Ring began some time during John Hoffman's term as mayor, when he met regularly with the street commissioner and the comptroller to discuss politics over dinner.[2] By that time Tweed and his associates controlled most offices of city government, including the Common Council and the Board of Supervisors, and had a working majority of the legislature. Construction of the Court House was firmly in their hands, along with several lesser projects in the city and a "piece" of many private business operations. It took only the election of 1868 to consolidate the Ring's power over the city completely.

The outcome of the election was taken so much for granted that it attracted very little interest either by the press or the public. Obedient to Tweed's orders, Tammany nominated A. Oakey Hall for mayor and endorsed O'Gorman for a second term; the other Democratic organizations swung into line behind them, and for the first time in a long time the party presented a united front to the electorate. The Republicans nominated merchant Frederick A. Conkling for mayor--"not with any prospect of electing

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[2]See, for example, Callow, The Tweed Ring, pp. 80, 182, and Werner, Tammany Hall, p. 112. Tweed's testimony is given in Board of Aldermen, Report of the Special Committee of the Board of Aldermen Appointed to Investigate the "Ring" Frauds, Together with the Testimony Elicited During the Investigation, pp. 28-29, published as Board of Aldermen, Documents (1878), no. 8; hereafter cited as Ring Investigation.

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him," noted the Times, "but, as their own organs say, for the purpose of keeping up the organization of the party."[3]

In much the same spirit they nominated for corporation counsel a reformer, Dorman B. Eaton, who had impeccable credentials for the office. He had helped edit a revised edition of James Kent's Commentaries, and was regarded as a first-rate legal scholar. A partner in William Kent's firm, he served as counsel for the Erie Railroad and several other large corporations, but was best known for his volunteer work as a Citizens' Association lawyer. Among other services he provided the Association, he had drafted the acts that had provided the city with its new and professionalized Health and Fire departments. The Times extolled him as "one of the ablest lawyers and one of the purest public men in this City" but, almost in the same breath, wrote off his candidacy as one pursued simply as a gesture.[4]

After a desultory campaign, enlivened only somewhat by a rally and fireworks display at Tammany Hall, the voters elected Hall by a lopsided margin over Conkling (75,109 to

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[3]Times, Nov. 30, 1868, p. 4; for the nominating conventions, see ibid., Nov. 24, 1868, p. 5. The Times has little coverage of the election, and the other newspapers I consulted--the Tribune, Herald, and Post--even less.

[4]Ibid., Nov. 30, 1868, p. 4. For Eaton's life, which included his later leadership of the civil service reform movement, see National Cyclopaedia of American Biography, vol. 21, p. 20.

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20,835) and returned O'Gorman by a similar vote.[5] The Times found some consolation in the election of Hall, whom it considered a gentleman, if a somewhat eccentric one, and a public servant of proven honesty. Yet its editors had no realistic hopes that he would be able to accomplish much as mayor. In an editorial that might have been written about O'Gorman as well, they noted that he owed his office to "the half-dozen men who constitute the Tammany Ring." It was, they said, "perfectly understood between them and him before his nomination, that he would do no official act that involved important considerations of any sort, without first consulting his 'friends'; and every politician knows precisely what this means."[6]

Whatever agreements were made between O'Gorman and the organization were never divulged, but it would be naive to suppose that they did not exist. In 1868 Tammany did not need O'Gorman on the ticket nearly as much as he needed to be on it; the ticket would carry with or without him on it, while he could not redeem himself as corporation counsel and place himself in consideration for a judgeship without it. Consequently, Tweed and his associates were in a position to do some very hard bargaining with him. At the very least we can suppose that he was required to make a hand-

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[5]Times, Dec. 2, 1868, pp. 1, 4. The official returns show O'Gorman beating Eaton, 74,794 to 20,789 [ibid., Dec. 16, 1868, p. 6].

[6]Ibid., Dec. 2, 1868, p. 4.

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some donation to the Tammany war chest; such was standard practice by then for all candidates.[7]

Later events strongly suggest that he also surrendered the patronage of his department to the Ring; at any rate, shortly afterward the caliber of his appointments took a decided turn for the worse. When the able and honest Martin McMahon resigned as corporation attorney, he was replaced by a Ring henchman, Thomas C. ("Torpedo") Fields, and Gratz Nathan, nephew of Ring judge Albert Cardozo, was made chief assistant.[8]

In addition, O'Gorman went along willingly when Ring judges appointed Ring favorites to serve as commissioners of the street openings overseen by his department, and he passed along without comment the outlandish bills they presented for payment. The commissioners routinely ignored the statutory limit of thirty cents a running foot for their fees, and at times their charges took on bizarre proportions. Asked in court to justify a $3,000 fee for the Columbus Circle proceedings, for example, one commissioner explained, "We measured a spiral line commencing at

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[7]"They would be ingrates if they didn't contribute to the organization that put them in office," politician George Washington Plunkitt later observed. See William L. Riordon, Plunkitt of Tammany Hall (New York: E. P. Dutton & Co., Inc., 1963; orig., 1905), p. 74.

[8]Greener, History of the Corporation Counsel, p. 29.

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the center and screwing its way out."[9] From his silence on these and other matters, it was obvious that O'Gorman had at least a tacit agreement with the Ring not to meddle in its business.

In accommodating himself to the reality of politics as he found it, he was not far different from other professionals of his day in city government. The second half of the nineteenth century was a time not just of boss rule but of the growing professionalization of municipal services. Machine bosses like Tweed, even as they were lining their pockets, had to hire competent people to keep their cities running. While colorful bosses like Tweed in New York, James McManes in Philadelphia, and "Bathhouse John" Coughlin in Chicago were making headlines, a less well known body of professional public servants were quietly building and running their cities. In New York City landscape architect Frederick Law Olmsted created Central Park, civil engineer Alfred W. Craven managed the Croton Aqueduct, and physician Edward H. Janes (founder of the American Public Health Association) ran the Health Department for 27 years. Other skilled professionals built the city's water and sewer systems, engineered its docks, ran its public markets, taught its children, and treated the

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[9]Testimony in The Record of John K. Hackett, as Recorded, Founded on Official Documents (New York, 1875), p. 74, pamphlet in New York Public Library.

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sick and insane. Some of the more prominent, such as Olmsted, had a stormy relationship with the machine, but most made their peace with the system as they found it, paying whatever political dues were required and then were largely left alone to practice their professions. The smart man went about his business and let the bosses go about theirs.[10]

Such was basically O'Gorman's attitude during his first term, but during his second term he began to go beyond mere co-existence with the Ring; at some point he moved beyond accommodation to admiration of Tweed. He spoke in public meetings on his behalf, denied allegations of his dishonesty, and assured one and all that the city was in safe hands. The question is, Why? The most obvious answer, that he began participating in the Ring frauds himself, is a possibility that cannot be disproved, but it is not the most likely answer. The Ring was a closed corporation that admitted as few partners as possible, and its members had no need to cut O'Gorman in on its deals; if they needed a legal mastermind, they already had Peter Sweeny.

There is no evidence that O'Gorman ever took part in any of their schemes. When the Ring scandals broke in 1871, charges were flying right and left--but not against

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[10]The traditional negative view of nineteenth-century municipal government has been re-examined by Jon C. Teaford, in his The Unheralded Triumph: City Government in America, 1870-1900 (Baltimore: Johns Hopkins University Press, 1984); see esp. pp. 1-10.

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O'Gorman. He was never charged with anything, nor was anything mentioned implicating him during the trials of the various Ring figures. Tweed himself made a long, detailed confession toward the end of his life without once mentioning O'Gorman, although he named names with a thoroughness and candor that embarrassed public officials high and low.[11]

But if the ties that bound O'Gorman to Tweed were not criminal ones, what were they? The answer is that they were the same ones joining the lives of many ordinary New Yorkers to Tweed--a combination of self-interest, personal friendship, partisanship, ethnic considerations, and common ground on city issues. Of these self-interest was the most pervasive and, in O'Gorman's case, the most obvious. He wanted to advance his career by serving as corporation counsel, and Tweed not only controlled the nomination to the office but also dictated advancement to the bench. O'Gorman was not the only one who realized that one's own interest made necessary a certain amount of cooperation with the "Boss." Newspaper publishers depended on the corporation's advertising and printing for a large part of

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[11]A pencil transcript of Tweed's confession, "Mr. Tweed's Statement and Promise," can be found in manuscript form in the Charles S. Fairchild Papers, Box 1, in the New-York Historical Society. It is substantially the same as the text appearing in the Herald, Oct. 20, 1877. Tweed furnished more details in his testimony before the Common Council's committee, in Ring Investigation, pp. 12-43, 98-143, 178-276; see esp. pp. 255-56, in which he names those "cognizant of frauds."

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their profits, and these contracts were arranged by Tweed. Building contractors, labor agents, suppliers, craftsmen, and anyone else interested in doing business with the city had to deal with Tweed or one of his agents. Bidders for city franchises had to get his nod, whether for a horse-drawn railroad or a vegetable stall in Washington Market. A word from Tweed miraculously sped inspections and permits for small businessmen, and made policemen blind to sidewalk obstructions and violations of the Sunday closing laws. A scrawled "O. K." from Tweed could get a job, if not for oneself then for an improvident relative. And in the private sector a seat for Tweed on the board of directors did wonders for a company's profits; one needed only ask Jim Fisk and Jay Gould of the Erie Railroad. In New York City almost anyone bent on getting ahead had to get there through Tweed, and O'Gorman was no exception.[12]

But there were other ties to Tweed as well, and of these the hardest to understand today is that of personal friendship. It takes a real effort of the immagination to see Tweed as he appeared to his fellows. The picture that comes most readily to mind is the Thomas Nast caricature of

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[12]These and many more examples are detailed in Callow's Tweed Ring, particularly in the chapters "'Honest' Graft," pp. 163-81, and "Peculation Triumphant," pp. 182-97.

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a beady-eyed, sneering villain, but Tweed in the flesh was nothing at all like that. He had an unusually winsome, attractive personality, and owed much of his power to the affection he inspired. He had friends in all walks of life, from Bowery bums to Wall Street financiers; they deserted him after his fall, but in his prime he was idolized by thousands of New Yorkers. Many of the things that seem so grotesque about him today--the bewhiskered jowls, the bulging belly, the gaudy diamond stickpin--were the fashionable standard for a mid-nineteenth-century statesman. Tweed lumbered through his doting subjects like an amiable giant, tipping a wink here and sharing a chuckle there. He kept barely hidden a maudlin streak of sentimentality that burst forth in legendary acts of generosity. It was well known that he gave tons of coal to the poor in his ward, but he also quietly made countless small loans, put groceries in empty cupboards, and paid for funerals. Gruff and unpretentious, he had a roguish charm that even his bitterest opponents found hard to resist. Matthew Breen, who knew well what a crook he was, still confessed to a sneaking affection for "the old Boss" and in some ways preferred him to the stiff-necked reformers.[13]

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[13]For a discussion of the personable side of Tweed, see ibid., pp. 10-12 and 250-52; Mark D. Hirsch, "More Light on Boss Tweed," Political Science Quarterly (June 1945), pp. 267-68, and Breen, Thirty Years of Politics, pp. 51-53 and 326. And for revisionism carried to an extreme (i.e., Tweed as more victim than villain), see Leo Hershkowitz, Tweed's New York: Another Look (Garden City, N.Y.: Anchor Press/Doubleday, 1977), pp. xiii-xx.

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O'Gorman was one who fell under Tweed's spell, becoming in Breen's opinion "mesmerized."[14] Scorned by his old reform colleagues, he was flattered when Tweed began showering him with attention shortly after his re-election. Tweed enjoyed his company and drew him into his social circle, including him in dinners at Delmonico's and weekends in Connecticut as the Americus Club. The two made a strange pair, the rough-edged Tammany politician and the "classic and eloquent" barrister, but their very unlikeness drew them together. O'Gorman admired Tweed's natural-born mastery of backroom politics, and Tweed admired his counsel's polish and eloquence. No one could work a smoke-filled room like Tweed, but public speaking unnerved him and left him sweating and stammering his way through an incoherent address. On the other hand, O'Gorman--called by Breen "perhaps as charming a speaker as has lived in any age"--could speak off the cuff with wit and grace, effortlessly tossing off an after-dinner speach or a flag-waving political oration.[15] The two men complemented each other perfectly: Tweed promoted O'Gorman in the backrooms, and O'Gorman promoted Tweed from the podium. It was the way of politics, friend helping friend.

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[14]Breen, Thirty Years of Politics, p. 326.

[15]Ibid., p. 274.

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Partisanship itself goes a long way toward explaining O'Gorman's loyalty to Tweed. O'Gorman had been in the thick of politics in Ireland, and he transferred that interest to this country. Even if he had not liked Tweed, he would have found it difficult to take part in politics (which, for him, was Democratic politics) without cooperating with the local political chieftain. In that he was like almost every other Democratic politician in New York. Samuel Tilden, for instance, found Tweed personally distasteful, but even he was careful to maintain cordial relations with him, appearing smiling on the same public platform with him, seating his delegation when it was contested in a state convention, and writing chatty letters soliciting small favors ("I wonder if you could find a place for Samuel Allen, a very old friend of ours"). Nor was he the only one; the Ring investigations uncovered a brisk and friendly correspondence with congressmen, governors, cabinet members, and other political leaders, all busy keeping their fences mended with Tweed.[16]

As an Irish exile, O'Gorman had an added reason to align himself with Tweed and Tammany. The Hall had long given a warm welcome to the Irish, with the first "friend" a greenhorn usually made being someone from the ward clubhouse who took him in hand, arranged for lodging and job,

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[16]Hirsch, "More Light on Boss Tweed," pp. 267-78; Tilden's letter is at p. 275.

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and enrolled him in the party. Tammany was intent on their votes, of course, but the newly minted citizens (products, the reformers claimed, of "naturalization mills" run by Ring judges) were proud of their citizenship and grateful to the party that provided it. Besides, the Irish were no mean political hands themselves; they used the Hall as much as the Hall used them, until by the 1860's it was hard to tell who was manipulating whom.[17]

No one was more skilled at advancing the political fortunes of the Irish than O'Gorman, who had lost none of his passion for the "cause" or for the plight of his fellow Irishmen. By attaching himself to Tweed, he pulled enough weight in Tammany that in 1870 he was able to push through a strong resolution of support for Irish independence. In this resolution the General Committee expressed sympathy for the rebels, noted the recent release of several Irishmen from British prisons, and extended a welcome to them. To demonstrate its commitment to the cause, Tammany set up a relief fund for the rebels, with Tweed opening the drive with $1000 of his own money. There is no doubt that he and the other members of the committee were using the cause for their own devices--cementing their Irish support--but it

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[17]See the chapter, "The Newcomer" in Callow, The Tweed Ring, pp. 60-75, and U. S. House of Representatives, New York Election Frauds: Reports of Committees of the House of Representatives, vol. 2, no 30 (50th Cong., 3rd Sess, 1869), esp. pp. 12-28, 40-41, and 138-40. Extracts of some of the testimony are given in Werner, Tammany Hall, pp. 134-38.

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was also an important first step in O'Gorman's campaign to swing the national Democratic Party behind the Irish cause.[18]

In addition to these ties, O'Gorman and Tweed shared common ground on most issues facing the city. O'Gorman knew that Tweed and his associates had their own financial stake in the city's growth, but still he found their attitude toward the future of the city far more attractive than that of the reformers, many of whom were, by comparison, backward-looking and anti-urban. O'Gorman was an avowed urbanite, an Irishman of the pavement rather than the peat bogs. With the splendor of his beloved Dublin falling into squalor, he transferred his affections to New York and exulted that it showed prospects of becoming a "center of enlightenment, of commerce, of finance, the best-lighted and best-watered, and before it the most glorious future of any city in the world."[19] He reveled in its crowded sidewalks, clogged traffic, and eager immigrants; the din and clangor of tearing down and building up was music to his ears, and he appreciated the maestro who wielded the baton, William M. Tweed.

The reformers were noticeably less enthusiastic. Instead of growth and progress, they saw a mindless rush

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[18]Times, Dec. 30, 1870, p. 5.

[19]Speech by O'Gorman, printed in Herald, Nov. 28, 1868, p. 5.

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toward bigness that was bringing with it dirt, disease, disorder, crime, alien ways, a ripping of the social fabric. As exemplified by the Citizens' Association, they were primarily a conservative group of business and professional men who were disturbed by the unsettling changes sweeping across post-Civil-War America. Their power was being threatened on all sides--by the newly rich "robber barons" in business and industry, by labor radicals agitating for unions, by immigrants with alien papist loyalties, and by the new breed of professional politicians.[20]

Some were members of the old, established families who had long run New York City--the Roosevelts, the Varians, the Vermilyes, the Iselins, and other proud "old stock" families. But a surprising number were themselves newcomers, Yankees who had left the farms and villages of New England or upstate New York (which was itself practically a colony of New England), and who had made their fortunes in New York City without ever shedding their conviction that cities were by nature evil places. More than the native sons of Manhattan, they gave reform its pronounced moral thrust and were the chief hairshirts of the movement--men like publisher George Jones of the Times (born in rural Vermont), Joseph Choate (Salem, Massachusetts), Peter Cooper (born in New York City but reared in Poughkeepsie

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[20]Callow, The Tweed Ring, pp. 67-70, and Sproat, The "Best Men", pp. 273-78.

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and points west), Dorman Eaton (Hardwick, Vermont), Andrew H. Green (Worcester, Massachusetts), and Henry Taintor (Buffalo). Their general air of disdain so provoked O'Gorman that he denounced them in 1868 with a speech that brought a delirious Tammany audience to its feet:

> It is not from foreign Democrats that a word of reviling ever comes against the City that they love; it is from the emigrants who have arrived here by land. [Laughter] They are, in fact, the foreign population of the City. They are a meddlesome few who believe that all the culture and right to govern dwell in them.[21]

Whether their model was the lower Broadway of their fathers' day or some rural childhood home, the reformers as a group felt strongly that municipal government should limit itself to a few essential functions and leave everything else to individual enterprise and private charity. It was a vision quite unrealistic for a city whose nearly one million residents were straining municipal services of all kinds, and Tweed and his associates ignored it in favor of a crash program of streets, bridges, parks, public markets, docks, sewers, water lines, dams and reservoirs, and public buildings. It was hard for the reformers to object to these in principle since such public works were not a new responsibility of government, and even the diarist Strong gave Tweed his due, admitting that "the Bat-

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[21] Ibid.

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tery, City Hall Park, Madison Square, and other spots have been greatly improved and embellished by this scurvy and sinful Ring."[22] But they could, and frequently did, object to individual projects on their merits.

It was, in fact, hard to propose almost anything without their disputing its need, questioning the credentials of those in charge, carping about every drawback, and, above all, recoiling in horror from its cost. Ever since their objections to the widening of Ann Street, O'Gorman had been exasperated by their fault-finding with proposed street improvements and openings. In his mind they were indeed a "meddlesome few" who persistently placed themselves in the way of progress.

And if the reformers were nettlesome about matters that were within the accepted province of city government, they were positively obdurate anything that tried to enlarge that sphere. In particular, they launched an all-out opposition to a special welfare program dreamed up by Tweed and supported by O'Gorman. Although modest by later standards, the proposal was a radical departure for its day inasmuch as it used state and municipal funds for charitable relief, education, medical care, and other aid to the city's needy. In effect, it was "an extralegal social security plan" that anticipated the New Deal by some decades and had government

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[22]Strong, Diary, vol. 4, p. 387 (entry for Sept 25, 1871).

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assuming a large amount of responsibility for public welfare.[23]

The various proposals all depended on funding from the legislature, and they received their biggest boost in 1869, when Tweed used his connections as state senator to gain control of several key committees. Rather than having the programs administered directly by city government, Tweed--no doubt with some input from the corporation counsel's office--devised a system that would operate through grants to existing schools, churches, and charitable agencies. Even so, the reformers denounced it as a costly boondoggle, an intrusion into matters best left to private charity, and, most alarmingly, a breach of the separation between church and state. To O'Gorman's disgust, the greatest storm arose over whether some of the funds should be shared with Catholic schools and charities, or whether these plans were part of a greater "Papal conspiracy."[24]

The reformers opposed other parts of the program, and in fact would have none of it. When the Board of Supervisors moved to put $20,000 into the budget for aid to the blind, the Citizens' Association objected: "There is no

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[23]John Pratt, "Boss Tweed's Public Welfare Program," New-York Historical Society Quarterly (Oct. 1961), pp. 397-411. See also Callow, The Tweed Ring, pp. 152-58, and Hershkowitz, Tweed's New York, pp. 140-41.

[24]A charge leveled in the Christian Advocate, quoted in Callow, Tweed Ring, p. 154.

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reason why the City should give $50 a year to each needy blind man." Its members also disapproved of municipal support for the new City College, on grounds that "collegiate education is a luxury." As for proposed relief for the city's jobless citizens, the Association suggested instead, "Let us forward the unemployed to the Western states."[25] Little wonder that to O'Gorman the reformers seemed a carping band of nay-sayers, constricting the role of government and blocking Tweed's progressive urban agenda--in essence, practicing what a later historian would call "the politics of nostalgia."[26]

During his second term O'Gorman came to identify himself wholeheartedly with the Tweed government and to increase the distance between himself and the reformers. He felt that he was making a creditable record as corporation counsel in a government that was serving its citizens well. The volume of legal business handled by the Law Department continued to increase. In 1870, for instance, his office handled 1, 157 cases, rendered 55 formal legal opinions, wrote 393 "official communications," and drafted

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[25]Citizens' Association, City Tax Budget for 1867: An Analysis (1967), p. 4 [advice on the blind]; same, Report on Public Instruction (1868) [criticism of City College], p. 32, and same, Philanthopic and Charitable Relief in New York City (1968), p. 3 [suggestion on the unemployed]; all pamphlets in New York Public Library.

[26]Sproat, "The Best Men," p. 272.

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countless contracts, deeds, and other legal papers.[27] The area east and west of Central Park was poised for real estate development, and the office was swamped with petititons for street openings. In addition to formal written opinions, O'Gorman daily dispensed on-the-spot advice to officers high and low in city government. He found himself increasingly acting more as an administrator than a lawyer, setting overall policy and then delegating the work to others. He tried fewer cases himself, assigning most litigation to his assistants or outside counsel.[28]

The careful record keeping O'Gorman had instituted in his first year in office was beginning to pay off. Not only did he have at his fingertips information about the progress of each case, but he was given early warning of trouble ahead. In 1870, for instance, two minor judgments were entered in default because no one had appeared in court for the corporation. In Develin's administration this lapse would have gone unnoticed in the general bedlam, but under O'Gorman's system alarms bells went off all over the office. He pounced on the occurrence and traced it back to an employee in the comptroller's office who, as a

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[27]"Annual Report of the Corporation Counsel," in Board of Aldermen, Documents (1870), no. 3. The number of opinions seems low; probably another corporation counsel would have classified some of the "official communications" as opinions.

[28]Ibid. See also "Annual Report of the Mayor," in Board of Aldermen, Documents (1870), no. 1.

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favor, had accepted service of a lawsuit and then dropped the papers in the nearest wastebasket. Able to prove from his office register that no service had been made to the corporation counsel as required by law, he went to court and had the judgment set aside. In itself it was a relatively minor matter, but one that O'Gorman was convinced would have become a full-fledged racket if not nipped in the bud.[29]

It was a heady time to be an officer of New York City government. Today Oakey Hall's administration is remembered chiefly for its corruption, but in the halcyon days of 1869 and 1870 it seemed likely to go down as one of the greatest in the city's history. The most visible sign of success was its vast public works program: paving and widening old streets, opening new ones, extending water and sewer lines, modernizing the docks, bringing neighborhood parks to the slums, providing public baths, beginning construction of Brooklyn Bridge. Less visible, but perhaps even more significant, were other changes in the city. "For a moment, at the end of the 1860's and the beginning of 1870's," writes Seymour Mandelbaum, "it appeared that New York's governmental institutions would be reconstructed and a comprehensive attack would be launched on all the

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[29]"Annual Report of the Corporation Counsel" (1870), p. 8.

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myriad disabilities of urban life."[30] In this "moment of opportunity," as he called it, the city's government not only undertook great public works projects but also embarked on Tweed's ambitious social welfare program.

Its most lasting accomplishment, however, was the "Tweed Charter" of 1870. Like many things in the Ring years, this charter came into being for Tweed's own benefit. With the election of 1868, the Ring had captured the strategic high ground in the city: Hall sat in the mayor's chair, Connolly cooked the books in the comptroller's office, Sweeney shuffled the money through the city treasury, and Tweed orchestrated everything from his quarters in the Street Department. The Ring was riding high, but its success had inspired jealousy among politicians who were not lucky enough to share in it. Ambitious men like former sheriff James O'Brien, mayoral hopeful Thomas Jefferson Creamer, eighth ward boss Mike Norton, and twelfth ward boss Henry ("Prince Hal") Genet began building a rival machine, using as a power base their growing strength in the Board of Aldermen and Board of Supervisors and clothing their motives behind the banner of reform. Using a group of idealistic young reformers as a cover, they organized the "Young Democracy" and set up shop

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[30]Seymour Mandelbaum, Boss Tweed's New York (New York: Wiley, 1965), p. 59.

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in Apollo Hall under a banner that proclaimed DEATH TO THE TWEED AND SWEENY RING--THE PEOPLE SHALL BE EMANCIPATED.[31]

The one thing they had not anticipated was that Tweed would spike their guns by becoming himself--briefly--the hero of the reformers. He did something the Citizens' Association and others had been trying, and failing, to do for some years: reform the city charter once again. It took Tweed only two months to push through the legislature a new charter that remedied many of the faults of the old charters of 1849 and 1857. He did so by using the same tactics that he had perfected in New York City--a combination of bribery, threats, and favors--and on April 5 he handed the reformers the changes they had been unable to enact themselves.[32]

The actual author of the charter is unknown, but there is strong reason to believe that it was written in the Law Department by David Dean, who almost thirty years later

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[31]Mark D. Hirsch dismisses them contemptuously as "a few dissident mediocrities posing as reformers" in his William C. Whitney: Modern Warwick (New York: Archon Books, 1969; orig. 1948), p. 56, and distinguishes them from the later organization that went under the name of Apollo Hall. See also Callow, Tweed Ring, pp. 222-24.

[32]Ibid., pp. 224-34. Ironically, one of the favors Tweed passed out was a promise to a state senator of a post in the Assessment Bureau for the senator's law partner, young William C. Whitney, who five years later would be calling on him in jail as corporation counsel [ibid., p. 230]. Hirsch does not mention this appointment in his biography pf Whitney, so something must have gone awry with the deal.

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would help write the Great Charter of 1898.[33] At any rate, the charter was an exemplary one. It did away with the "metropolitan" agencies imposed on the city by the legislature, including the police, fire, and health commissions, and replaced them with city departments whose heads were appointed by the mayor. These state-appointed agencies had proved a disappointment to the reformers; besides being unwieldy and unresponsive to the wishes of local citizens, they had turned out to be just as susceptible to corruption as the local offices they had replaced. The new charter also took the Croton Aqueduct Board, which ran the water system from reservoir to faucet, and made it part of the Public Works Department. And, to the surprise of everyone, it did completely away with Tweed's own power base, the Board of Supervisors, and returned its powers to the Common Council. Almost as an afterthought, however, it delegated its powers over the budget to a new "Board of Audit," which later evolved into the Board of Estimate.[34]

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[33]Despite his "law degree," Tweed would have been incapable of drafting such a document himself; Hall or Sweeny conceivably could have, but they had no special expertise in this area and, at any rate, never claimed authorship. It is more likely that the actual writing was turned over to the Law Department, whose staff drafted the city's legislation. O'Gorman, who had no more familiarity with municipal charters than Hall or Sweeny, would have assigned the drafting to someone who did--at this time, probably Dean.

[34]For these and other provisions of the charter, see "An Act to reorganize the local government of the City of New York, passed April 5, 1870, as amended by Chapter 383, passed April 26, 1870, and further amended by chapter 571, passed April 18, 1871," in Board of Aldermen, Documents (1871), no. 3.

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The city's government had long been balkanized into feuding department whose heads jealously guarded their own turf and warred with one another over jurisdiction and responsibility. The new charter centralized authority, drew firm lines of command, and spelled out who was in charge of what. It replaced a mayor whose functions were still largely ceremonial and ministerial with one who at last wielded real executive authority. It gave him the power to appoint all department heads and to hold them accountable to him for their performance.

The corporation counsel, for instance, would no longer be elected by the public and responsible to no one in particular in city government; at the expiration of O'Gorman's term he would be appointed by the mayor and answerable to him. He no longer had the independence of an elected official, but he gained something in return: authority over other officers by dint of his special relationship with a new "strong mayor." Department heads who once flouted his advice when it suited them now did so at their peril, defying not just a fellow department head but the mayor himself.[35]

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[35]Art. 6, secs. 40-42 of the charter spells out the organization and duties of the Law Department, which were little changed aside from making the corporation counsel and appointed officer and increasing his term from three to four year. O'Gorman's term was set to end on December 31, 1872, so that the next corporation counsel would be appointed by the mayor taking office Jan. 1, 1873.

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The new charter tidied up a few other loose ends of city government. It took responsibility for the corporation's waterfront facilities, which had been scattered among various agencies, and assigned it to a new Department of Docks. It reduced some of the powers of the Board of Aldermen, preventing it from interfering at will in the departments of city government, and required a three-fourths majority for money appropriations. It kept the state-created Central Park Commission but made its members appointed by the mayor. In these and other provisions, it was an unusually comprehensive, progressive document that streamlined the operations of city government and provided a blueprint for its future.[36]

To say that the reformers were bowled over would be putting it mildly. "Senator Tweed is in a fair way to distinguish himself as a reformer," the Times declared. "At all events he has put the people of Manhattan Island under great obligations." The editors were especially astonished that he had abolished his own Board of Supervisors and had shown "no disposition to evade or prevaricate" in implementing the changes.[37] Even the Citizens' Association stood in awe of the city's newest statesman, with chairman Peter Cooper rushing to invite him to be an honored guest

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[36]For an analysis of the charter, generous in its praise, see Bryce, American Commonwealth, pp. 342, 352-53.

[37]Times, Apr. 8 and 13, 1870, both p. 4.

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at Cooper Institute's spring commencement. "It would give me great pleasure to have you present on the platform," he wrote, signing off with a cheery, "hoping you will lend your presence to the occasion."[38]

Some of the city's most distinguished citizens consented to serve in the new city departments, lending the respectability of their names to a government in which only recently "no decent man [could] take public office without imminent danger of losing caste."[39] Impressed, the Times pronounced mayor Hall's new appointees "far above the average in point of personal fitness."[40] Tweed returned a hero from Albany. Cannons boomed in salute, balloons soared into the air, and a torchlight parade stepped off smartly to the strains of the "Star-Spangled Banner." Modestly, Tweed refrained from speaking himself and had a short letter read to the crowd giving credit to his "associates and soldiers."[41]

In the late spring of 1870 the whole city lay at Tweed's feet, and it seemed that nothing could dim his glory. Underneath the surface, however, ominous cracks were developing in his support. The leaders of the Young

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[38]Quoted in Hirsch, "More Light on Boss Tweed," p. 275.

[39]Strong, Diary, vol. 5, p. 246 (entry of May 20, 1869).

[40]Times, Apr. 13, 1870, p. 4.

[41]Ibid., Apr. 10, 1870, p. 5.

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Democracy, who had supported a rival charter, discovered that one of the effects of Tweed's charter was to shake them from whatever precarious grasp they had of the city government. The inroads they had made into the Board of Supervisors vanished with its abolition, as did many of their seats in the re-districted Board of Aldermen. In the reorganized city departments, Hall purged any of their remaining members and gave all the patronage to Ring loyalists. Tammany elected Tweed to a second term as Grand Sachemitself and ousted all Young Democrats from its General Committee. In retaliation they began preparing a "fusion" slate for the fall elections for mayor and governor.

Then disturbing rumors began circulating about the city's finances. The city had trouble finding buyers for a $3 million bond issue; the financiers who usually underwrote the bonds were concerned about word on the street that the city's credit was seriously over-extended.[42] This incident seemed to confirm another rumor that the Ring's graft had pushed up the City's spending to unheard-of levels. The talk during the summer was that the standard "kickback" of 15 to 20 percent on a municipal contract had been increased to an incredible 65 percent. No one knew whether to believe this rumor or not. The city's new Board

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[42]Mandelbaum, Boss Tweed's New York, pp. 77-78.

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of Audit had oversight of municipal spending, and so far it had seen nothing wrong in any of the bills submitted to it. This fact was not as reassuring as it might have been, however, because its members were the mayor, public works commissioner, comptroller, and president of the Parks Department--that is, Hall, Tweed, Connolly, and Sweeny.[43]

The Times picked up all these rumors, and by the late summer of 1870 publisher George Jones was beginning to wonder whether he had been made a fool by Tweed. If there was one thing Jones could not stand, it was to be a figure of ridicule. Consequently, he set his reporters to digging into the facts behind the rumor; they talked to disgruntled contractors, disappointed politicians, disillusioned city employees, concerned businessmen, and other sources of information. In September the Times splashed their findings across its front page: TWEED'S BLACKMAIL. BOLD DEEDS OF THE RING EXPOSED. THE PUBLIC OUTRAGEOUSLY AND SYSTEMATICALLY PLUNDERED.[44]

New Yorkers, the Times charged, "have been robbed during a series of years in the most barefaced manner by the band of plunderers who have ruled the City, and will continue to be, so long as they permit a corrupt 'Ring' to hold fast to the reins of power." There had never been "so

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[43]Ring Investigation, pp. 397-98.

[44]Times, Sept. 24, 1870, p. 1.

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extravagant, so unprincipled, or so degraded a local government seen in the United States as the Democratic government of this City."[45]

The series broke on the city like a bombshell. All over town people read the Times and talked of little else. Was the Times right? Was the hero of the city nothing but a common thief? Was the city being taxed into bankruptcy? What did all the accusations mean? Did "wholesale confiscation of private property" mean that people would lose their homes?

O'Gorman read the series of articles with mounting distress. He was proud of the government he served in and had been pleased when Tweed was given the recognition he deserved for securing the new charter. In the euphoria of the past few months the Ring and the reformers had put aside the differences and worked together on behalf of the city's future. Now, in an outburst of irresponsible journalism, the Times had placed this spirit of cooperation and progress in jeopardy. O'Gorman could only conclude that, just as in his own case in 1867, partisan politics was at work. The Times had, he believed, tipped its intentions when it warned in its opening story, "What these men have done in this City, the Democrats would do in the State, and

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[45]Ibid., Sept 21, 1870, p. 4; Sept. 24, 1870, p. 1, and Sept. 28, 1870, p. 4.

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what they would do in the State they would do all over the country if they had the opportunity."[46]

Apparently the Times had decided that the only hope for a Republican victory in the fall elections was a smear campaign aimed at discrediting the local Democratic party and its leader Tweed. O'Gorman, at least, could discern no other motive. It did not escape his notice that while trumpeting charges of robbery and plunder, the Times had provided no real evidence of wrongdoing, relying instead on innuendo and personal vilification. To O'Gorman it was bad enough to say that taxes were high because the Ring was robbing the city blind, and that Tweed had run away with the state Democratic convention and had made himself into an autocrat. But what was really unforgivable was the newspaper's intrusion into Tweed's personal life.

In particular, he was offended by the way the newspaper had criticized Tweed for providing a good living for his family. In a long editorial on September 28, the Times had criticized Tweed's "showplace" home on Fifth Avenue as unduly luxurious for a public servant. The reporter had gone around back and, finding the stables "fitted up with imperial splendor," reported that Tweed's horses lived better than many a poor taxpayer of the city. The Times tried to make something sinister of this display of wealth:

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[46]Ibid., Sept. 21, 1870, p. 4.

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"'How did he make all his money?' strangers ask when they see our great Dictator's palatial residence." Obviously, through plundering the public.[47]

O'Gorman's wrath grew day by day. The articles in the Times struck every tie that bound him to Tweed and his government. They were a libel against a friend, an insult to his party chieftain. They were a challenge to the party that had his allegiance as an American and an Irishman. They threatened to undermine all the progress that was being made toward building the shining city of the future. They also, not incidentally, threatened to bring down the city's government and with it O'Gorman's own political career. If the Times had aimed its arrows straight at him, they could not have struck with greater accuracy. When a Tammany official approached him to say a few words in answer, he leapt at the opportunity.

The occasion was a routine meeting of the General Committee called for the evening of October 13 to name polling places and inspectors for the coming election. Everyone knew, though, that the Times' series could not pass without comment, and as a result the meeting drew a huge turnout. "The Old Wigwam was packed as tight as a box of plug tobacco," the Sun observed. The seats were crowded with politicians "all well plastered with diamonds," including

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[47]Ibid., Sept. 28, 1870, p. 4.

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the entire Board of Aldermen, several judges, Mayor Hall, Connolly, Sweeny, and all other major officeholders. The "Shiny Hat Brigade" of patronage employees turned out in force, among them one Frank Duffy, sporting "the most costly $5 glass diamond in the world." Hall, O'Gorman, and other notables occupied the dais over which Tweed presided, looking "every inch a divine" in a stiff white shirt and somber black suit.[48]

The naming of inspectors and polling places was speeded through, interrupted by impatient calls from through the auditorium: "O'Gorman! O'Gorman!" The assembled braves knew what the real business of the meeting was, and when he took the podium at last, O'Gorman did not disappoint them. He uncorked an address later recalled as "the most remarkable speech ever delivered in behalf of the Tweed Ring."[49]

O'Gorman went straight to the point. "Now, fellow citizens, what is the meaning of this word 'Ring?'" he asked. "A Ring I take to be a collection of men united for some common object. If the object be bad, it is a bad Ring--if good, it is a good Ring." O'Gorman recalled for them a number of Rings never mentioned by the likes of the Times: the Whiskey Ring, the Land Grabbing Ring, the Gold

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[48]Sun, Oct. 14, 1870, p. 1.

[49]Callow, Tweed Ring, p. 240. The speech was published almost in its entirety in practically every newspaper in the city. The quotations that follow are from the text carried in the Times, which is more complete than the one in the Sun.

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Ring, the Bessemer Steel Ring. All of them "bad" Rings, Republican Rings, "conspiracies to plunder and defraud and dishonor the American people." What, then, about the Tweed Ring?

> But if the Ring referred to means a body of men in the City of New York directing, organizing, guiding and governing the Democratic Party in this City, and governing it so that the effect and history of the Party expresses success, then I say that a "Ring" is a necessity; it is a good "Ring," and I, for one, am in favor of it.[50]

The crowd went wild, whistling and cheering, while O'Gorman plunged on.

> If, instead of the present Ring composed, if you will, of Mr. Tweed, Mr. Sweeny and Mr. Hall--if, instead of that, there is to be a Ring composed of any other men I have ever heard named in what it is called the "Young Democratic Party," I for one will stand by the old Ring, because I believe it has more sagacity, more power, more intelligence, more political skill, and more promise of success than the other.[51]

War whoops split the air. "Pour it on!" "Pitch it to 'em!" "Hurrah for the Boss!" "Hurrah for the Ring!"[52]

Warming to his task, O'Gorman branded the charges in the Times "false, scandalous, and idle." He brought all his sarcasm to bear against its editors and their accusations. "It is said that Mr. Tweed has a gorgeous house,"

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[50]Times, Oct. 14, 1870, p. 5.

[51]Ibid.

[52]Sun, Oct. 14, 1870, p. 1.

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he said companionably. "Well, I do not know about that; but I guess every one of us would like to have a gorgeous house!" ("You bet!" "I'll take one!") Not content with invading the privacy of Tweed's home, O'Gorman went on with a wink, the Times had even poked its nose into his stables! He turned suddenly serious. "Now, gentlemen, it seems to me that the perfection of Mr. Tweed's house is a matter for Mr. Tweed's family and for Mr. Tweed's guests." Then, with a twinkle in his eye: "The condition of Mr. Tweed's stable is a matter of interest only to Mr. Tweed and to Mr. Tweed's horses!" (Laughter)

O'Gorman now had his audience in the palm of his hand and could deal with the substance of the Times' charges: corruption in city government. Clearly the accusations pained him. The good name and character of many distinguished public servants had been most unfairly called into question. Judge for yourself whether Ring government is corrupt, O'Gorman challenged. Judge it by the men who are now serving in it.

Eyes swiveled across the room, focusing on familiar faces. On the dais Tweed looked solemn, and Hall fiddled with his pince-nez. Connolly fidgeted in his seat among the audience, and Sweeny peered owlishly from his private box in the balcony. Other politicians struggled to look virtuous. But O'Gorman passed without comment over the better-known public servants and took his examplars of

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morality from the ranks of the Board of Education, the Department of Docks, the Board of Charities and Corrections, and so forth. Look at the Department of Docks, for instance, he said. Whom did Mayor Hall appoint as its head? William Wood, "a man of enlightened intellect, of high character, a banker . . . respected wherever he is know." Serving with him, John T. Agnew, "a merchant than whom there is none more honored," and Wilson G. Hunt. "What can be said against him? Did any man ever attach to that honored name the slightest cloud of dishonor?" Its chief engineer was the famed general, George B. McClellan, "a citizen, a gentleman, and a Christian." Its disbursing officer was Jacob Westervelt, "an old Knickerbocker, once Mayor of New York." O'Gorman went on and on, through the Parks Department, the Police Department, Charities and Corrections, and other agencies: all staffed by pillars of the community, the very epitome of civic virtue.[53]

It was a masterly performance. "Mr. O'Gorman was at his best," Breen, who was present, later recalled. "He acted as if he sincerely believed what he said. Perhaps he did."[54] At any rate, he convinced his audience, which soon grew to include the general readership of the city's newspapers. O'Gorman's speech read as well as it sounded, and

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[53]Times, Oct. 14, 1870, p. 5.

[54]Breen, Thirty Years of Politics, p. 326.

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the next day's newspapers snatched it up and ran it practically verbatim. "Tweed evidently intended that through him, New York should be favored with what he believed to be a complete answer to those who criticized the Tammany Hall leaders," Breen wrote.[55] If so, he succeeded beyond his wildest dreams. Carried in the newspapers, the speech reached everyone in the city and convinced many that there had been no substance to the Times' charges. The speech made the charges against Tweed look ridiculous, the typical mud-throwing of an election year.

O'Gorman's master stroke had been the roll call of names offered as proof of the Ring's honesty. Breen dismissed it as so much window dressing intended to divert attention from the real crooks in government, and the Times felt that O'Gorman had evaded the real issue. An editorial complained, "It is as if he had been engaged in defending a man from a charge of burglary and based his defense upon the fact that the prisoner in his early days attended Sunday-school regularly."[56] But the list of names had a telling effect on those who read the speech. Almost everyone knew, at least by reputation, one or more of the men mentioned, and considered them honest, upright citizens. If these distinguished New Yorkers had agreed to serve in

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[55]Ibid.

[56]Times, Oct. 14, 1870, p. 4.

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the city's government, it could not be the sinkhole of corruption that the Times claimed it to be. O'Gorman made sense to many people, who agreed that the whole affair was a typical election year stunt by an newspaper intent on gaining a Republican victory.

O'Gorman's speech was not the only thing that saved the Ring in the fall of 1870. At the invitation of Tweed, a "blue-ribbon panel" of businessmen examined a sanitized set of the comptroller's books and pronounced the city's finances, despite rumors to the contrary, to be in fine shape.[57] The Young Democrats, the Republicans, and the various reform groups fell to squabbling among themselves and never mounted an effective "fusion" campaign in the fall elections. Lacking any hard evidence of frauds, the rest of the city's newspapers stayed out of the fray and left the Times to take potshots at the Ring. The famed "Ring Defense Speech," as it came to be called, did not by itself prolong the life of the Ring for another year, but it certainly helped. At the very least, it lulled the people of the city into a sense of complacency that was difficult to shatter.

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[57]Called the "Astor Committee," its members were some of the most respected of the business and financial committee: John Jacob Astor, Moses Taylor, Marshall O. Roberts, George K. Sistairs, Edward Schell, and E. D. Brown. For a criticism of its motives and methods, see Callow, Tweed Ring, p. 240.

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It also did something far worse. When proof of the Ring scandals finally broke in the summer of 1871, how could the corporation counsel--on record so memorably in this speech--be trusted to take legal action against the Ring?

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CHAPTER XI

AN ABDICATION AND AN IMPEACHMENT

In the summer of 1871 the New York Times began the famous series of disclosures generally credited with bringing about the Ring's downfall. Acting independently of each other, two former cohorts of Tweed revenged themselves for real or fancied slights by smuggling out to publisher George Jones figures copied from the comptroller's and auditor's offices.[1] It was exactly the ammunition that Jones and his editor Louis Jennings had been waiting for: facts to back up charges that up to them had been mere conjecture. In July the newspaper ran a series of attacks under such headlines as "THE SECRET ACCOUNTS: PROOFS OF UNDOUBTED FRAUDS BROUGHT TO LIGHT."[2] Using figures that it promised had been copied "with scrupulous fidelity" from

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[1]James O'Brien, former sheriff and founder of the Young Democracy, supplied figures obtained from a spy in the comptroller's office, and county auditor Matthew O'Rourke (whom the Ring had "stiffed" on a claim) passed along information from his own office. See Callow, The Tweed Ring, pp. 259-60.

[2]Times, July 22, 1871, p. 1. The articles were written by reporter John Foord and the editorials by Jennings. For the story behind publication of the series, see Elmer Davis, History of the New York Times, 1851 to 1921 (New York, 1921), pp. 92-106.

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the Ring's own books, the Times offered seemingly incontrovertible proof of staggering frauds in the construction of the new County Court House ("The House That Tweed Built") and in rents and repairs of National Guard armories.

In several issues the entire front page was devoted to long lists of checks and warrants, nominally drawn to the order of various tradesmen but all endorsed over to James H. Ingersoll, Tweed's business partner and reputed "bagman" for the Ring.[3] It was obvious that most payees had endorsed the checks to the Ring and accepted considerably less in cash as their actual payment, but in some cases the checks were outright forgeries. The most famous instance was that of Fillipo Donnarumma, a sign painter tracked down by a reporter, who was astonished to learn that two checks totalling $66,000 had been made out in his name and endorsed over by "Philip Dummy" to Ingersoll.[4]

The most sensational of the Times' articles concerned the new Court House, and it was the disclosure of these

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[3]The entire series of disclosures ran on page 1 of the Times through several issues, chief among them July 8, 22, 23, 24, 26, 29, and 30, 1871; Aug. 2, 3, 28,30, and 31, 1871. The July series was summarized in a special supplement published July 29, 1871, and issued as a pamphlet, How New York is Governed: Frauds of the Tammany Democrats (1871), available in New York Public Library.

[4]The endorser was later revealed to have been the Ring's "Prince of Plasterers," Andrew Garvey, who was indicted for the forgery. See Hershkowitz, Tweed's New York, pp. 208, 240; Werner, Tammany Hall, p. 167, and Callow, The Tweed Ring, p. 204.

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frauds that did more than anything else to bring down the Ring. Using figures purportedly obtained from the comptroller's and auditor's office, the newspaper laid out for its readers a stupendous list of expenditures. The city had paid out over $5.6 million for "furniture and repairs" for the Courthouse (part of which also went into bogus National Guard armories), with most of the money going straight into the pockets of Ring members: Ring carpenter George S. Miller, almost a half million dollars; plasterer Andrew J. Garvey, $2.8 million; plumber John H. Keyser, $1.2 million; furniture dealer John H. Ingersoll, $350,000 for carpets alone. It became a popular game for amateur mathemeticians to calculate how far certain of the Court House furnishings would stretch. Enough had been spent on thermometers, for instance, that the Court House walls could have been papered with them; figuring carpet at a generous $5 a yard, the city had paid enough to cover City Park at least three times. The bills paid to the Ring's contractors were, in the opinion of reformer Robert Roosevelt, "not merely monstrous, they are manifestly fabulous."[5]

By the end of July the Times had published an item-by-item list of $9.8 million of fraudulent accounts and dared

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[5]Quoted in ibid., p. 202. The examples above, and numerous others, are detailed in pp. 201-04, and can be found along with others in the Times' series.

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the mayor or comptroller to explain them. The Ring, it claimed, stood condemned by the figures themselves: "There they are, copied straight down from the Controller's own books, and, as we truly believe, not susceptible of defense or explanation." The Ring's members "ought to be subjected to a criminal prosecution."[6]

The disclosures were an excruciating embarrassment to O'Gorman, so recently on record as assuring everyone that it was a "good Ring." The voice the Irish-American had described as "the blast of a bugle-horn" was uncharacteristically silent. At first O'Gorman tried to deny to himself the seriousness of the new attack, hoping as did the Ring itself that the storm would soon blow over. Later, in testimony given in Ingersoll's trial, he put the best face possible on his reluctance to confront the charges that summer:

> Q. Were you present in the City at the time they were published?
>
> A. I should think I was; I suppose it was in the month of July or August; anybody who reads the newspapers knows as much about it as I do.
>
> Q. Did you read the accounts as they were published?
>
> A. I suppose I did; at first with very little attention, for I am so accustomed to newspaper attacks which have not foundation at all in truth, that I

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[6]Times, July 22, 1870, p. 1, 4.

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> treated the first publications with very little attention.[7]

O'Gorman was not the only public figure to be discomfited by the Times' disclosures. Samuel Tilden had been state Democratic chairman since 1866 and had often cooperated closely with Tweed on political matters. Now he saw his party's future and his own hopes for a governorship blighted. He kept a low profile until he could be certain which way the wind was blowing, and it was not until well into the autumn that he came out publicly against the Ring. In the summer, with the Times clamoring for someone to bring the Ring to justice, he temporized. The evidence presented in the newspaper created "a moral conviction of gross frauds," he believed, but did not constitute "judicial proof."[8] At this point Tilden was more concerned with minimizing the political damage; if the Ring was to be brought down, it was important that the Democratic Party get the credit for doing it. In August he began secret discussions with the Democratic attorney-general and with

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[7]From a transcript of the trial in ibid., Oct. 20, 1871, p. 5. O'Gorman had been called as a witness because the question before the court was whether to allow a taxpayer suit against Ingersoll on grounds of neglect of duty by the corporation counsel.

[8]Samuel Tilden, "The New York City Ring: Irs Origin, Maturity, and Fall," in John Bigelow, The Writings and Speeches of Samuel J. Tilden, 2 vols (New York: Harper Brothers, 1885), vol. 1, p. 587. See also Mark D. Hirsch, "Samuel J. Tilden: The Story of a Lost Opportunity," American Historical Review, vol. 56 (July 1951), pp. 788-802.

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Charles O'Conor, the Democratic "reform" lawyer who was eager to lead any legal action against the Ring.[9]

For a time it seemed that, as O'Gorman hoped, the whole affair would blow over like so many other excitements in the press. But the disclosures had been too damning for that; influential men in the business and financial community read them and were staggered by the large sums apparently stolen by the Ring. Confidence in the city's financial soundness was shaken; banks refused to extend any more credit, even short-term, to the city, and the Berlin Stock Exchange suspended trading in its municipal bonds. With a major interest payment on the municipal debt coming due in November, there was real danger that the city might default, and a financial journal warned that if it did, the debt would amount to a lien against every taxable piece of property in the city. With the total debt estimated at 12 percent of the assessed value of all property, bankers holding real estate as collateral for loans became understandably nervous as they realized that a default might well bring down a number of banks whether they held the city's bonds or not.[10]

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[9]Tilden to William Cassidy, Aug. 1871, in Bigelow, Letters and Literary Memorials of Tilden, vol. 1, p. 293. See also Hirsch, "Lost Opportunity."

[10]For the financial implications of such a default, see Mandelbaum, Boss Tweed's New York, pp. 78-80, and Robert Roosevelt's analysis for the Citizen and Round Table, reprinted in the Times, Aug. 28, 1871, p. 5.

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Spurred by these fears, a coalition of civic groups called a mass meeting at Cooper Union for September 4 to form a plan of action against the Ring. The usual reform crowd and anti-Tweed politicians flocked to the meeting, but also attending was a nervous clutch of bankers, brokers, financiers, merchants, business executives, corporation lawyers, and professional men. Speaker after speaker denounced the Ring, but the real order of business was the presentation of a resolution by reform lawyer Joseph H. Choate calling for legal action:

> Resolved: That any legal remedy which is now available to citizens at large to fully ascertain the disclosed frauds charged upon the City or County officers, and to recover the money wrongfully taken thereby from the Public Treasury, should be resorted to; and that, if no such remedies are found to exist, then the law should be altered so as to enable citizens and taxpayers, under proper restrictions and regulations, to call officers entrusted by them with power and money to legal account, and to invoke the arm of justice to discover fraud in public officers, and to prevent or redress the dishonest appropriation of public money.[11]

There were, to be sure, legal problems in bringing the Ring members to justice, but the most perplexing problem was more political than legal. Tweed, faced with the Times' charges, was widely believed to have sneered, "Well, what are you going to do about it?" Hall, more to the

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[11]Quoted in Breen, Thirty Years of Politics, p. 339; full text of all resolutions, pp. 337-40.

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point, asked, "Who is to sue?"[12] The Ring seemed to have all avenues of legal redress blocked. "They controlled . . . the Judges on the Bench, or at all events a working majority of them," Matthew Breen recalled. "They owned the District Attorney of the County; they owned the Grand Jury, which body was selected by their creatures; they owned the Counsel to the Corporation . . . they owned everything, in sight and out of sight, in the way of public functions and public functionaries."[13]

The Cooper Union meeting ended with the formation of a Committee of Seventy to explore ways of taking legal action against the Ring, but some felt it was a waste of time and flirted with forming a San Francisco-style vigilante committee. "Get an order from some honest Judge--Barnard will vacate it," complained one lawyer. "Get another--Cardozo will vacate it. Get a third, and Ingraham will 'modify' it . . . . Appeal, and the General Term will, in turn, sustain Barnard and Cardozo and Ingraham--who compose the General Term!" By the time a case worked its way up to the

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[12]Tweed's remark is probably acocryphal. Hershkowitz [in Tweed's New York York, pp. 174-75] finds it first appearance as a caption for a Thomas Nast cartoon in Harper's Weekly some weeks before the disclosures to which it is a supposed rejoinder. Hall's comment, less widely know, was reported by Ring contractor Garven; see Tilden, "New York City Ring."

[13]Breen, Thirty Years of Politics, p. 355.

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Court of Appeals in Albany, he pointed out, the city would already be financially ruined.[14]

Certainly the corporation counsel had given no indication that he would be of any help in bringing legal action against the Ring. Unlike Lorenzo Shepard, who went out of his way to challenge Fernando Wood in similar circumstances, O'Gorman took a conservative view of his duties. The Ingersoll case brought out his attitude perfectly:

> Q. Did you during the month of August [1871] take any means to verify the accuracy of the facts charged?
>
> A. None whatever; it was no part of my official duty, and I believe that a man who performs his duty, neither more nor less, is not an unworthy public officer; if all public officers do that, there can be little objection to them.
>
> Q. Did you ever examine the Comptroller's books to see what was spent on the Court-house?
>
> A. Never! it was no part of my duty; I represent the Law Department; these accounts are in the Finance Department, from which I expect instructions.[15]

As far as O'Gorman was concerned, his relationship with the reformers was the same as it had been in his first month of office when the Citizens' Association had wanted him to oppose the widening of Ann Street. As corporation counsel, he assumed that he had a lawyer-client relationship with the city's officials that precluded cooperating

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[14]Ibid., pp. 355-56.

[15]Transcript of trial in Times, Oct. 10, 1870, p. 5.

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with their adversaries. Asked about his attitude toward the new Committee of Seventy and other anti-Ring groups, he answered stiffly, "I have taken no steps to cooperate with them, for the reason that I am the officer of the law representing the Mayor, Aldermen, and Commonalty, and can have no dealings with them."[16]

O'Gorman not only refrained from cooperating with the reformers, but by the second week of September was actively opposing them in court. On September 7, 1871, manufacturer John Foley of the Committee of Seventy asked the state Supreme Court for an injunction to prevent the city from disbursing any more funds. Appearing before the Ring's own judge George Barnard, lawyer George C. Barrett presented a complaint that alleged that Foley was a resident and a taxpayer; that during Hall's administration the city had spent $147.7 million, much of it fraudulently; that city officials had illegally been interested in city contracts and had awarded sums in excess of the amounts that had been lawfully appropriated; that on May 5, 1970, the Special Board of Audit (Hall, Connolly, Sweeney, and Tweed) had signed a certificate auditing $6.3 million in fraudulent claims; and that the same board had violated the "Two Per

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[16]Ibid.

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Cent Bill" of 1870 limiting expenses to two percent of the assessed value of property in the city.[17]

Because of the injury to him as a taxpayer, Foley demanded on behalf of himself and other taxpayers that the court put an end to the city's unrestrained spending. He asked the court to direct the Board of Audit to set aside immediately the moneys due for payment of interest and principal on the bonds maturing in November.[18] Once that was done, the remainder could be apportioned among the various departments of city government, but this remainder was all that could be spent for the rest of fiscal 1871. Considering the low state of the city's finances, this complicated injunction would almost certainly bring the entire machinery of government to a halt--a prospect that did not worry Foley and the Committee of Seventy in the slightest.[19]

To the surprise of all those present, Judge Barnard--whose often-expressed opinion of "so-called reformers" was that they were "all as crazy as Canada bed-bugs"--granted the order, and set September 11 as the date for a hearing

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[17]Foley v. Board of Supervisors, et al., "Summons and Complaint," Sept. 6, 1871 (filed Sept. 12, 1871), in New York County Clerk's Office.

[18]For technical reasons, the complaint referred to the board at this point as "the Board of Apportionment," which was one of its other functions--i.e., apportioning tax revenues to expenditures as they arose and were approved.

[19]Ibid.

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on making it permanent. Mayor Hall was incredulous when a reporter told him the news. "Nonsense! Not a word of truth in it," he protested--and then, grudgingly, "Well, then it is one of Judge Barnard's stereotyped jokes." Tweed was bemused. "I can't understand it," he said. "Barnard and I myself were together last night, and we talked over matters." Later, after some reflection, he shrugged off the whole matter. "I, pooh! I am not afraid." In general, the members of the Ring put on a studious show of unconcern. Asked if he had been served with the injunction papers, Connolly appeared to have to think for a moment before remembering: "Oh, yes, but I sent them over to the corporation counsel without reading them. That's what I always do with these little things."[20]

The Times declared that no civil case had ever attracted a crowd the size of the one that squeezed into Barnard's court on Monday, September 11. O'Gorman appeared on behalf of the city and county of New York, but the first sign of a growing divergence of interest between the city and its incumbent officeholders was manifested when Hall, Connolly, Tweed, and Sweeney trooped in flanked by counsel of their own. Accused of fraud, they had a personal as well as official interest in the case, and each of their counsel spoke in rebuttal to Foley's complaint, making a

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[20]Quotations from Breen, Thirty Years of Politics, pp. 359-61.

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point of exculpating his particular client from personal responsibility. Slouching on the bench in his customary fashion, Barnard whittled on a piece of wood and listened idly to their arguments. [21]

Then O'Gorman spoke on behalf of the city, urging that the judge not be swayed by "the squalls and tempests of what passes by the name of public opinion." What was at issue, he argued, was safeguarding the interests of the corporation. While any attempt to put municipal government in good working order was commendable, the fact was that this injunction was not an appropriate remedy, nor did Foley have any right to bring suit. The concept of the taxpayer suit, in which one taxpayer could sue on behalf of all, had been stricken down in one court decision after another since its overuse in the 1850's. By law, Foley had no standing in court unless he could demonstrate actual personal damage as a direct result of one of the alleged illegal actions, and even if he could, his pecuniary interest was too slight to justify the complete interruption of the city's financial processes. "It seems to me," O'Gorman stressed, "that it is going a little too far for that purpose that all the machinery of the City government should be arrested." In support of his position O'Gorman cited an exhaustive body of statutes and court decisions--a perform-

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[21] Times, Sept. 12, 1871, p. 1, and Sept. 14, 1871, p. 2.

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ance that the Times irritably dismissed as an attempt "to befog the main question at issue . . . by a mass of legal verbiage and repeated references to chapter this and chapter that of the law of this or that year."[22]

The newspaper's attitude reflected a growing public impatience in which legal niceties were less important than getting rid of the Ring. O'Gorman scored all the legal points in Foley v. Mayor, but the game Barnard was following was a political one. There was a growing sense among political insiders that the Ring was crumbling and that they should beat a retreat to higher ground before they were swept along with it. It was no longer just a clique of woolly-headed idealists who opposed Tweed, but hard-nosed businessmen, industrialists, and financiers. Barnard, generally conceded a disgrace to the bench, might not have known the law, but as a gambling man (he had once been a shill in faro house) he had a sure instinct for calculating the odds in any given situation. On September he laid his bets on the reformers, and made the Foley injunction permanent. "We owe to Barnard all our trouble," Tweed later moaned. "That fellow was seized with the idea that

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[22]Transcript of O'Gorman's argument given in ibid., Sept. 14, 1871, p. 2; editorial comment, Sept. 12, 1871, p. 4. The leading cases cited by O'Gorman were Doolittle v. Supervisors of Broome County, 18 New York 155 (1858), and Roosevelt v. Draper, 23 New York 318 (1861).

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he would be made Governor of New York by the action he took."[23]

The Foley injunction had exactly the effect that O'Gorman predicted: the gears of municipal government clanked to a halt. Essentially the city was limited to spending only cash on hand, and that only after setting aside funds for November's interest and principal. Although some necessary items were supposed to be exempt, as a practical matter the comptroller simply quit spending for anything. The city's bills went unpaid, contractors and suppliers were stuck with work and materials, and the city was unable to meet its payroll. Central Park and Croton laborers, unable to pay rent and buy groceries, laid down their picks and shovels and marched on City Hall. With the Fire Department on the verge of shutting down, the city's insurance companies met in emergency session and pledged to meet its payroll. Claimants with legitimate bills thronged the corridors of City Hall beseeching payment, and the courts soon become clogged with their suits.

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[23]Tweed interview in Herald, Oct. 26, 1877, quoted in John D. Townsend, New York in Bondage (New York: Privately printed, 1901), p. 90. Townsend was Tweed's counsel in the last months of his life, fell heir to most of his legal papers, and wrote this book as a corrective to the reformers' version of events. For speculation about Barnard's motives, see Breen, Thirty Years of Politics, p. 296, and Callow, The Tweed Ring, p. 272.

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The situation was as a headline in the Times described it: "ALL BUSINESS AT A STANDSTILL AT THE CITY HALL."[24]

The Foley injunction was severe medicine--it almost killed the patient--but it had the desired results. "In the straitened condition of our credit, which was so extended on every side, it broke us," Tweed later testified. "You see, our patronage had become so enormous and so costly that the injunction, which might not have troubled us at any other time, destroyed all our power to raise money from the banks and left us strapped."[25] The Ring, which could not operate without directing the flow of city funds, began to fall apart. Barnard's defection was the first sign that it was rapidly to become, in George Templeton Strong's words, "skunk vs. rattlesnake."[26]

Hall had been distancing himself from his fellows ever since the Times' disclosures, claiming that his signing of the warrants had been a purely "ministerial" act and that he, of course, had never had the slightest idea what had been going on.[27] Now there were signs that the other theives were falling out as well. With the Foley hearings focusing a spotlight on the Ring's most vulnerable point,

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[24]Times, Sept. 30, 1871, p. 1; see also Sept. 24 and 28, both also p. 1.

[25]Tweed interview in Herald, Oct. 26, 1877..

[26]Quoted in Callow, The Tweed Ring, p. 271.

[27]Statement in Times, July 30, 1871, p. 4.

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the comptroller's office, rumors swept the city that Tweed and Sweeny were going to throw Connolly to the wolves and blame him for everything. Whether true or not, the rumors made Connolly nervous, and he began shifting his funds into his wife's name and inquiring into steamship fares to Europe. On September 11 he became even more nervous when he learned that a burglar had stolen 3,500 vouchers from three unlocked cabinets in his office. Some New Yorkers thought the Ring must have stolen them, while others suspected Connolly himself; significantly, the theft occurred the night before two citizens' groups were scheduled to examine the office's records.[28]

The burglary made no sense for, as Connolly pointed out, duplicates of the vouchers were available in the Broadway Bank. The conclusion he drew was that the break-in had been engineered by Tweed and Sweeny to point the finger of suspicion his way. When Hall demanded his resignation the day after the burglary, Connolly decided that the time had come to cut a deal with the reformers. He met with Tilden and the chairman of the Committee of Seventy and worked out a bargain: in return for immunity from prosecution, he would appoint Tilden's associate, Andrew H.

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[28]Callow, The Tweed Ring, pp. 269-71.

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Green, as his deputy and confer his powers as comptroller on him.[29]

The members of the Ring realized that their defenses had been fatally breached. The evidence produced so far in the pages of the Times, as Tilden himself had acknowledged, had created a "moral conviction" of fraud, but in itself hardly constituted judicial proof. But if the reformers were to get their hands on the actual records in the comptroller's office--not simply figures someone claimed he had copied from them--then the game was over.

Their only hope was to find a way for Hall to get rid of Connolly and put into office a figurehead who would cooperate with them. But Connolly stubbornly refused to resign (he would have lost his immunity), and by law only the governor could remove him. What could the Ring do? Hall came to the rescue, claiming that by deputizing Green, Connolly had in fact resigned his office and left it open for appointment by the mayor; he would, therefore, shortly appoint a new comptroller. Tilden and the Committee of Seventy were outraged; they disputed this reading of the

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[29]Townsend, New York in Bondage, pp. 91-95; Tilden, "The New York City Ring," and Ring Investigation, pp. 97-101. It was a bargain the prosecutors later disavowed; under indictment, Connolly fled the country with a reported $6 million and spent the rest of his life abroad.

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law, and presented Hall with a legal opinion by Charles O'Conor backing up their position.[30]

It was a crucial moment in the struggle against the Ring. If the reformers could keep Connolly (which is to say, Green) in office, they could manage the city's finances through the November debt crisis and also have access to hard legal evidence against the Ring. If they could not keep the office in their hands, then they would have no case. Hall fully realized this and was anxious to appoint his own man, but he hesitated to fly in the face of a legal opinion by someone who carried as much weight in the community as O'Conor. Seeking a way out, he turned to his own corporation counsel for a friendlier opinion.

It was, for O'Gorman, the moment of truth he had been avoiding. Through his two terms as corporation counsel, he had developed strong personal and political ties with Tweed. When Tweed had come under attack the year before, he had come to his rescue with his highly publicized "Ring Defense Speech." He was in a position now to help his friend and patron by doing actually very little all. He did not even have to dispute O'Conor point by point; Hall, Tweed, and the rest of the gang would have been satisfied with a vague, "impartial" opinion that would have bought them time and given Hall leeway to do what he wanted. In

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[30]Ibid., p. 101.

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fact, that was probably all anyone expected of him. In contrast, O'Gorman had little to gain by concurring with O'Conor. He had no friends among those who were trying to take over the comptroller's office; on the contrary, many of them were the same reformers who were his bitterest enemies. To the Committee of Seventy, to Tilden and O'Conor, and to the city's press, he was "the Ring counsel."[31]

O'Gorman had only the feeblest notion that a corporation counsel represented any entity other than the incumbent officeholders, and yet he delivered to Hall a legal opinion that could have been written by Lorenzo Shepard, rising from the grave for the purpose. After reviewing a great mass of cases, opinions, and memoranda, O'Gorman wrote, he had come to the conclusion that the mayor should be governed more by "considerations of expediency and sound policy" than by fine legal points as to whether or not a vacancy existed in the comptroller's office. Even if Hall were to find a judge willing to uphold his appointment of a new comptroller, Connolly would no doubt appeal the decision and refuse to relinquish his office while the case was pending. O'Gorman warned,

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[31]A appellation given him by the Times as early as Nov. 15, 1870 [p. 4]. Callow seems to have accepted without question the reformers' view of O'Gorman (whom he twice identifies as "John O'Gorman"; see his Tweed Ring, pp. 63, 119, 142-43, 178, and 240.

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> The law's delay is proverbial, and during the progress of the litigation, at a very critical period of the financial condition of the City, already complicated by one lawsuit and injunction, there would be presented the indecorous spectacle of two persons claiming to be entitled to the office of controller, each advised to defend his own claim and contest that of his rival. From this state of things great confusion would inevitably ensue, and great damage to the City Treasury, and to the public creditors.

Under all these circumstances, and considering the opinion of such an emiment jurist as O'Conor, O'Gorman concluded, "I cannot advise you at present to take any step that would lead to complicated and mischievous litigation."[32]

With this opinion, Hall's hopes of appointing his own man were dashed. Ignoring O'Conor's opinion would have damaged him enough in the eyes of the public, but defying the explicit advice of his own corporation counsel would have been even worse. While technically not binding on him, the opinion of the corporation counsel carried strong moral and legal weight, and if Hall were ever challenged in court for disobeying it and appointing a new comptroller, the burden would have been on him to justify his actions. Consequently, Hall took the only realistic course left open to him, and dropped his plans to replace Connolly.

Not too surprisingly, the reformers took all the credit. "Mr. O'Conor's opinion saved the day," exulted

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[32]"Opinion of the Corporation Counsel," Sept. 28, 1871, printed in full in the Times, Sept. 20, 1871, p. 1.

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Tilden, who viewed the corporation counsel's role as only incidental. "The plot fell to pieces."[33] O'Gorman garnered no laurels from the reformers for his opinion, nor did he probably expect any. He never explained why he had offered advice so unwelcome to his colleagues, and his motives can only be guessed. He may, like Barnard, have sensed that the time was ripe for jumping ship. He may have felt that such an action would ingratiate him with his private business and financial clients. He may have even been stung by recent criticism of in the Irish community and taken this opportunity to show his true colors. ("You rebelled in 1848 at home against the dishonest policy of England," railed one writer, "but here you accept office and become derelict in your public duties under an infamous set of public plunderers.")[34] Or he may have been, as he expressed it in the Ingersoll case, simply "performing his duty, neither more nor less" as a public officer.[35]

O'Gorman's actions during the rest of his term were, like his opinion on the comptroller's appointment, subject

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[33]Tilden, "The New York City Ring," p. 94.

[34]John O'Donnell, "From an Irish Exile to Richard O'Gorman, the Corporation Counsel," in Times, Sept 8, 1871, p. 8. O'Donnell charged that instead of exposing fraud, "You have drank wine at the Metropolitan; you have reclined on luxurious sofas at the Americus Club; you have trod the Axminister carpets Tweed selected for himself. You have hob-nobbed with Oakey Hall, and drank Tweed's health out of silver goblets. Your gratitude, a noble quality, deadens, I fear, your sense of public duty."

[35]From transcript in ibid., Oct. 10, 1871, p. 5.

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to varying interpretations. With the reformers clamoring for legal action, he and Mayor Hall seemed to compete with one another in avoiding any direct action. O'Gorman wrote a letter to Hall suggesting that "as chief executive officer of the City," it was his--Hall's--responsibility. He awaited, he said piously, "your instructions in the premises."[36] The mayor responded in the same spirit. "My Dear Sir," he wrote breezily. "You are the head of the Law Department; yours is the full discretion to bring any action at law which you may deem best . . . I have such entire confidence in your judgment that I leave the matter within that discretion."[37] The Times branded the whole correspondence "a stupendous hoax," each party evading responsibility by dumping it on the other. "It needed only Mayor Hall's letters to the Corporation Counsel to crown his reputation as an addle-headed blunderer," the newspaper said tartly.[38]

With this vague commission, O'Gorman proceeded slowly and cautiously to investigate matters himself before filing

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[36]O'Gorman to Hall, Sept 19, 1871, p. 8.

[37]Hall to O'Gorman, Sept. 19, 1871, in ibid. According to the Times, Hall had furnished the newspaper with both letters, and O'Gorman--who came down to the editorial offices to correct the proof of his letter--was clearly unhappy that the confidential correspondence had been made public.

[38]Ibid., p. 4. Whether the comment referred to the mayor or corporation counsel is not clear from the context--not that it mattered greatly, apparently being applicable to either party.

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any legal action. He perused the Times' July pamphlet detailing the frauds, carefully studying the figures and trying to discern anything provable in them.[39] He wrote the comptroller asking whether he had any information that might throw light on the charges, and was told told that he knew nothing; everything had been turned over to Andrew Green.[40] He retained the noted constitutional lawyer George Tichnor Curtis as outside counsel and engaged him in a lengthy correspondence on all the complicated legal issues that might arise.[41]

Chief among these was whether the corporation actually had any standing in court, inasmuch as the frauds had technically been committed against its shadow government, the County of New York. But the County's legal status was so obscure that O'Conor and others had raised doubts that it could even bring suit. If it could, did he have authority to act in its name? By law the corporation counsel had been made legal adviser to the county's Board of Supervisors, but had never been given conduct of all the county's legal business. But if not the corporation and

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[39]O'Gorman's testimony in the Ingersoll case, in ibid., Oct. 10, 1871, p. 5.

[40]O'Gorman to Connolly, Sept. 20, 1871, and Connolly to O'Gorman, Sept. 22, 1871, printed in ibid.

[41]Author of a history of the Constitution, Curtis had argued several important cases before the U. S. Supreme Court, including the Dred Scott case and the Colt revolver patent suit.

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not the county, then who was entitled to bring action? If the state instituted a suit through O'Conor, should he pursue a parallel one on behalf of the city? O'Gorman was reluctant to begin any action until these and other questions were settled.[42]

"Mr. O'Gorman stands, unfortunately, too much on the etiquette of his position," complained the Times. While action was called for, he was frittering away his time on inconsequential matters.[43] During a recess in court in the Ingersoll case, a group of lawyers were overheard joking that, given O'Gorman's progress so far, it would probably take him a year to decide "the knotty point" of whether the city had a right to go after its stolen property. This produced a gale of laughter that, according to a reporter, was checked only by the entrance of the judge.[44]

O'Gorman dawdled a whole month before events suddenly propelled him into action. On October 18 the newspapers reported that on the previous day governor John Hoffman had met in Albany with Charles O'Conor and authorized him to bring legal action against the Ring in the name of the

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[42]O'Gorman to Curtis, undated, in ibid., Oct. 30, 1871, p. 1. These questions and others are discussed at length in "Points for the People," in People v. Ingersoll, included among other court papers in Charles O'Conor, comp., Peculation Triumphant, Being the Record of a Four Years Campaign against Official Malversation in the City of New York (New York, 1875), pp. 17-25.

[43]Times, Oct. 20, 1871, p. 4.

[44]Ibid., Oct. 12, 1871, p. 5.

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State. In much the same way that the city had been saddled with other state-appointed commissions, O'Conor and other counsel of his choosing would constitute a new "Bureau of Municipal Correction," empowered by the attorney-general to bring whatever civil or criminal suits they saw fit.[45]

On the same day that this news rocked the city and, not concidentally, before O'Conor had time to return from Albany, the mayor instructed O'Gorman to file his own suits immediately. O'Gorman complied, and on October 19 he went quietly before a friendly judge and filed a $7.9 million civil suit against Tweed, Hall, and Connolly. The suits were, according to the Times, "of the sleepy sort," begun by summons only, without the customary complaint, warrant of arrest, or attachment of property. They were begun so quietly, in fact, that O'Conor was unaware of them when he returned home and filed his own actions on October 24. Not until O'Gorman told the Evening Post of his own suits the next day did O'Conor discover that he had been beaten to the Court House door by the Ring itself.[46]

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[45]Times, Oct. 18, 1871, p. 1. The Herald, Tribune, Post, and Sun of the same date also features the story on page one. The Bureau of Municipal Correction was similar in concept to the older "metropolitan" commissions, the chief difference being that it operated under authority of the attorney general rather than being created by the legislature.

[46]Post, Oct. 25, 1871, p. 1; Times, Oct. 26, 1871, pp. 1, 4, and Nov. 3, 1871, p. 4 [quoted], and Townsend, New York in Bondage, pp. 106-07. The Times was in error in one respect; the records that survive show that O'Gorman filed complaints with his suits, although the judge may well have pigeonholed them a few days before passing them on the court clerk for the public record. See Mayor v. Tweed, Complaint, Oct. 18, 1871, in judgment roll filed Feb. 13, 1878 [discussed later

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The reformers were furious. O'Conor lodged a protest with the court charging that the mayor's suits had been filed in bad faith and could not be prosecuted fairly; Hall was governed by "evil designs and intent" and had complete control over the progress of the cases.[47] It was obvious to all why the mayor had ordered the suits: First, according to the Times, because the Ring knew O'Conor and "felt a cold shudder at being prosecuted by one whose hatred of fraud, and ability to reach and punish it, had made his name a terror to evil-doers throughout the land." And, secondly, because the Ring could not be tried twice for the same offense; O'Conor's suit, even if it differed somewhat from O'Gorman's, could not be tried while the first action was pending. And, as the Times was quick to predict, "The suits of O'Gorman will stand still, or drag their slow length along, merely to serve the interests of those who supple and pliant tool he is."[48]

In fact, however, O'Gorman had no such intention. On October 26 or 27 he paid a call on O'Conor and assured him that he could expect from him, as legal representative of

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in this work] now in the office of the Court Clerk, Appellate Division, New York Supreme Court. Both would have been necessary to institute a suit--the summons to tell Tweed he was being sued, and the complaint to tell him the nature of the claims against him [see Cataldo, Introduction to Law and the Legal Process, pp. 223-226].

[47]In an open letter quoted in the Times, Nov. 3, 1871, p. 4.

[48]Ibid.

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the City of New York, "no official opposition or obstruction, but all such official cooperation and assistance as it would be proper for me to give, and for you to receive."[49] O'Conor was concerned that the corporation counsel might be obligated to defend the Ring officeholders in the state suits, but in a subsequent letter O'Gorman assured him that such was not the case. As officeholders they were entitled to consult with him "officially, on official matters," but not as defendants in suits for fraud.[50]

The two lawyers reached a tacit agreement that O'Gorman would hold his civil suits in abeyance while O'Conor pursued his main objective--criminal prosecutions against the members of the Ring. The agreement came as an immense relief to O'Gorman, who until then had been in a truly untenable position. How could he prosecute the city's suits when his immediate superior, the mayor himself, was among the defendants? If the suits ended badly (as well they might, considering the unpredictability of juries), would it be any surprise if the press and the reformers

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[49]Testimony of O'Gorman in People v. Ingersoll, trial record, Nov. 25, 1872, p. 47.

[50]O'Gorman to O'Conor, Oct. 27, 1871, introduced as part of O'Gorman's testimony in ibid., at pp. 45-46. A letter written by O'Conor to O'Gorman on Oct. 28, 1871 refers to the corporation counsel's visit and asks several follow-up questions [ibid.]. Townsend, in his New York in Bondage, tells essentially the same story, at pp. 106-08.

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blamed him? But above all, the agreement removed him from an agonizing double bind: He could not bring himself to condone what now seemed, without a doubt, criminal acts, but at the same time he lacked the heart to ruin his old friends and quite probably send them to prison. O'Conor's insistence that the state suits take priority released him from a nightmare.

In abdicating any responsibility in the legal action against the Ring, however, O'Gorman essentially abdicated his office. The Ring lawsuits were the most important litigation involving the city during the rest of his term, and until they could be settled, neither could thousands of related claims--both large and small--against the city. Moreover, by shelving the city's civil suits until the criminal cases were finished, O'Gorman forfeited any realistic hope of collecting any judgments that might be won; in the closing months of 1871 all the Ring figures were frantically hiding their assets and, in several instances, fleeing the county.[51] In addition, by removing himself from the picture, O'Gorman lost any role in deciding which of the defendants were to be offered immunity in

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[51]Tweed transfered an estimated $4 million worth of real estate and $1 million in other assets to family members before the end of October; Garvey shortly afterward fled to Canada; Elbert A. Woodward, Tweed's chief clerk, signed over his property to his wife and vanished; Ingersoll fled to Portland, Maine, "on business" and then to Paris; other Ring figures took similar measures. See Times, Oct. 27, 1871, p. 1, and Callow, Tweed Ring, pp. 280-81.

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exchange for testifying against the others--a matter of great interest to the corporation, considering that one of the major bargaining points was certain to be the dropping of the city's demands for restitution..[52]

For the rest of his term O'Gorman was withdrawn and dispirited, leaving most of the work of the office to his subordinates and absenting himself from his usual rounds. His apathy was so pronounced that the Times began referring to him as "that moribund official, the corporation counsel."[53] His spirits were not helped when two of the unfolding Ring scandals touched the Law Department. His corporation attorney, Tweed's bosom friend Tom Fields, was indicted in February of 1872 for a $459,000 fraud he had perpetrated as a state senator.[54] In March investigators revealed that the commissioners of street openings had swindled the taxpayers of hundreds of thousands of dollars; while not part of the scheme himself, O'Gorman bore considerable blame for having appointed them on Tweed's recom-

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[52]For the results of some of these negotiations, see the testimony of O'Conor's associate, Wheeler H. Peckham, in Ring Investigation, pp. 803-25.

[53]Times, Nov. 28, 1872, p. 2.

[54]Ibid., Feb. 6, 1872, p. 1. The swindle involved fraudulent fire department claims; for details, see Nov. 6 and 7, 1871, p. 1; Nov. 20, 1871, p. 2; Nov. 19, 1871, p. 6.

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mendation.[55]

Although these two scandals damaged O'Gorman's already-tattered reputation, they were nothing compared to what he did to himself in December of 1872. By the terms of the Charter of 1870, his term of office was to end on January 1, 1873, so that the incoming mayor--who, as a result of the December election, was Republican reformer William F. Havemeyer--could appoint his own corporation counsel. Instead O'Gorman, who carried loyalty to a fault, acceeded to Hall's desire to make the appointment himself. He resigned his office on December 4, and Hall immediately named a little-known lawyer, E. Delafield Smith, as his successor. The mayor's move caught the reformers by surprise, and they fell on him with fury. "A decent regard for the opinions of mankind should have induced him to have spent the brief remnant of his official days . . . in humiliation and repentance instead of thus outraging public sentiment," declared the Committee of Seventy.[56]

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[55]Ibid., Mar. 12, 1872, and Apr. 9, 1872, both p. 4. The commissioners included a number of minor Ring figures: among others, George Purser, Hugh Smith, Alexander Frear, and William M. Tweed, Jr. The process of appointment was that Tweed suggested the names, O'Gorman passed the nominations along, and the Ring judges (who were in charge of street opening proceedings) formally appointed them. For details, see Callow, The Tweed Ring, p. 179-80, and Charles Wingate, "An Episode in Municipal Government," North American Review (Jan. 1875), p. 134.

[56]Times, Dec. 5 and 7, 1872, p. 4, and Dec. 12, 1872, p. 5 [quoted]. Havemeyer was a leading member of the Committee of Seventy, and had served as mayor in 1845-46; he is described by Hirsch [in his William C. Whitney, p. 66] as "a Knickerbocker leader . . . almost as venerated and respected as Peter Cooper."

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The Times found the circumstances of O'Gorman's resignation "very suspicious" and concluded that it was part of a conspiracy to extend the Ring's control of the office into Havemeyer's administration. The Committee of Seventy, of whom Havemeyer was a leading member, would be unable to have someone of their own--O'Conor, perhaps, or one of his associates--serving as corporation counsel. In effect, the office would be neutralized against the Ring for the next four years; due to a quirk in the existing law, Hall was able to appoint Smith to a full four-year term instead of to the month remaining in O'Gorman's term.[57]

Hall had neatly mouse-trapped the reformers, for Smith could be removed only by the governor and then only for cause. Moreover, removing him would have been politically awkward for a Republican administration; Hall had deliberately chosen him because he was a Republican, albeit one of that curious variety known as "a Tammany Republican."[58] Besides, as the Times itself noted, "to Mr. Smith

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[57]The Charter of 1870 and a subsequent amendment had changed the term from three to four years, and specified that vacancies (either from death or resignation) would be filled by appointing a successor to a full term; see New York, Laws (1870), ch. 137, sec. 41, and (1871), ch. 574, sec. 4, and James Beekman's opinion dated December 1888 in Opinions of the Corporation Counsel, vol. 50, in Library of the Association of the Bar of the City of New York.

[58]The Ring could hardly have succeeded with securing the cooperation of strategic Republican politicians; see Callow, Tweed Ring, pp. 80-81, 108.

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personally few, if any, objections [could] be made."[59] He was in fact chosen largely because he was uncontroversial to the point of dullness--in contrast to the flamboyant O'Gorman, not just colorless but positively drab.

The scion of two distinguished old New York families--the Smiths and the Delafields--he was a dreamy sort who had been class poet at New York University and had drifted into the law as a suitable "gentleman's occupation." His practice in an office with his brother had been unremarkable; he represented a few mercantile houses and puttered about editing and publishing a series of reports of Common Pleas cases.[60] Well connected politically through his family, he was appointed United States attorney during Lincoln's administration but had so botched the job that he had been fired and spent the next few years "clearing his name" to anyone who would listen. He had been befriended by Hall, with whom he shared a fascination for the arcana of the law, and was soothed and flattered by the Ring, whose members saw in him a useful contact in the Republican community. Hungry for recognition, he eagerly accepted the honor Hall offered him in December of 1872.[61]

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[59] Times, Dec. 5, 1872, p. 4.

[60] E. D. Smith Reports, 1854-59.

[61] For Smith's life, see Herald, Apr. 14, 1878, p. 8, and Times, Apr. 14, 1878, p. 8 [obituaries], as well as Hirsch, William C. Whitney, p. 86. For the controversy about his service as district attorney (and his eventual exoneration), see Harper's Weekly, Dec. 21, 1867.

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Smith has been described by William C. Whitney's biographer as "a mediocrity born under an unlucky star."[62] It is an accurate description of him during his years as corporation counsel, for bad luck seemed to dog him no matter how hard he tried. Smith was serving under a mayor who did not want him, a Board of Aldermen who had no use for him, and a public who did not know him. His chief patron, Oakey Hall, was of no help to him, being out of office and struggling to stay out of jail. To everyone, both Ring and reformer, he was essentially irrelevant; his office, once a busy hub of power, was one of the loneliest places in town.[63]

Smith followed the policy that O'Gorman had adopted on the Ring suits, holding them in reserve while O'Conor and his associates pursued their prosecutions. For this, he endured the same criticism as O'Gorman: If he did not bring legal action against the Ring, then it must be because he was colluding with its members and helping them escape prosecution. But if he made any motion toward activating any of the city's cases, it was taken as a sign that he was trying to undermine O'Conor's prosecutions with sham suits that would allow the Ring to go scot-free. The

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[62]Hirsch, Whitney, p. 86.

[63]For a sample of the feeling against him, see Committee of Seventy, "A Protest," in Times, Dec. 12, 1872, p. 5. asking him to step down.

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fact that the state's suits were going badly made the reformers doubly touchy about any suggestions from his quarter.[64]

No matter how hard he tried, Smith faced insurmountable problems. For one thing, although he was only forty-six when he took office, he was plagued with poor health that kept him from giving his office the attention it needed. He found himself relying more and more on his staff, particularly his chief assistant George P. Andrews and the indefatigable David Dean.[65] But even with their help, he was unable to cope with the unprecedented number of cases, many of them stemming from claims against the city that the comptroller had disallowed on the grounds that fraud necessarily lay at the bottom of most of them.[66] Smith desperately needed a larger staff to help him handle the onslaught of litigation, which he described as "twenty

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[64]The outcome of these suits is detailed later in this work; for typical criticisms of Smith at the time, see Havemeyer, "Annual Report of the Mayor," in Board of Aldermen, Documents (1872), no. 1, pp. 8-9; O'Conor to Tilden, Sept 29, 1874, in Bigelow, Letters and Memorials of Tilden, p. 342, and comptroller Andrew Green's complaints in Board of Aldermen, Documents (1875), no. 5, pp. 138-40.

[65]From comments in the Tribune after his death in 1878, it seems likely that for some years he had suffered a number of debilitating "little strokes" that had interfered with his ability to function; see Tribune, Apr. 13, 1878, p. 2.

[66]Green's obstreperous behavior was similar to Flagg's actions some years before, and it caused the same sort of problems. See Report of the Law Department of the Board of Aldermen on the Investigation into the Conduct of Andrew H. Green, Comptroller, in Board of Aldermen, Documents (1875), part 1, no. 5 [hereafter cited, Green Investigation].

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times what it ever was before."[67] Instead, the Board of Aldermen short-sightedly allowed him an increase in his use of outside counsel, which before long amounted to much more than an increase in staff would have cost.[68]

Adding to Smith's woes was the fact that he had no authority over other officers of the city government. Lacking any meaningful relationship with the mayor, he could not borrow his authority and enforce his opinions on his chief antagonist, comptroller Green. Typical of Green's attitude was this exchange, reported in testimony by a disappointed claimant:

> I said, "Mr. Green, you told me that the case should be submitted to the Corporation Counsel, and if he should give a favorable opinion, you were willing to pay me. Such opinion has been had. Why won't you pay me?" Mr. Green said, "I don't give a straw about the Corporation Counsel's opinion, or about the decision of the Court. I care for my own opinion, and I am the best judge in this case. You will have to sue me for every month's salary."[69]

With an attitude like that, it is little wonder that Smith found it impossible to work with Green in settling the hundreds of claims against the city. As a result,

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[67]Smith to Board of Aldermen, Mar. 23, 1875, in Board of Aldermen, Proceedings, vol. 135, p. 894.

[68]See complaints of Mayor Samuel H. B. Vance [successor to Havemeyer after his death on Nov. 30, 1874] to Smith in City Record, Jan. 2, 1875, pp. 1-2.

[69]Green Investigation, pp. 141-42. Under further questioning, Rosenthal acknowledged that Green had said "damn" instead of "straw." Smith's opinion was printed in the City Record, Oct. 30, 1874.

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suits continued to pile up in the Law Department, most of them indefensible, and because they were indefensible, creating one of the worst win-loss records in the history of the office.

Smith might have weathered all these storms, but events in 1874 and early 1875 brought about his downfall. In June the Court of Appeals ruled that the state had no standing as a plaintiff in the civil suits; the sole right to recover the stolen money lay with the city and county.[70] It was a major blow for the reformers--particularly for O'Conor, who had staked his professional reputation on the assertion that the suits belonged in the hands of the state. Somewhat ungraciously, he consented to continuing his suits under retainer, technically, from the corporation counsel. Then in the fall of 1874 his health, which had long been precarious, became so poor that he was forced to step aside and leave the suits with his young associates, Wheeler H. Peckham and Francis C. Barlow.[71]

Smith would never have dared to challenge O'Conor's conduct of the suit, but he felt free to second-guess and criticize Peckham and Barlow. By the end of September Barlow had become so alarmed that he wrote O'Conor of his fears that Smith intended to drop the cases altogether.

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[70]People v. Ingersoll, 58 New York 1 (1874).

[71]Townsend, New York in Bondage, pp. 106-09, and Flick, Tilden, p. 259.

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Relaying this unsettling news to Tilden, O'Conor wrote irritably, "It really seems to me that things are ripe for a pounce upon him."[72] Relations between Smith and the attorneys became increasingly strained throughout the next few months, but matters did not come to a head until the very end of the year. Then on December 29, Mayor Samuel Vance wrote Smith a letter complaining of his excessive use of outside counsel, which in the previous year had amounted to an unheard-of $100,000. Seizing upon this as an excuse, Smith replied that he would of course obey immediately; he would begin by firing Peckham and Barlow from the Ring cases. Then he blithely announced in the next sentence that he would re-hire George Ticknor Curtis and his associate John Knox Porter for the cases.[73]

Vance was dumbfounded. So were the reformers. They had just elected a reform mayor, William H. Wickham, and a reform governor, Samuel J. Tilden, and had expected to be riding high on January 1. Now Smith had thrown all their plans in jeopardy. "As the local prosecutions stand now, the defendants might as well appoint the counsel to prosecute," Peckham complained to Tilden. "Unless some one has

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[72]O'Conor to Tilden, Sept. 29, 1874, in Tilden Papers, box 22.

[73]Vance to Smith, Dec. 29, 1874, and Smith to Vance, Dec. 30, 1874, in City Record, Jan. 2, 1875, pp. 1-2. See also Smith to Barlow and Peckham (notice of discontinuance of retainer), Dec. 30, 1874, and newspaper clipping of letter of retainer from Smith to Curtis and Porter, both in Tilden Papers, Box 22.

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charge of them very different from Smith and his friends, the prosecutions might as well be abandoned."[74] O'Conor added his own apprehensions. "Perhaps I am too suspicious or too prone to evil constructions," he wrote Tilden, "but I cannot resist the belief that there is a complete conspiracy. And for aught I see, it may succeed."[75]

Curtis and Porter were both lawyers with exemplary credentials (considerably more eminent at the time than the younger Peckham and Barlow), but they were anethema to the reformers.[76] In 1871 they had supplied O'Gorman with an opinion that the city or the county, not the state, was the proper party to bring suit, and the Ring's lawyers had picked up the opinion and made good use of it in court; it was, in fact, the argument that had prevailed in the Ingersoll case the past June.[77] To have chosen them as replacement counsel was probably the lowest blow Smith--probably

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[74]Peckham to Tilden, Jan. 2, 1875, in Tilden Papers, box 8.

[75]O'Conor to Tilden, Jan. 4, 1875, in Bigelow, Letters and Memorials, vol. 1, p. 355.

[76]Both were, at the time, considerably more eminent than Peckham and Barlow. The 70-year-old Curtis had argued a number of cases before the U. S. Supreme Court, including the Dred Scott case and the Colt and Goodyear patent suits, and was author of a scholarly book on constitutional law. Porter, somewhat younger, was a former Court of Appeals justice and a leading trial lawyer, who would shortly become the first president of the New York State Bar Association. Both were, unfortunately, Republicans. For biographical detail, see National Cyclopaedia, vol. 1, p. 395 [Curtis], and Bergan, History of New York Court of Appeals, pp. 42-43 [Porter].

[77]Compare the opinion, printed in the Times, Oct. 31, 1871, p. 1, with People v. Ingersoll, "Points for the Defendant."

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acting in all naivete--could have delivered to O'Conor and his associates.

The reform lawyers saw two possible outcomes from Smith's actions. The first was that the Ring suits would be discontinued, or compromised; Tweed had already offered a $3 million settlement which was still on the table, and Smith and his team might decide to accept it. The second was that Curtis and Porter would take over where O'Conor and his associates had left the suits, see them through to successful completion, and take credit for winning them--a credit which, given their political affiliations, would redound to the Republican Party. It is hard to tell which possibility was the most distressing to the reform lawyers.[78]

"What are we to do?" O'Conor implored of Tilden early in January.[79] His question was misleading, because he had already put the wheels in motion himself. On January 2, Wickham sent a public letter to Smith, ghost-written by O'Conor, announcing that he would attempt to have him

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[78]"The idea should be kept all the while before the public mind that the Democratic party is not responsible for these wrongs; that it will be foremost in punishing the authors and foremost in adopting all measures necessary to prevent their recurrence," Tilden wrote in 1871. See Tilden to William Cassidy [publisher of Albany Argus], Aug. [n.d.] 1871, in Bigelow, Letters and Memorials, vol. 1, p. 273.

[79]O'Conor to Tilden, Jan. 7, 1875, in ibid., p. 355.

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removed from office.[80] The letter contained several charges against him of "failure in duty": He had abused the practice of allowing referees to decide claims against the city, specifically by having chosen referees friendly to the Ring. He had mismanaged the $700,000 Baird case involving a fraudulent contract for water meters.[81] He had failed to prosecute Henry Starkweather, collector of assessments, for having pocketed $130,000 in illegal charges.[82]

But above all, charged Wickham, the way in which Smith had been appointed disqualified him from any role in the actions against Tweed and his associates. The Ring members had "sedulously striven" to keep the cases against them in his office because they had in it someone who owed his position to them. So far they had been remarkably successful in evading punishment, and in another year the statute of limitations would run out on their frauds. Would Smith pursue them with the vigor that was necessary? Not likely, thought Wickham. Smith had had charge of those cases since

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[80]The letter is printed in full in the Times, Jan. 5, 1875, p. . O'Conor later boasted to Tilden that he had drawn the charges himself; see O'Conor to Tilden, Feb. 10, 1875, in Bigelow, Letters and Memorials, vol. 1, p. 358.

[81]The case is discussed later in this work, and in Hirsch, Whitney, pp. 127-29.

[82]Starkweather was father-in-law of John Hoffman, who was governor at the time of the frauds, and had allegedly given Tweed a share of the $130,000; see Callow, Tweed Ring, p. 121.

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the Ingersoll decision in June, but had done nothing. "In failing to bring the actions against Tweed to trial since that decision, you have neglected your official duty," concluded Wickham.[83]

The threat of impeachment horrified Smith. Not knowing O'Conor's role in the matter, he rushed to his side that very night and begged him to intercede with Wickham. O'Conor later wrote gloatingly to Tilden about the visit:

> I had all my life greatly aided and befriended this man . . . . He thought me very amiable, but took good care to keep out of my way from the moment he took office until he was accused. Then he could scarcely believe his senses; so, near midnight, he visited me, cried, implored, etc., etc. I gave him no hope, and to his face condemned him, observing courtesy to be sure in the choice of words.[84]

Staggered by the charges against him, Smith labored two weeks on a highly emotional reply. He answered each of the accusations against him in exhaustive detail, even knowing as he probably did that it was futile. He denied that he had abused the practice of submitting claims to referees, pointing out that he had disposed of 771 cases in court and only 62 by references. He had retained "eminent counsel," James C. Carter, in the Baird case, because he had been too ill to pursue it himself ("according the doctor, threatened

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[83]Wickham to Smith, Jan. 2, 1875, in Times, Jan. 5, 1875, p. .

[84]O'Conor to Tilden, Feb. 10, 1875, in Bigelow, Letters and Memorials, vol. 1, p. 358.

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with death"); all his decisions in it had been made after consultation with experienced lawyers and public servants. He had dropped the Starkweather case because the city's legal position was weak, and it had not seemed worth pursuing anyway because the defendant was insolvent and there was no hope of recovering any judgment that might be won.[85]

As for the most serious charge, his failure to prosecute the Ring suits, he pointed out that for most of his term the cases had been in the hands of others. It was hardly his fault that the Ring members were still unpunished; the courts had been engaged with the suits for the past four years. What could he have done about that? And from June until the end of December, Peckham and Barlow had been in charge of the suits; he had been too preoccupied with the other duties of his office, and too sick, to give them his own personal attention. How could he blamed for the conduct of the Ring suits? "In this I am without fault," he asserted.[86]

Smith made it clear that he intended to stay and fight. "I am not pleading for a burdened and thankless office," he wrote, "but for my good name." If he resigned now, after Wickham's charges had been made public, it would seem as if

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[85]Smith to Wickham, Jan. 16, 1875, in Mayors' Papers, William H. Wickham (1875), Law Department folder; also printed in Times, Jan. 21, 1875, p. 2.

[86]Ibid.

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he were admitting a guilt he did not recognize. He would have resigned, he told Wickham reproachfully, if he had only been asked; but now his character had been impugned, and he would be leaving under a cloud. "I will not resign in the face of accusations which I know to be unjust," he declared.[87]

Wickham was caught off guard by Smith's intransigence. He had not expected the enfeebled corporation counsel to put up a fight, and now he did not know how to respond. He was tempted to back down himself, but under the urging of O'Conor, Peckham, and Barlow, he forwarded formal charges to Governor Tilden on February 3.[88]

Now Tilden was the man in the middle. He was clearly unhappy. As governor, he was charged by law with removing local officials, but only for, in his words, "substantial, reasonable, and just causes."[89] The charges that Wickham had preferred against Smith hardly qualified, particularly considering his strong rebuttal of them. Tilden hesitated

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[87]Ibid. Appended to the letter was a mass of documentation behind his answers, including an analysis by assistant David Dean of the probable results if each referred case had been tried in court, and copies of several cordial letters between himself and the reform lawyers about the progress of the Ring cases.

[88]For details, see Hirsch, Whitney, p. 87, and sources cited in notes 13-17.

[89]Tilden to Wickham, in Bigelow, Letters and Memorials, vol. 1, p. 359. The Times, no friend of Smith, also criticized the charges as "falling short of what the law would regard as justifying removal 'for cause'" [Times, Jan 6, 1875, p. 4.

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to make what was clearly a politically motivated removal. Moreover, there was the tricky question of who would be put in his place; there was no love lost between Tilden and Wickham, and he was not entirely sure the mayor would appoint anyone better than Smith. For these and other reasons, Tilden delayed making a decision until it was practically forced on him late that summer. The Ring cases had ground to a halt, the clock was ticking on the statute of limitations, and only a new corporation counsel could break the impasse.[90]

On August 6, 1875, Tilden finally signed an order removing Smith as corporation counsel. In doing so, he put his own interpretation on what constituted "just cause." Instead of validating Wickham's charges, he wrote simply, "I am of the opinion that the acts are established which would at least be sufficient to induce a private client to change his counsel."[91] In effect, the corporation had been allowed to fire a lawyer with whom it had become dissatisfied, just as a private client might have done under similar circumstances.

It was a bitter blow to Smith, hardly made any easier by Tilden's effort to soften it. He left office under a cloud, the general impression being that Wickham's charges

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[90]Hirsch, Whitney, pp. 87-91.

[91]Tilden, Letters and Memorials, vol. 1, pp. 385-85.

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were true and that he had been a henchman of the Ring. If he was guilty of anything, it was vanity, which had made him accept an office under circumstances that he knew were questionable, and ineptness, which had made his administration of that office generally a failure. Other corporation counsels come readily to mind who might have been impeached and removed with more justification--Develin, perhaps, or O'Gorman. In a sense, Smith paid the price that they had escaped; he simply happened to have been there instead of them when the city's frustration with the office finally boiled over. Getting rid of Smith was probably personally unfair to him, but it was the best thing that could have happened to the office itself. After years of failure, it stood on the brink of a new beginning.

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CHAPTER XII

REBUILDING THE LAW DEPARTMENT

When William C. Whitney became corporation counsel in August of 1875, the Law Department was near collapse. Its former head, E. Delafield Smith, had been impeached, for incompetence if not outright corruption. The handful of assistants and clerks who had been holding the office together during his erratic reign were demoralized, uncertain of their jobs and--however unfairly--stigmatized by their very presence in an office that had been deemed too cozy with the Ring to be trusted with its prosecution. The prosecution of Tweed had been farmed out to a series of private attorneys, and the great mass of civil "Ring" litigation had been scattered among a dozen or so private offices. The mayor and other officials had largely gotten out of the habit of consulting the corporation counsel for legal advice, preferring instead lawyers of their own choosing. With the city's most important legal affairs in the hands of outsiders, the Law Department had become for all practical purposes a vestigial organ of municipal

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government--an embarrassment to the city, an expensive municipal joke.

Had it been a private law firm, the Law Department would likely have passed from existence. That it not only survived but shortly became the nation's largest law office and one of the most powerful departments in city government is, to borrow a phrase from Jon C. Teaford, one of the "unheralded triumphs" of late nineteenth-century municipal government.[1] The Law Department not only increased greatly in size--from a staff of 26 in 1875 to one of 115 in 1897--but took control of virtually all the city's legal affairs and began handling a phenomenal amount of business. Between 1885 (when it first began publishing yearly statistics) and 1897, the office annually disposed of more than 1,000 actions and proceedings,[2] tried 250 or more major cases,[3] argued over 100 appeals, wrote hundreds of

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[1]Teaford, in his The Unheralded Triumph: City Government in America, 1870-1900, details the achievements of city government during this period and challenges the conventional belief that it was a "conspicuous failure." The phrase, coined by James Bryce [in The American Commonwealth, 3 vols. (London: Macmillan & Co., 1888), vol. 2, p. 281] has served ever since as a codeword for the era; see, for example, the standard text on municipal government by Ernest S. Griffith, A History of American City Government: The Conspicuous Failure, 1870-1900 (New York: Praeger Publishers, 1974). Teaford makes a convincing case that critics have focused "microscopic attention" (p. 4) on the cities' failures and ignored their far greater successes.

[2]That is, lawsuits, taxation and assessment proceedings, wage claims, court and administrative hearings, and various other matters.

[3]That is, cases in the Court of Common Pleas, Superior Court, New York Supreme Court, and the U. S. District Court, as opposed to the lower "police" or municipal district courts .

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opinions, and examined or drafted hundreds of contracts.[4] By 1887 the transactions of the department, according to its annual report, were "probably greater than those of any other law office in the United States."[5] And this was, it should be noted, the "old" Law Department, when New York City was made up only of Manhattan and a part of the Bronx.

The Law Department was transformed in size and substance. It developed a national reputation for expertise not just in the specialized "law of municipal corporations" but in areas as diverse as general corporation law, contracts, personal injury, real estate, admiralty, and others. In court it consistently won more cases than it lost, a particularly impressive feat considering that unlike a private firm it could not choose its clients or cases. In certain areas its success in court was nothing short of spectacular, managing, for instance, to keep the rate of recovery against the city below five or six percent in contract and personal injury cases.[6] And because it annually handled more appellate cases than any other law office in the nation, it enjoyed a reputation within the

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[4]Figures from Board of Aldermen, Proceedings (1875), vol. 137, pp. 902-03, and New York City Law Department, Annual Report (1897), p. ix.

[5]New York City Law Department, Annual Report (1887), p. xi.

[6]That is, five or six percent of the total amount sought by plaintiffs. See under "Accidents" or "Personal Injury," and "Contracts" in Law Department, Annual Report (1885-1897). For the the numbers of cases won and lost, see under "Disposition of Calendar Cases."

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profession for being in the forefront of new developments in the law; its lawyers, by necessity, were always arguing new law because old law did not exist for all the problems of the new metropolis.

The transformation of the Law Department can best be understood not just as a single development but as a constellation of many changes that, taken together, created an radically different office. Some of these developments involved the corporation counsel himself: his growing role in partisan politics, the forging of a special relationship between him and the mayor, his increasing involvement in municipal policy-making, his emergence as more administrator than lawyer, and the recognition, at long last, that in matters of law his authority prevailed over that of other department heads. But there were other broader changes involving the department itself: its achievement of a near-monopoly of the city's legal business, the increasing importance of its counsel (as opposed to litigation) function, its metamorphosis from an overgrown law firm into a government bureaucracy, the virtual exemption of much of its staff from the patronage system, a new mentoring system that apprenticed junior staff to seniors, and the growing attractiveness of service in the Law Department as a legal career.

The way in which these changes occurred and worked in combination with one another to revolutionize the Law

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Department can best understood by tracing them through the administrations of those who served as corporation counsel from 1875 to 1897:

William C. Whitney	August 1875--November 1882
George P. Andrews	November 1882--May 1884
E. Henry Lacombe	June 1884--June 1887
Morgan J. O'Brien	July 1887--December 1887
Henry R. Beekman	January 1888--May 1889
William H. Clark	May 1889--February 1895
Francis M. Scott	February 1895--December 1897

Each was, in varying degrees, a combination of lawyer, politician, and administrator. Most tended to shine more in one respect than another--Andrews as a lawyer, for instance, or O'Brien as a politician--but all moved easily from role to another as the occasion demanded. Each left his own stamp on the office, but if any one of them can be regarded as father of the modern New York City Law Department, it is Whitney. The 1875-97 Law Department was practically a Whitney dynasty, for during all but eight years either Whitney himself or a "Whitney man" sat as corporation counsel. Andrews and Lacombe were his hand-picked successors, trusted senior assistants whose administrations were essentially continuations of his own; Scott, an assistant under both, was trained in what was essentially a Whitney office. More to the point, the office staff itself was molded in the Whitney image, for as late as 1890 over half the assistants were Whitney-Andrews-Lacombe holdovers--four of whom were still around in 1897, as well

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as Whitney's chief clerk, law librarian, and register clerk.[7]

Whitney swept into office like a fresh breeze off the Hudson. Mayor William Wickham had passed over several prominent members of the bar (among them, Charles O'Conor, Abraham R. Lawrence, Wheeler H. Peckham) to pick a relative unknown for the post.[8] Whitney, at thirty-four, was a "rising" rather than established corporation attorney; he had clerked in Lawrence's office and was only beginning to build his own practice. He had followed his mentor into the civic crusade against the Ring and then into the reform wing of the Democratic Party, where he had accomplished the singular feat of impressing both Tammany boss John Kelly and governor Samuel J. Tilden. Whitney was strictly a behind-the-scenes politician, familiar in party councils but scarcely known to the public, his only political office a stint as school trustee for the 21st Ward. But the fact that he was a relative unknown was, in a way, an advantage. The city had grown so weary of both Ring and reformers alike that the Tribune pleaded with Mayor William Wickham to replace "the old trading set with fresh, live men of

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[7]From a comparison of Law Department rosters for 1875-87, 1890, and 1897 in "List of Officers and Subordinates in the Departments of City Government" published each January 30 or 31 in New York City, City Record.

[8]For gossip about potential appointees, see Charles R. O'Conor to Gov. Samuel J. Tilden, Jan. 4, 1875, in Tilden Papers, Box 8, New York Public Library, and Hirsch, Whitney, pp. 86-89.

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character and capacity."[9] Whitney was exactly the sort of person the editors had in mind: "a trained lawyer, of excellent antecedents, ability and character" who would bring "business" skills to the city's tangled legal affairs.[10]

The new corporation counsel had his work cut out for him. Upon the downfall of the Ring in 1871, the comptroller had essentially stopped paying all claims against the city. In Whitney's words, "[f]raud was assumed to be somewhere at the bottom of all pending contracts and transactions, and pretty much everything was repudiated."[11] People with legitimate claims against the city--workmen's wages, services and supplies, construction contracts, everything--were forced to go to court to compel the city to pay them. By the time Whitney came into office in 1875 some 3,800 pending suits had piled up against the city, and the Law Department was, in his words, "floundering around under the weight in a very unfortunate manner."[12]

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[9]Tribune, Aug. 10, 1875, p. 4. Wickham's election reflected voter disillusionment with William F. Havemeyer "reform" administration of 1873-74.

[10]Ibid., pp. 1, 4. The new corporation counsel was so little known that the Tribune initially identified him as "John" C. Whitney (p. 1).

[11]From a statement in the New York World, March 20, 1878, p. 1.

[12]Ibid.

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Smith had chosen to cope with the unexpected surge of litigation by farming most of it out to special counsel, a move that was, in Whitney's mind, a serious mistake. "Under such a system it is evident that the corporation counsel has no real charge of or supervision over such suits, while he is by virtue of his office fully responsible for their proper conduct," he pointed out.[13] Whitney had trouble even finding out the current status of these suits, for all the court papers and legal records were not in his office but those of the various lawyers. What he had been able to ascertain hardly reassured him. The lawyers seemed unfamiliar with municipal law, uncertain how to get at the facts of the cases, and content to collect their fees and let the cases drag on year after year. He did some quick arithmetic on the ones that had gone to trial and was not surprised to find the rate of recovery against the city running at about 70 percent.

Whitney decided that his first priority must be to return control of the city's legal affairs to the corporation counsel. In what amounted to a declaration of emergency, he went before the Board of Estimate and asked permission "to institute at the earliest possible moment a radical change in the manner of conducting the business of

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[13]Whitney to Board of Estimate and Apportionment, Sept. 21, 1875, in Whitney Papers, Library of Congress, vol. 8.

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this department."[14] Whitney wanted to respond to the litigation crisis not by hiring more outside counsel but by putting the Law Department itself on a "war footing."[15] To do this, he asked the Board of Estimate to reduce the amount budgeted for outside counsel and to allow him instead to hire more staff lawyers. "I think the great increase of the law business of the City should now be met . . .by increasing the force of competent men in the office of the Counsel to the Corporation, thereby securing in the hands of the Corporation Counsel the general conduct of all the cases and the custody of all the important papers," he argued. "This, while involving a larger expenditure inside this office, will in the end work a great saving to the City."[16]

Whitney did not have the power personally to sway the Board of Estimate, but he had the ear of Wickham and--more importantly--that of Kelly, and they did. The Board of Estimate endorsed his proposal and cut the appropriation for outside counsel in half, from $100,000 in 1875 to $50,000 for 1876. Then, as requested by Whitney, the board took somewhat less than half of the amount saved and applied it to an increase in staff salaries--from $52,850

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[14]Ibid.

[15]See Lacombe's recollection of the Whitney office in Law Department, Annual Report (1885), p. x.

[16]Whitney to Board of Estimate, Sept. 12, 1875.

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in 1875 to $75,000 for 1876.[17] In effect, Whitney was gambling that he could make an additional $22,250 in staff salaries do the work of $50,000 in fees for outside counsel. It was the sort of fresh "business-like" approach that the Tribune had hoped for, but one with results more far-reaching than anyone, including Whitney himself, anticipated.

The fact that Whitney had to make one dollar in salary do the work of two in outside counsel fees dictated the shape his Law Department would take. Determined to stretch the $22,250 as far as possible, Whitney took a monumental risk: he went out and hired a horde of eager young law school graduates on the cheap, paying salaries as low as $600 a year. He knew from his own experience that New York City had a glut of bright young lawyers who were starving for clients and fees and ready to sell their souls for a small but reliable salary--particularly one presented as part of a package offering experience, responsibility, and influential contacts. In little more than a year's time Whitney snapped up fourteen of the brightest young lawyers in the city for a total of $16,600 in salaries.[18]

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[17]Compare the budget adopted for the Law Department for 1875 and 1876, in Board of Estimate and Apportionment, Minutes (1874), p. 715, and ibid. (1875), p. 1316.

[18]From "List of Officers and Subordinates in the Departments of City Government--Law Department," City Record, Jan. 31, 1877, p. 136.

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Hired on as "clerks"--the bottom rung of the office's legal staff--they provided the massive manpower Whitney needed. With their help the department could dig its way through the mountain of work that had piled up since the fall of the Ring. The new clerks could free the time of the more experienced staff lawyers by relieving them of routine but time-consuming chores: drafting contracts and other legal papers, conducting title searches, making routine court appearances, deposing witnesses, researching legal questions, writing simple briefs, and trying uncomplicated cases. The only thing the newcomers lacked was experience, and Whitney was confident he could compensate easily enough by putting them under the supervision of senior staff members.

But this tactic tied his hands in one respect; it practically dictated that he retain Smith's senior assistants, for they had exactly the sort of experience needed to make his scheme work. David J. Dean, a mainstay of the office since 1867, was a recognized expert on municipal law in general and New York City matters in particular. George P. Andrews, a respected former assistant United States attorney, had been Smith's chief assistant; having essentially run the department himself, he had at the tip of his tongue anything one might need to know about the city's pending legal business. Other assistants offered valuable expertise in specialized areas of the law: Charles P. Mil-

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ler in trial work, William L. Tidball in street openings, Thomas B. Clarkson in contracts, and Henry W. Wheeler in legal records. Whitney could not afford to let any of this experience get away, and despite some partisan calls for a "clean sweep" of Smith's office, he kept its force almost intact. Althogether, he retained six of the eight clerks and assistants, as well as most of the support staff of record clerks, copyists, stenographers, and messengers.[19]

Despite an enduring impression that Whitney "cleared out the Ring deadwood" and staffed the office with his own men, he built his new Law Department around the staff he inherited from his predecessor.[20] He made it his office essentially by enlarging it; where Smith had, at most, eight clerks and assistants, by 1877 Whitney had twenty-one. In addition to his army of clerks, he added a number of assistants, including a close friend, Francis Lynde Stetson, who became his right-hand man in the department. Having economized on the hiring of clerks, Whitney was able to pay respectable salaries to his assistants. Andrews and Stetson, at $10,000, and Dean, at $7,500, were among the

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[19]See "List of Officers and Subordinates in the Departments of City Government--Law Department," City Record, Jan. 30, 1875, p. 180, and Jan. 30, 1876, p. 172. There were few changes even in 1877, after ample time had passed to make them; ibid., Jan. 31, 1877, p. 136.

[20]An impression that lingers even in Whitney's biography; see Hirsch, Whitney, pp. 94-95. Hirsch has him clearing out the deadwood as his first order of business and then appointing, among other, Andrews and Dean.

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most highly paid municipal employees of their day, and the middle level of assistants--those making $3,000 to $5,000--were considered moderately well off.[21]

Although these salaries seem absurdly low by modern standards, they were generous in terms of the currency of the 1870's, when the dollar was worth at least ten times its modern counterpart.[22] In March of 1878 a scandalized New York World scolded Whitney for paying salaries "out of their proper relation to any other law salaries paid anywhere else in the country"--"so large," in the editor's opinion, "that the city cannot afford to pay them."[23] The World was both right and wrong. Law Department salaries were exceedingly generous, considering that two-thirds of the lawyers practicing in New York City were making only about $3,000 a year.[24] But as Whitney was quick to point out, the city could hardly afford not to pay these

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[21]Several commissioners--fire, health, and docks--were paid only $6,500, as was landscape architect Frederic Olmstead. The mayor himself was paid only $12,000.

[22]It is impossible to make exact comparisons. The Consumer Price Index, which McCusker uses in his How Much Is That in Real Money?, is the best indicator, but even it is flawed. Using 1860 as a base year (100), the CPI was 135 when Whitney took office, and was generally in the 110's and 120's the rest of the century; in comparison, it stood at 1,629 in 1991. However, the CPI was never designed to stretch so far over time; the "market basket" of goods of 1860 hardly resembles the same basket of 1991. Even so, one can safely multiply by least ten to convert a late nineteenth-century dollar to that of today.

[23]World, March 21, 1878, p. 4.

[24]Kermit L. Hall, The Magic Mirror: Law in American History (New York: Oxford University Press, 1989), p. 213.

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salaries, for only by attracting the best men could it hope to defeat all the claims against it. "The difference between a small and a large salary is nothing if you have the right man," he argued. "He must be judged by results, and if you have the right man you are fortunate no matter what his salary is, for his whole year's salary he can lose any week by mere inattention, let alone ignorance or dishonesty."[25]

Whitney's Law Department salaries were not high enough to attract established leaders of the bar (some of whom considered $50,000 a bad year), but they were a powerful temptation to rising young professionals in their twenties and thirties. One of Whitney's gifts was an uncanny ability to recognize talent before the marketplace did and to attract it to him; he could spot a young lawyer on the brink of success and convince him he could make his reputation in the Law Department. He recruited Stetson as an obscure 29-year-old attorney, recognizing his brilliance as corporation lawyer long before he proved it to the world as J. P. Morgan's counsel.[26] He spotted 34-year-old Charles Blandy on a chance visit in court and, impressed by his cross-examination of a policeman, hired him on the spot; he

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[25]World, March 20, 1878, p. 1.

[26]For Stetson's career with Morgan, see Horace L. Wilgus, A Study of the United States Steel Corporation in its Industrial and Legal Aspects (Chicago: Callahan & Co., 1901; reissued by Arno Press, 1973), pp. 8-10, 76-81.

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would later, as a founding partner of Blandy, Mooney & Shipman, be hailed as "one of the best equipped lawyers in the city."[27] Wilmot T. Cox joined the department as a $600-a-year clerk fresh out of Columbia Law School and went on to become a prominent Nassau County lawyer who helped draw up the act creating the new county.[28] Arthur H. Masten, who signed on as a clerk three years after his admission to the bar, later became wealthy handling business bankruptcies and serving on the boards of three mining companies.[29]

Such success and riches were far in the future when Whitney appointed these young assistants, but they soon proved their worth to the department. Whitney's gamble--the pairing of fresh young law school graduates with their more experienced older brothers--quickly paid off. In two years' time he could point to an astonishing record of achievement: expenses had been reduced over 25 percent even as the amount of business more than doubled, the department was now winning 70 percent of its cases, and the staff was not only keeping up with current cases but had erased a third of the backlog. Moreover, the department had done so

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[27]The Brown Book: A Biographical Record of Public Officials in the City of New York for 1898-99 (New York: Martin B. Brown Company, 1899), pp. 108-09, and National Cyclopaedia of Biography, vol. 9, pp. 504-05.

[28]Who's Who in New York (1907), p. 344.

[29]Who's Who in American Jurisprudence (1925), p. 993.

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at a bargain rate for the city. The total expenses of the office in 1875 had been 11 percent of the amount disposed of in litigation; in 1877, the expense was less than 4 percent. And whereas in 1875 it had cost the city 30 cents to defeat a dollar of claims, in 1877 it cost a nickel. "I think private litigants can rarely show that their law business is done at lower rates or with greater success than is the case with the City at present," Whitney declared. "The result is, in my judgment, due to the change in the system of doing business, and to the effective organization of this office."[30]

It was an organization, however, which depended largely on his personal supervision. There was no formal assignment of certain clerks to certain assistants, but a sort of genial chaos in which anyone could cry for help and someone would answer.[31] Instead of operating through a hierarchical chain of command, Whitney supervised everyone himself and kept track of what was going on by holding daily staff meetings. In these breezy sessions he and his assistants sorted through incoming cases, requests for advice, and

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[30]Statement of William C. Whitney, 1875 [sic], Whitney Papers, Library of Congress, Box 8. The date, a hand-written addition to the typed manuscript, is obviously an error; the statement is an expanded version of the the one published in the World, March 20, 1878, p. 1.

[31]For the chaotic conditions in the office, see Report of Horace E. Deming, Special Counsel to the Commissioners of Accounts, on the Office of the Counsel to the Corporation of the City of New York (1885), pp. 5-6.

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other new business, and parcelled the work out among the staff. They reviewed the progress being made on existing business, discussed strategy on ongoing cases, aired differences of opinion, and vented their feelings on various matters. The informal give-and-take of these sessions was invaluable, for through it Whitney kept abreast of everything that was going on in the department and controlled its progress with a nudge here and a push there. Then, throughout the day, he dealt with specific problems and, when necessary, conferred with individual clerks and assistants.[32]

It was a system that worked well, but it brought with it a change in the role of corporation counsel as Whitney increasingly found himself acting more as an administrator and less as a litigator. The necessity of overseeing so large a staff left him with little time to argue cases on his own, write appellate briefs, or look up points of law when asked for an opinion. Not that Whitney, for that matter, particularly wanted to do any of these things; as his biographer notes, his particular genius was to surround himself with men whom he recognized as better lawyers than himself and then to exploit their talents.[33] Whitney was

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[32]The New York Trade Reporter, Apr. 14, 1877, [no page; clipping in Whitney Papers, Library of Congress, vol. 8] describes office operations; see also Hirsch, Whitney, pp. 95-96.

[33]Ibid, p. 95.

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not only a new type of corporation counsel but a new type of lawyer, a sort which did not yet exist in the private sector. He pre-figured by at least a half-century the sort of lawyer who would later rule the nation's large commercial firms: the senior partner who personifies the office in the minds of clients and the public but who "lawyers" by delegating authority to subordinates and supervising their work.[34]

Whitney's work outside the office--representing the department to other city officials and to the public--was just as vital as his work inside it. To make the department a success, he had to restore public confidence and rebuild the relationship between his office and the rest of municipal government. It was essentially a political task, and fortunately Whitney was a consummate politician. He not only rode the shifting political currents nimbly, but did his share in directing them into new channels. When the local party split between Kelly and Tilden in the winter of 1880-81, for instance, he not only cast his lot with the Tilden faction but also played a major part in organizing a rival to Tammany, the grass-roots-based "County Democracy."[35] Whitney served four mayors--Wickham, Smith Ely, Jr., Edward Cooper, and William R. Grace--to

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[34]A fuller discussion appears later in this work.

[35]For contemporary assessments of his role in this rival to Tammany, see Hirsch, Whitney, 171.

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whom he was not only a legal adviser but friend, fellow reformer, and political ally. They belonged to the same wing of the fractious Democratic Party, and in general their friends were his friends, their enemies his enemies. Already an acknowledged "kingmaker" in the party, he had been instrumental behind the scenes either in their nominations or their hard-fought election campaigns. Once in office, they relied on him for both legal and political counsel and gave him unstinting support and public praise.[36]

A case in point is his close relationship with Grace, for whom he played a crucial role in his election in 1880 as the city's first Catholic mayor. When Grace's campaign was hit by rumors that he was plotting with Cardinal McClosky to funnel tax funds into Catholic schools, Whitney met the charges head-on. In an interview with the New York World, he not only denied that the candidate had any such plans, but went on to reassure the voters with a long legal opinion showing just how impossible any such attempt would be.[37] Grace never forgot Whitney's timely help, and although he inherited rather than appointed him as corpora-

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[36]For Whitney's political activism as corporation counsel and his relationships with the three mayors, see, in general, Hirsch, Whitney, pp. 147-73. For mayoral attitudes toward him, see the annual message of Wickham in Board of Aldermen, Proceedings, Jan. 1, 1876, pp. 43-46; that of Ely in ibid., Jan. 7, 1878, pp. 33-36; and Grace's comments in New York Mail, Nov. 6, 1882.

[37]World, Oct. 21, 1880.

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tion counsel, he quickly made him his most trusted adviser.[38] Whitney was not just close but, some felt, too close. When he and Grace sat side by side, whispering incessantly through a mayoral hearing on the conduct of the police commissioners, the commissioners' counsel Elihu Root objected: "It is exceedingly difficult to argue against whispered counsel for the other side. If the Counsel for the Corporation is to decide the question, I should prefer to address him."[39]

Because of his closeness with the mayors under whom he served, Whitney was able to borrow the full weight and authority of their office in his clashes with fellow officers of city government. Whitney had to battle the same powerful and pervasive misconception that had plagued his predecessors: the tendency of city officials to see themselves as clients of the Law Department and the corporation counsel as "their" lawyer. They expected to deal with him just as they did with their own personal lawyers--that is, they would instruct him in what they wanted to do, and he would find a way for them legally to do it. It was

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[38]One of the pecularities of the 1870 charter was that the corporation counsel was appointed to a four-year term by a mayor whose term was only two years. Originally appointed to serve the remainder of Smith's term, Whitney was re-appointed for a full term by Wickham in December 1876, and thus inherited by Cooper when he took office in January 1879. Cooper reappointed him to another term in December 1880, shortly before Grace took office in January 1881.

[39]Quoted, without attribution as to source, in Hirsch, Whitney, p. 135.

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an unrealistic attitude to take even toward one's private attorney; as Elihu Root once remarked, "[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."[40] Whitney had to deal with his own share of "damned fools": the aldermen who wanted to claim a $2,000 salary for an office of theirs that no longer existed, the comptroller who considered a court order no reason to pay a claim he had opposed, the mayor who hoped he did not have to appoint a transit board just because a state law told him to.[41] His biggest problem, however, was educating his fellow officers that he was not "their" lawyer but the corporation's, and that in matters of law they were subject to his instructions, not he to theirs.

Whitney established this point in a confrontation with his most formidable challenger, comptroller Andrew Haswell Green. Green was one of the most scrupulously honest public servants ever to grace city government but also one of the most exasperating, and Whitney was among those who

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[40]Quoted in Philip Jessup, Elihu Root, 2 vols. (New York: Dodd, Mead and Co., 1938), vol. 1, p. 133.

[41]For the contretemps known as the "$2,000 salary grab," see Billings v. Mayor, 68 New York 413 (1877). For the comptroller's noncompliance, see Whitney to Andrew H. Green, Opinion, Nov. 18, 1875, as well as an account in the World, Nov. 25, 1875, p. 5. For the mayor's reluctance to accept a transit board, see Whitney to John Tracy, Chief Clerk of Mayor's Office, Apr. 21, 1881, in Mayors' Papers, William R. Grace (1981), Law Department, New York City Records and Archives Center.

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believed that his reputation as "watchdog of the treasury" had gone to his head.[42] Convinced that fraud lay hidden in every claim presented to him, he refused to pay large numbers of the city's bills and dared the disappointed claimants to take him to court--which, in droves, they did. Examining these claims when they came to him in the form of lawsuits, Whitney could divine no reason why most should not have been promptly paid, nor could he muster any legal grounds for defending against them in court. "The inevitable result of this," complained Whitney, "is that the City is put to the wholly useless expense of paying the costs of a suit without any result but a damaged reputation."[43]

One of Whitney's first acts in office had been to adopt a policy of examining all lawsuits as they came into the office and weeding out those the city stood no chance of winning. These he sent back to the departments involved, advising that they be settled out of court on the best terms available. It was not a policy that had endeared him to Green, who, after receiving a number of rejected cases,

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[42]For contemporary criticism of Green, see Report of the Committee on Law Department of the Board of Aldermen on the Investigation into the Conduct of Andrew H. Green, Comptroller, in Board of Aldermen, Documents (1875), No. 1.

[43]Whitney to Green, Apr. 5, 1876, in Mayors Papers, Wickham (1876), Law Department folder, New York City Archives and Records Center. In addition to losing the amounts for which it was being sued, the city had to pay the legal expenses of the plaintiffs.

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wrote a tart letter to Whitney informing him he did not have "any discretion except to obey the directions of the Finance Department."[44] At this point Whitney lost all patience and fired off a letter, buttressed with a concurring opinion by bar association president William M. Evarts, setting him straight. Whitney denied that the comptroller had any power to give him orders: "The head of the Law Department is not a bureau officer in the Finance Department." The charter had given the corporation counsel "sole and exclusive" charge of the city's law business, he declared, "and when a suit is brought against the City, it has become part of the law business of the Corporation and not of the Finance Department, or any other department." It would, in fact, be unethical for the corporation counsel or any lawyer to do what the comptroller suggested--to defend indefensible lawsuits, to "lend himself to the maintainance [sic] of what he considers a false legal position, or to give an opinion as to the law, and then advocate the reverse."[45]

Green did not respond to the letter, or if he did, no record survives. Whitney was clearly the winner, however, for the next annual message of the mayor noted the existence of an "arrangement" between the comptroller and the

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[44]Paraphrased in ibid.

[45]Ibid.

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corporation counsel that claims would no longer be given final refusal without consultation with the Law Department.[46] Whitney had established an important point: in matters of law the corporation counsel had authority over other department heads. Rather than existing to carry out their wishes, he could in fact command obedience from them. Theoretically, Whitney's fellow department heads could have appealed to the mayor, but there is no evidence any of them other than Green ever did; considering the close ties between the two, it would have seemed extremely unlikely that the mayor would have overruled his corporation counsel.[47]

Most of Whitney's differences came not with other department heads but with the Board of Aldermen, a group not notably amenable to mayoral persuasion. In November of 1875 the aldermen, who were charged with certifying the city's elections, voided the election of the Marine Court judges as illegal and declared another slate the winner. Whitney, barely three months in office, sent the aldermen an unsolicited and quite unwanted opinion informing them

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[46]Wickham, "Annual Message," in Board of Aldermen, Documents (1877), No. 1, p. 29.

[47]The same set of circumstances applies today. See Sayre and Kaufman, Governing New York City, p. 361. Sayre and Kaufman note that other agencies must yield to the corporation counsel unless they can successfully appeal to the Mayor or someone else to whom he will listen. "Few agencies can accomplish this feat," they declare, for it would require unusual political power for an agency to persuade the mayor to overrule his own legal adviser.

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they had no such power; their role in elections was purely ministerial, and questions of the legality of an election belonged solely to the corporation counsel.[48] Two years later he successfully opposed them in a case the newspapers dubbed "the $2,000 salary grab." Although their role as county supervisors had ended by law on January 1, 1875, they had contrived to continue drawing a salary for it just the same.[49]

Finally in 1882 the long-simmering question of authority was resolved by the courts when Whitney and the Board of Aldermen took opposite sides in a case. The Parks Department had announced plans to build a park on the site of the Fifth Avenue reservoir, with the cost to be assessed on neighborhood property owners. When these owners went to state supreme court asking for an injunction, Whitney appeared on behalf of the Parks Department and entered the city's answer. The Board of Aldermen, under considerable pressure from its constituents, supported the property owners and passed a resolution ordering Whitney to withdraw the city's opposition.[50] Whitney refused to comply, argu-

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[48]Whitney to Board of Aldermen, Opinion, November 18, 1875; Herald, Nov. 20, 1875, p. 4.

[49]Billings v. Mayor, 68 New York Reports 413 (1877). Judge Charles A. Rapallo upheld the city, noting that no salary was due for an office that no longer existed by virtue of article 3, chapter 22, of the New York Constitution

[50]Board of Aldermen, Proceedings, Feb. 28, 1882, pp. 599-600.

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ing in court that the corporation counsel was not subject to the orders of the Board of Aldermen in the city's suits but was bound instead to follow his own ideas of what was proper. Ruling on behalf of Whitney, justice Abraham Lawrence declared, "The corporation counsel is responsible to the corporation made up of the whole body of citizens, and not merely to the aldermen, and . . . in the performance of his duties he is not bound to consult the wishes of those local legislators."[51] Lawrence's ruling was an important one, for as a judicial opinion it stood as a precedent that would be binding on similar situations in the future; the corporation counsel, not other officers, would decide the city's position on legal questions.[52]

Despite their occasional clashes, Whitney and the aldermen worked together quite well most of the time. The aldermen needed him more than he needed them, and both knew it. The Board of Aldermen had difficulty coping with all the demands placed on it, and its members were unsure what powers they actually enjoyed in the name of the city. The

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[51]Quoted in New York Times, June 23, 1882, p. 2. See Webb v. Mayor, 64 Howard's Practice Reports 10 (1882). Although upholding the corporation counsel on this point, the court ruled against the city on the larger issue of who was to pay, forcing the Parks Department to abandon its project. The city later turned the site over to the New York Public Library, eventually building Bryant Park adjoining it at city expense.

[52]For the operation of precedent in American law, see the section "Precedent and Stare Decisis" in Bernard F. Cataldo and others, Introduction to Law and the Legal Process, pp. 10-15.

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increasing growth of population brought with it perplexing new problems, and there was nothing more disquieting to the aldermen than to pass some badly needed ordinance only to see it voided by the courts. They began to practice a sort of preventive law, consulting the corporation counsel for advice on whether they had a certain power and for help, if they did not, on securing legislation to get it for them. Some of the matters were routine, but others involved novel questions of law. Could they pass an ordinance prohibiting the carrying of pistols?[53] Could they regulate over-crowded excursion boats?[54] Would an ordinance allowing a company to run steampipes under the streets conflict with the constitutional prohibition against a city's giving financial aid to private businesses?[55]

Whitney answered these and a host of other questions, and even mediated between the board and other departments

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[53]Board of Aldermen, Proceedings, Sept. 4, 1877, pp. 190-91. Whitney advised that they could, but only within certain limits. See Whitney to Board of Aldermen, Opinion, Oct. 5, 1877.

[54]Board of Aldermen, Proceedings, Oct. 23, 1877, pp. 208-09. Not directly, according to Whitney, for such regulation was reserved to the federal government. However, the city could post an officer to count the passengers boarding and, once the load limit had been reached, warn potential passengers against boarding. They might not heed the warning but the ship's captain would, Whitney noted, particularly if the officer notified additional passengers that their presence made the boat liable for a fine under federal law of $500 per person, half of which was payable to any informant by the U.S. Attorney.

[55]Ibid., Sept. 17, 1878, p. 509. Whitney held that such an ordinance would be invalid without legislative authorization; see Whitney to Board of Aldermen, Opinion, Jan. 4, 1879.

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of government--intervening, for instance, in one case in which the department in charge of garbage removal greeted "with derision and contempt" an aldermanic resolution ordering it to clean up the ferry landing.[56] Whitney's relations with the aldermen were so good, in fact, that near the end of his service as corporation counsel they gave his department their ultimate endorsement. When a rival slate of candidates--the so-called "Wolf Board of Aldermen"--contested the 1882 aldermanic election, the sitting aldermen turned down a proposal to retain special counsel in the suit and voted instead to let the Law Department defend them.[57]

Whitney, however, was not universally admired. His breezy self-assurance struck some observers as arrogance, a little too cocksure to please the courthouse crowd. "People know this man as a conceited ass," complained one old-timer. "When he goes into court, he puts his glasses on his nose and swaggers in as if he owned the judge and court."[58] Contractors, accustomed to the free and easy

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[56]Ibid., Apr. 19, 1881, pp. 170-71.

[57]Board of Aldermen, Proceedings, June 6, 1882, p. 782, and June 20, 1882, p. 991. Whitney took on their defense only because he was satisfied in his own mind that they were in fact the duly elected board; as the corporation counsel he could not defend private individuals but only actual officers of city government.

[58]Reported to him, with barely concealed glee, in a note from a friend identified only as "G. H," July 1881, in Whitney Papers, Vol. 12.

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ways of the Tweed years, resented his insistence on being a stickler for details. When Mallory & Company signed a contract promising to supply the Fire Department with certain items for $5.40 each, he held the company to the letter of its agreement and refused to let its officers move their misplaced decimal point back to $540.[59] Real estate operators complained of red tape and "useless, vexatious law proceedings" in street openings. "We want a little less of law quibbles and a damn sight more plain common sense," groused one property owner; another blustered that "if this thing is not ended soon I'll put his ass in a kettle of hot tar."[60] Other department heads at times considered him a bit starchy. When the director of public charities promised to loan a portrait to the Philadelphia International Exhibition, Whitney insisted he rescind the offer. "The laws of the State of New York do not expressly or impliedly confer upon you the power to permit others to use city property," he lectured the unhappy director.[61]

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[59]Whitney to James L. Perley, New York City Fire Department, Opinion, Jan. 27, 1876. Whitney noted that while it might be a hardship, it arose from the company's carelessness in preparing its proposal. Even so, he was not wholly unsympathetic, and although insisting that city officials could not by law change a contract after it had been executed, he suggested that the company might obtain relief by legislative act or a suit in equity.

[60]"G.H." to Whitney, July 1881, in Whitney Papers, vol. 12, relaying talk he had overheard on the ferry.

[61]Whitney to Director of Public Charities, Opinion, March 15, 1876.

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And there was a certain callousness in the way he informed a grieving Fire Department that it could not pay for the funeral of a fireman who had perished saving his comrades; such an expenditure, he ruled, was "not essentially necessary and not comprehended by the powers of the municipality."[62]

Yet the very things about Whitney that so annoyed people--his self-assurance, his unemotional approach to problems, his seeming obsession with the letter of the law--were the very qualities that made him so valuable to the city. The fact was that the officers of New York City government did not need legal advocacy so much as they needed dispassionate counsel. They did not need someone who would win their battles in court so much as they needed someone who would keep them out of court altogether. In this sense, Whitney was the right man at the right time. His background as a corporation lawyer had conditioned him to think of law in the way businessmen did; they might not like it when their counsel brought them bad news, but they preferred that to no news at all, to uncertainty. What businessmen wanted more than anything else was order and predictability: being able to count on what would happen if they took a certain course of action. What they hated more than almost anything was surprise, some occurrence that

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[62]Whitney to Commissioners of the Fire Department, Opinion, Aug. 6, 1877.

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should have been forseen but was not and that cost them dearly to overcome.[63]

The officers of New York City government were in much the same position as the nation's new captains of industry. They were at the helm of a giant enterprise, the "Empire City of the World." Its budget, work force, real estate holdings, and operations were greater than that of any giant corporation. And like these corporations, it was venturing into new and unexplored territory, where at every turn it encountered novel legal questions. As a consequence, its officers began to do the same thing their business brethren were learning to do: to seek order and predictability by engaging legal counsel before the fact rather than after it.[64]

Within that context, Whitney's "legal quibbles" begin to make sense. Take, for instance, his refusal to let the Fire Department contractor correct his misplaced decimal point. To many this seemed an egregious bit of nit-picking

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[63]Their need for certainty was what led them eventually not just to accept but to collaborate in their regulation by the government; they might not like regulation, but if they knew what it was going to be, they could plan for it and work around it. See, in general, Robert H. Wiebe, The Search for Order, 1877-1920 (New York: Hill and Wang, 1967) and Gabriel Kolko, Railroads and Regulation, 1887-1916 (Princeton, N.J.: Princeton University Press, 1965).

[64]For the increasing importance of the counsel function in private law, see Wayne K. Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915," in Gerard W. Gawalt, ed., The New High Priests: Lawyers in Post-Civil War America (Westport: Greenwood Press, 1984), pp. 3-27.

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on his part, for both the Fire Department and the contractor had understood that the price was to have been $540. In fairness, it seemed, the city should have told the chagrined contractor, "Don't worry, we'll change it back to what we both thought it was." But more than fairness was involved; order and predictability were at stake. The whole reason for insisting that all city business be done by contract was to remove the element of uncertainty in its transactions, as well as opportunities for corruption. Under the "will theory" of contract, both parties specified up front all the details of their bargain--had, in the parlance of the law, "a meeting of the minds"--and then each could be certain what the other would do as the contract was fulfilled.[65] The contractor could not decide midway through to use two-inch pipe instead of three-inch, nor the city to pay ninety cents a foot instead of a dollar.

On occasion such inflexibility hurt someone, as it did the unfortunate Fire Department contractor, but without it the city could hardly have operated. The city was engaged in installing a vast infrastructure, and it depended on multitudes of contracts with the private sector for its construction. How could it have built its "New Croton System"--a massive project of huge dams in the Catskills, a

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[65]For the evolution of contract law away from concepts of fairness and toward the will theory in the nineteenth century, see Lawrence M. Friedman, Contract Law in America (Madison, Wisc.: University of Wisconsin Press, 1965).

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long aqueduct conducting water to the city, and miles of water mains and pipes--if every step along the way the parties to each contract had discretion to change its terms?[66] How could it have avoided a return to the pervasive corruption of the Tweed years, when contracts--though in place--were routinely ignored, or jiggered to suit the Ring?

To appreciate the commitment of New York City government to the sanctity of contract, one need only skim the bound volumes of the corporation counsel's opinions, which are replete with earnest questions about contracts. In 1877 the parks commissioner discovered that a sewer project would require a little more work than anticipated in the contract. Should he let the same contractor undertake it, or did he have to start the bidding process all over again? Whitney ruled that the provision of the charter requiring bidding on work or supplies of more than $1,000 applied to "extra work" as well; the commissioner would have to open new bidding if the work amounted to that much.[67] Were several requisitions of slightly less than $1,000 each for fire hydrants an unlawful evasion of this requirement? No; decided Whitney, for they had been ordered in different

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[66]For this project, see Charles A. Weidner, Water for a City (New York: New Brunswick, N.J.: Rutgers University Press, 1974).

[67]Whitney to William R. Martin, Department of Public Parks, Opinion, May 1, 1877.

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lots at different dates.[68] Might the Parks Department "borrow" pipe left over from a Public Works Department project? Not without a legislative act authorizing a change in the public works contract, Whitney regretted to say, even though doing so would obviously save a great deal of money.[69] There is a sense in these and other questions that although officials chafed at the "red tape" of contracts, they were also grateful for it; as long as they stuck to the letter of these contracts, they could be sure what they were doing and at the same time be protected from any suspicion of wrongdoing.

Contract law was fairly cut and dried; the greenest clerk in the office could usually find answers to these questions in standard treatises on the subject.[70] Many of the questions officials raised, however, involved obscure points of law, circumstances peculiar to New York City, specialized technologies, or issues so new they were not yet in treatises or case reports. It was in answering these questions that Whitney proved the real worth of the Law Department to the city. It required an encyclopedic

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[68]Whitney to Comptroller Green, Opinion, May 3, 1877.

[69]Whitney to Board of Aldermen, Opinion, Oct. 27, 1877.

[70]Theophilus Parsons, The Law of Contracts, 3rd Ed. (Boston: Little, Brown and Company, 1853); William Wetmore Story, A Treatise on the Law of Contracts, 5th Ed. (Boston: Houghton Mifflin, 1874), and Theron Metcalf, Principles of the Law of Contracts (Cambridge: H. O. Houghton & Co., 1871).

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knowledge that neither he nor any other lawyer had, but Whitney had an advantage over other attorneys--he had an large legal bureaucracy at his service, both senior assistants with expertise in a wide variety of fields and junior clerks with the stamina for tedious hours of combing through treatises and case reports. The clerks might find the law, and Dean or Andrews or Stetson might draft the final polished opinion; but it was his nonetheless for it represented, in the end, his own best judgment of what the law was.

In 1877, for instance, the Board of Aldermen asked Whitney whether it had the power to require street railroads to provide seats for all passengers or to forfeit their fares. To arrive at his answer, Whitney--or, more accurately, his clerks and assistants--dug through all previous ordinances on mass transit (beginning with the horsecar), voluminous New York state legislation on the subject, and fourteen separate citations in case law. He finally came to the conclusion that the board did not have such power, although he noted that it was a "novel question" on which other lawyers and judges might differ.[71] In answering a question on the regulation of firearms, he followed a trail of law back to the Montgomerie Charter of

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[71]Whitney to Clerk of the Common Council, May 9, 1876 [a copyist's error; the year was 1877], opinion in Bar Association Library.

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1731 and a legislative act of 1833 giving the city the power to preserve peace and good order.[72]

Whitney found himself dealing with both the old and the new. In 1876 there was a dispute about whether part of the proposed route of an elevated railroad lay within the original bounds of Battery Park; if it did, as opponents of the railroad insisted, its use could be held contrary to the terms by which the state had granted the park to the city in 1790. Whitney found the answer to that question (it was outside the original bounds) only by finding and poring over "all the accessible ancient maps," finally establishing by comparisons with a 1686 map that the site was a later landfill.[73] Whitney was equally at home in dealing with questions involving modern technology. In 1876 five newly chartered companies were vying to supply New York City with illuminating gas, and the aldermen were concerned about protecting the public safety. Did the city have the power to regulate this new technology? With no established law in place, Whitney extrapolated the power to regulate water and sewer pipes in the streets to the power to regulate pipes in general, including those conducting gas. To that extent, the city could regulate the gas; but,

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[72]Whitney to Clerk of the Common Council, Oct. 5, 1877, opinion in Bar Association Library.

[73]Whitney to Department of Public Parks, Jan. 24, 1876, opinion in Bar Association Library.

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he cautioned, any extensive regulation of the companies themselves would have to come from legislative authority.[74]

Whitney's counsel carried so much weight with other city officials that they began to think of a Law Department opinion as a "ruling" and of the corporation counsel as a quasi-judge or referee. In the internecine squabbles of city government an opinion of the corporation counsel took on the force of a verdict. Whitney settled an 1876 quarrel between the aldermen and the comptroller unequivocally: "I am of the opinion that the so-called resolution has no legal validity whatever and that no notice whatever should be taken of it by the Finance Department." Case closed.[75] When officers anticipated criticism for some action of theirs, they protected themselves by securing beforehand an "authorization" from the corporation counsel. Worried about the large number of violent criminals in the work-house, for instance, the corrections commissioner got an opinion from Whitney that it would be all right to arm his guards.[76] Not only municipal officers but citizens as well began to think of Whitney as someone who could settle matters for them without going to court. In 1876 he mediated

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[74]Whitney to Clerk of the Common Council, March 3, 1876, opinion in Bar Association Library.

[75]Whitney to Comptroller Green, Feb. 4, 1876, opinion in Bar Association Library.

[76]Whitney to Department of Public Charities and Corrections, March 29, 1876, opinion in Bar Association Library.

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between upper east side property owners and two street railroad companies, summoning both railroad presidents and the leaders of the Fourth Avenue Improvement Association to his office to settle several long-standing grievances that had been ripening into a lawsuit.[77]

Belatedly it began to dawn on Whitney that in terms of his proper role there was a line somewhere and that he had to guard against crossing it. In 1879 a city-owned vessel collided with a coal boat and sank it in the East River. Was the city at fault? Rather than face the expense and delay suing in federal court, the boat owner made a startling proposal: Whitney would arbitrate the question, and both sides would abide by his decision. It was startling in two respects--not only that a person would trust the city's own lawyer for such fairness but that it would occur to him, or to anyone else, that he could put on the robes of a judge. Whitney, to his credit, turned the proposal down and advised the owner, "The case is one which should be passed upon by the courts and not by the Counsel to the Corporation."[78] It must have started him thinking, however, because a week later when he turned down a request

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[77]Whitney to Commissioner of Public Works, Jan. 19, 1876, opinion in Bar Association Library. The city's interest in the matter was that it would have been named one of the defendants in the lawsuit.

[78]Whitney to Commissioner of Public Charities, May 2, 1879, opinion, Bar Association Library. It was this agency that owned the boat involved on part of the city.

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by the mayor to decide a complicated question about the commissioner of jurors, his answer amounted to a statement of policy: "If I were a court of last resort, I would decide the question and settle the law, but an ex cathedra opinion from me . . . will have no tendency to settle the question."[79]

Whitney's administration had its share of disappointments, but in the end it was these disappointments more than the successes that bore out his vision of the office. They became an object lesson to city officials about what could happen when the city's legal affairs fell into the hands of counsel not directly responsible to the city itself. The most famous of the cases were the criminal prosecutions and civil cases against the major Ring figures--Tweed, Hall, Sweeny, Connolly--and their confederates.

In the conduct of these actions Whitney was twice removed: the public officer under whose authority they were being prosecuted was not the city's corporation counsel but the state's attorney-general, and that officer had delegated his authority to the private lawyers (Charles O'Conor, Wheeler Peckham, and others) chosen by the

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[79]Whitney to Edward Cooper, Mayor, May 7, 1879, opinion in Bar Association Library.

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reformers.[80] Whitney was effectively excluded from any participation in these cases, barred from taking part in decisions of serious legal consequence to the city. In October of 1877, for instance, a lawsuit against Thomas Coman for $472,848 was discontinued without his knowledge. When Whitney wrote asking for an explanation, the attorney in charge--Francis C. Barlow--seemed dumbfounded at his interest: "The time in which I must decide was so short, and you are so overwhelmed with so much work that it never occurred to me to burden you with this."[81]

Whitney was not bothered so much by being burdened as by being excluded. His exclusion from the cases handled by O'Conor and his associates hampered him in his conduct of hundreds of other Ring-era cases for which he was responsible--the very numerous and complicated claims against the city that had arisen from the Ring's activities. The downfall of the Ring had interrupted work in progress, halted payment of both legitimate and bogus claims, and in general thrown the city's finances into

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[80]Smith's earlier removal of Peckham and Barlow had not been allowed to stand; the reformers secured passage of a law returning the cases the cases to the attorney-general, and he retained O'Conor and his associates again. See Hirsch, Whitney, pp. 120-21, and New York, Laws (1875), ch. 49. O'Conor's illness interfered with the group's effectiveness, but he insisted on being kept in charge.

[81]Barlow to Whitney, Dec. 26, 1877, in Whitney Papers, Vol. 9, two months after Whitney's letter of inquiry. See Whitney to Barlow, Oct. 23, 1877, same volume. In fairness to Barlow, he had little choice (judging by his letter) but to withdraw the suit, given the sudden failures in memory by his chief witnesses.

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turmoil. As a result the Law Department had become, in Whitney's words, "the final breakwater against which all the driftwood of the Ring times piled up."[82]

The image was a favorite of Whitney's, conveying a picture of the Law Department standing as a barrier between the city and the lawsuits pounding its shores.[83] But it did not go far enough. The lawsuits had not just "drifted" in from sea--they had been borne along on a tide of criminal activity. Yet the Law Department, charged with responsibility for protecting the city from these lawsuits, was allowed nothing to do with the criminal prosecutions. And as Whitney discovered, the decisions made by those involved in these cases--not only O'Conor and his legal team, but also the Committee of Seventy, the governor of the state, and the attorney-general--closed off many of his own options.

By the time Whitney came into office, the criminal case against Tweed (from the so-called "omnibus indictment") had ended, with the Court of Appeals overturning his cumulative twelve-year sentence and releasing him for time served. Anticipating this outcome, O'Conor had gained authorization from the attorney-general to bring civil suit against Tweed

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[82]Whitney to Mayor William R. Grace, letter of resignation, Nov. 6, 1882, in Mayor's Papers, William R. Grace, Letters to Mayor (1882), New York City Municipal Archives and Record Center.

[83]For earlier versions, see World, March 20, 1878, and Statement of William C. Whitney, 1875 [sic].

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to recover the city's stolen money.[84] Tweed had no sooner been released than O'Conor brought suit for $6 million and had him jailed in lieu of $3 million bail. The use of bail in a civil case was extraordinary--Tweed's counsel David Dudley Field called it "a grave assault on civil liberty"[85] --but this was an extraordinary case, and it was granted.[86]

It was this case, and not the criminal one, that kept Tweed behind bars except for the brief interlude of his famous escape to Spain.[87] Whitney, though he was in office by the time the trial started, had nothing to do with the case. Peckham took charge because O'Conor's health had finally broken, and he won judgment against Tweed for $6 million in the fraudulently audited bills of May 1871. In a sense the suit was a sham, for O'Conor and Peckham both knew that Tweed did not have $6 million--or indeed, by this time, even enough to pay his own lawyers.[88] But that was

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[84]At least such was the effect of the act; the law itself [New York, Laws (1875), ch. 49] was carefully phrased as a "general" act allowing the state the right of action in cases of defalcations by officials of municipal corporations. It was used against other Ring figures as well.

[85]Points for Defendant, People v. Tweed, 5 Hun 353 (1875).

[86]For the court's reasoning, see the appellate ruling on the bail issue in 63 New York 194 (1875).

[87]An escape recounted at length in Callow, The Tweed Ring, pp. 290-91.

[88]Tweed, who could no longer afford David Dudley Field, was taken on practically as a charity case in 1876 by William T. Edelstein and John D. Townsend. See Hershkowitz, Tweed's New York, p. 307.

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precisely the point; without the money to pay the judgment, he would be stuck in jail indefinitely. The lawyers were counting on one of the pecularities of debtor law in New York state, the fact that although the state had presumably abolished imprisonment for debt in 1831, an exception existed in the case of debt based on fraud.[89] Tweed's prosecutors were able to secure with one civil suit what they had so far been unable to get with fourteen indictments and two criminal trials--a sentence of life in prison.[90] True, it was the relatively comfortable Ludlow Street jail and not Sing Sing--but it was imprisonment just the same, particularly in the case of Tweed. Although most other imprisoned debtors were allowed the "freedom of the jail," leaving during the day and being confined only at night, he was not; having escaped once, he could not be allowed a chance to do it again.

The reformers congratulated themselves on having so neatly trapped, at long last, the "boss thief," but it was a success that came with a heavy price. In their zeal to

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[89]An account of the history of debt imprisonment in New York appears in Max S. Grifenhagen, Memorandum in Support of the Proposed Amendment to the Constitution Relating to Abolishing Imprisonment for Debt (1915), pamphlet in New York Public Library. As late as 1915, eighteen debtors were in jail in New York City, either for civil fraud or the other notable exception to the law, arrears in alimony.

[90]For a list of the indictments, see Townsend, New York in Bondage, pp. 110-11. An exhaustive account of the indictments, the counts contained in them, and the abandonment of all but the 220-count "omnibus" one, see Herskhowitz, Tweed's New York, pp. 196-260.

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make an example of Tweed, they made deals with most of the rest of the gang--at least the ones who had not fled the country--and granted them immunity in exchange for their testimony against him. Tweed's counsel John Townsend counted the number of these deals and determined that "about nine out of ten men who were confessedly guilty of stealing were accepted as witnesses against the other one man."[91] E. A. Woodward, Andrew J. Garvey, John H. Keyser, James H. Ingersoll, J. McBride Davidson, and George S. Miller were all, in the words of an aldermanic committee, "released, not only from criminal prosecutions, but apparently . . . from all obligations to return their stolen booty."[92] Restoring the money was the least of O'Conor's concerns; he had, in fact, been anxious that the prosecutions not "degenerate into mere collection suits."[93] As a free-lance reformer, he could afford to take such a lofty moral stance, but as the city's chief legal officer, Whitney could not. His obligation was not to lead a great moral crusade but to serve the larger interests of the city. Vengeance against Tweed might be sweet, he wrote the attorney-general in the spring of 1877: "But in my position

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[91]Townsend, New York in Bondage, p. 141.

[92]Ring Investigation, p. 793.

[93]Ibid., p. 35. The aldermanic committee was of two minds about this policy, endorsing it as "undoubtedly the correct one" (p. 35) but at the same time criticizing its results (pp. 11-12, 34-35).

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where I am struggling daily against these immense money claims pressing on the city, the money side of the question looks big."[94]

Whitney's chief concern at the moment was the Baird water meter case, a million-dollar claim which, if lost, would wipe out the entire amount that O'Conor and his associates had so far recovered from the Ring.[95] This case, which had helped ruin Delafield Smith, became an obsession with Whitney. He wanted badly to win it. The facts of the case were typical of the muddle that had been left behind in the wake of the Ring. Tweed had contracted with Jose Navarro for 10,000 water meters at an outlandish price--$70 each when others could be had for $20--and they had been delivered just as he was being deposed. The comptroller, suspecting fraud, refused payment, and Navarro assigned the claim to John Baird, in whose name the suit was finallycase were typical of the muddle that had been left behind in the wake of the Ring. Tweed had contracted with Jose Navarro for 10,000 water meters at an outlandish price--$70 each when others could be had for $20--and they had been delivered just as he was being deposed. The comptroller, suspecting fraud, refused payment, and Navarro assigned the

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[94]Whitney to Charles S. Fairchild, May 25, 1877, in Charles S. Fairchild Papers, New-York Historical Society, Box 1. I have slightly changed the punctuation.

[95]Using figures from Ring Investigation, p. 27, and subtracting legal costs.

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claim to John Baird, in whose name the suit was finally brought.[96] By the time Whitney became involved in it in 1877, the original claim of $700,000 had, with interest and legal expenses, swollen to over a million dollars. It was money the city could ill afford. Not only was Whitney convinced that the meters were outrageously overpriced, but informants had told him privately that they did not even work; when the engineers had tested a sample before accepting the lot, Tweed had slipped a confederate into their office at night and tampered with the results.[97]

Rumor and supposition alone, however, did not make a case. Baird had a valid contract unless Whitney could prove it was based on fraud, and to do that he needed the testimony of the Ring figures themselves, some of whom would necessarily have been involved in the scheme. But Whitney, excluded from the Ring prosecutions, had no power over them; most had already made their deals with O'Conor and his team, had testified, and had been granted immunity. The only one who had not, William E. King--Tweed's deputy in the Department of Public Works--had fled and no one knew where he was. This left, as far as Whitney could see, only

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[96]Such assignments were commonplace. One of the legacies of the Ring was a market in lawsuit futures, with cash-hungry plaintiffs selling their claims against the city to speculators for so many cents on the dollar.

[97]Hirsch, Whitney, citing a digest of the case by Whitney which I have been unable to find in his papers.

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one possibility: Tweed himself. The idea was not as far-fetched as it might seem, for in December of 1876 Tweed--defeated, bankrupt, and plagued by illness--had opened negotiations with his prosecutors and attorney-general Charles Fairchild, promising to testify in any cases they wanted in exchange for his freedom.[98]

Tweed's offer could not have come at a more opportune time for Whitney. He had no sympathy for Tweed, but in his mind he would be of far greater value to the city in court than in the Ludlow Street jail. There were encouraging signs that the deal was going to be struck. Kelly and Wickham were both urging it on governor Tilden, and Fairchild and Peckham were at least open to the suggestion. They were engaged in negotiating a settlement with Peter Sweeny, and Tweed's testimony could be expected to help them drive a hard bargain. Fairchild asked for a full confession by Tweed as a sign of his good faith, and on April 17 received a long, rambling document which he in turn showed to Whitney and Peckham.[99]

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[98]Tweed to O'Conor, Dec. 5, 1876. This letter was published by Tweed's lawyer John Townsend in his New York in Bondage, pp. 119-20. For a detailed account of the negotiations with Tweed, including most of the letters back and forth, see pp. 115-51.

[99]A copy of this confession, in pencil and unsigned, is in the Fairchild papers, Box 1. Extracts were leaked to the press by Kelly on April 17, and the complete text appears in the Herald, October 10, 1877, p. 5.

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Whitney, his hopes raised high by the confession, had them raised even higher. On May 4, 1877, Tweed wrote his lawyer Townsend, "If possible, have the Counsel to the Corporation, Mr. Whitney, call to-day. I would much like to see him. My mind and thoughts are now fresh on the matter and I can explain fully all he desires (that I know of), and particularly the 'O'Brien,' 'Navarro,' [i.e., Baird], and 'Jones' matters."[100] Whitney closeted himself with Tweed and emerged barely able to contain his enthusiasm. "Tweed's testimony is to the effect that the making of the contract was the result of a corrupt bargain," he wrote excitedly to Fairchild. "He was the executive officer who acted for the city in making it--as commissioner of public works. We cannot as matters now stand prove it without him."[101]

Whitney visited Tweed several times in jail, and became increasingly convinced that he would be an invaluable witness for the city in a number of cases.[102] In June, however, the deal fell apart. It developed that the state did not need Tweed's testimony against Sweeny, only the threat of it. Sweeny caved in and settled for $400,000,

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[100]Tweed to Townsend, May 4, 1877, in ibid., p. 135.

[101]Whitney to Fairchild, May 25, 1877, in Fairchild papers, New-York City Historical Society, Box 1.

[102]Ibid., p. 136. Tweed told Townsend Whitney and Peckham both visited him several times, both together and separately.

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and Fairchild returned Tweed's confession with a note dismissing it as being of no value.[103] Tweed was not the only one who felt betrayed; Whitney felt he had been made a fool. He wrote Fairchild--from the tone of the letter it is plain he was seething--and asked if he could not have Tweed, could he at least have King? Whitney had been told privately that the prosecutors knew where King was but were content to leave him there, knowing how weak their case actually was. In light of such a shaky case, Whitney argued, why not do as the state had done with all the other Ring figures except Tweed himsel? Send word to King, he pleaded, that the indictments that were keeping him away would be dropped if he would return and testify in the Baird case.[104].

Fairchild refused, and it seems to have been the last straw for Whitney. From this point on, his actions show that he was finished with the reformers and with the attorney-general. He was, however, not finished with the hope of using Tweed to testify in the Baird case, and to that end he began to use his office in all the ways that a determined, clever, and politically well-connected corporation counsel could. The Sweeny settlement and the collapse of the Tweed deal had created sharp public controversy.

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[103]Fairchild justified his rejection in a lengthy report printed in the Albany Argus, June 29, 1877, in Fairchild Papers, Box 1.

[104]Whitney to Fairchild, July 10, 1877, Fairchild Papers, Box 1.

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Had Sweeny been let off too lightly?[105] Had Tweed's confession been suppressed because, in the words of the Tribune, "once let loose like a bull in a china chop . . . he would ruin half the Christian statesmen of both parties in the State"?[106] The Board of Aldermen formed a special committee in July of 1877 to look into the whole Ring affair, including the conduct of the cases against its members.[107] The board, by now increasingly dependent on the Law Department, asked Whitney to assign one of his lawyers to help with the hearings. Whitney was happy to oblige, for it meant he would be able to steer the three-man committee in the direction he wanted the hearings to take, while at the same time staying discreetly behind the scenes.

Whitney sent one of his leading assistants, 39-year-old Hugh L. Cole, who lent a dignified air of impartiality to the proceedings. A former Confederate major and refugee from a ruined practice in North Carolina, he was about as

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[105]For a sampling of press criticism, see Townsend, New York in Bondage, pp. 146-49. Besides arguing that he owed much more than $400,000, critics found it a "disgraceful and offensive sham" that he had not paid it from his own pocket but had been allowed to specify that it be taken from from the estate of his dead brother, James Sweeny.

[106]Tribune, June 14, 1877, p. 1. The Tribune may have been right, for Whitney received from Tilden a "little tin box" of papers that would have embarrassed many prominent citizens as well as politicians. See Mark D. Hirsch, "More Light on Boss Tweed," pp. 267-78.

[107]Board of Aldermen, Proceedings, July 19, 1877, pp..

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far removed from Ring and reform politics as one could be.[108] Given a chance to display his talents in so public a forum (the hearings were open, and covered avidly by the press), Cole positively shone. It was not long before the three aldermen faded into the woodwork and, under Cole's relentless questioning, the hearings became a Law Department production. If Whitney had not perhaps planned it that way from the beginning, he was at the very least pleased.

Cole elicited from Tweed, the first witness, staggering details about the Ring's operations and tantalizing hints as to what he would, if freed, testify about in court in the city's cases. He almost, in fact, blurted out some of his testimony about the Baird case before his lawyer jumped in to stop him.[109] Cole followed him with accountant Henry F. Taintor, who established the size of the amount stolen (at least $30 million, probably more), and then key figures of the Ring (Andrew Garvey, James Ingersoll, John H. Keyser, E. A. Woodward), who blithely related how it was all done.[110] He examined a discomfited Peckham about the

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[108]Cole was one of many "reverse carpetbaggers" who left the ruined South and built new lives for themselves in New York City. For details of his life, see his obituary, New York Times, Nov. 6, 1898, p. 7.

[109]Ring Investigation, Testimony, pp. 8-380. Tweed testified for eleven days.

[110]Ibid., pp. 403-41; 547-683, and 599-683.

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numerous deals for immunity and the abyssmally few convictions or judgments, and had Law Department librarian James Valles give a detailed accounting of the uncertain status of the various suits that were still pending.[111]

Between August 13 and December 14, 1877, the committee held thirty days of open hearings and took over 800 pages of testimony. Although it stopped short of recommending Tweed's release, it had paved the way for public acceptance of that step, and on January 4 the Board of Aldermen encountered little outcry when by a vote of 13 to 6 it formally petitioned the attorney-general to end his imprisonment.[112] But even beyond this, the outcome of the hearings was gratifying to Whitney in another way. The final report of the committee pointedly criticized the conduct of the prosecutions and of the lawsuits by outside counsel and suggested that matters like these were better left to the city's own law officers.

"At present all the thieves, with one single exception are at large, several of them are living in and near New York, in elegant ease, if not in ostentatious luxury," the report noted, "and all of them claim entire immunity from all sorts of suits or demands from the City or the People, on the ground that they have all been used as witnesses."

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[111] Ibid., pp. 803-25, 841-45.

[112] Board of Aldermen, Proceedings, Jan. 4, 1878, pp. 793-95.

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The aldermen found it incredible that "some dozen" of the thieves had been freed to convict only one or two others.[113] It noted as well that although the city had been defrauded of at least $30 million, its net recovery, after legal expenses of an extraordinary $243,283, was a paltry $876,241.[114] The committee cited the whole affair as an object lesson to be filed away for future reference:

> The disposition and present status of these Ring suits forces your Committee to the conclusion that the substitution of private persons and voluntary associations for the regular and responsible offices of the law, even when those persons and associations are above the breath of reproach, by no means assures reform in governmental affairs; but that it rather tends to a divided responsibility and to spasmodic action, which, although energetic in the beginning, is apt soon to degenerate and finally to become careless and utterly inefficient.[115]

While the hearings were going on, Whitney was quietly pursuing another avenue in his mission to salvage the Baird case. On July 16 Tweed offered to accept judgment in all the city's pending suits against him because, as he pointed out, he had already disclosed all his defenses in his confession.[116] Questioned by a reporter, Whitney brushed the offer aside as hardly mattering: "Tweed, having a judgment

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[113]Ibid., Report, p. 26.

[114]Ibid., p. 27.

[115]Ibid., p. 33.

[116]New York Times, July 19, 1877, p. 2.

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for over $6,000,000 now against him, does not care how many more judgments are piled up against him, since he will pay none."[117] But in fact it did matter, and if Whitney did not realize it at the time, he did a short time later. Throughout the late summer and the fall of 1877, friends of Tweed mounted a muddled attempt to have a sympathetic judge secretly declare them Tweed's creditors and then--without the awareness of any other creditors such as, for instance, the State of New York--grant their petition to release Tweed. The scheme fell apart when, despite elaborate care to publish the required legal notice in the most obscure journal they could find, the attorney-general got wind of the scheme anyway and sent his representative to appear in court with the other "creditors." Tweed's friends withdrew their petition on the spot, for they knew whose wishes the judge would have to honor; the attorney-general could show he held $6 million in debt, and they could legitimately show, at most, an unpaid bill from a stable keeper for $1,050.[118]

At the time it seemed like just another comic-opera episode in the long saga of the Tweed Ring, but it did accomplish one thing: it attracted Whitney's notice and got him to thinking. He may have had a bright young clerk look

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[117] Ibid.

[118] Times, July 29, 1877, p. 8, and Sept. 28, 1877, p. 8.

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up New York debtor law or he may have simply remembered it himself, but suddenly Tweed's offer to confess judgment became more than a meaningless gesture. The state's debtor law anticipated that a bankrupt would often owe many creditors and that not all of them would find it in their interest to keep him in jail, so it provided that the holders of two-thirds of the total debt could successfully petition the court for his release. It occurred to Whitney that it might be useful to find out exactly how much was involved in the city's old suits against Tweed and what their status was. Digging through court records, he found that O'Gorman's original suit against Tweed for $7.9 million had never been pursued but neither had it been formally withdrawn; essentially it had just been put to one side so that O'Conor and the other outside counsel could pursue their own legal actions. He found two similar suits, each for $500,000, filed by Smith in 1874. The total amount asked in all three had, with interest, grown to $10,851,197.[119] Whitney looked at these cases and realized that if Tweed accepted judgment on them, the city would hold more of his debt than the state--not yet two-thirds, but close.

Whitney proceeded cautiously, for premature publicity could jeopardize the whole undertaking. There is no record

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[119]Mayor v. Tweed, Complaint, Oct. 18, 1871; Mayor v. Marrener and Tweed, and Mayor v. Tweed and Miller, both complaints Nov. 24, 1874. All in judgment rolls filed Feb. 13, 1878 and now in office of the Court Clerk, Appellate Division, New York State Supreme Court.

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of the conferences he must have had with Mayor Wickham, who had formal responsibility for the decision--or for that matter, with Kelly, who as the head of the local party played a decisive role. Both Wickham and Kelly, however, were actively seeking Tweed's release and would have readily agreed with anything likely to effect it. At any rate, Whitney took Tweed up on his offer, and Tweed signed a consent to allow judgment on the two smaller cases on November 7, and on the $7.9 million suit on December 24, 1877. For the time being, Whitney kept the consents in his pocket. He waited until after the aldermanic hearing had ended before he made a public filing of the settlement of the two smaller cases on December 27, and he did not reveal the $7.9 million settlement until January 18, after the Board of Aldermen had passed a formal resolution on January 4 asking for Tweed's release.[120]

Once it got wind of what had happened, the Times sniffed that the whole matter had "very much the appearance of what is vulgarly termed 'a put-up job.'"[121] And, in a sense, the Times was right. Whitney was playing a very political game. Whitney, Kelly, and the mayor (first Wickham and then, after January 1, 1878, Smith Ely) were all working in concert to put pressure on a new attorney gen-

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[120]See notation, "Acceptance," in ibid. For the resolution, see Board of Aldermen, Proceedings, Jan. 4, 1878, pp. 793-95.

[121]Times, Feb. 21, 1878, p. 8.

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eral, Augustus Schoonmaker, to release Tweed.[122] The fact that the city was very close to being able to walk into court as senior debtor and dictate that release on its own terms added to that pressure. Schoonmaker, who owed his election to Tammany, wavered between fear of Kelly and fear of his own legislature; fearful he might be impeached if he freed Tweed, he insisted on putting the whole matter off until after the legislative session was over.[123] For his part, Whitney was skeptical that Schoonmaker would make good on his promises to Kelly and anticipated that he would eventually have to go into court with the judgments and force Tweed's release himself.[124] Even if he had to bring more suits against Tweed to increase the city's share of judgments to two-thirds, he knew he could find ample material for them in the dozens of criminal indictments still outstanding.

But the whole matter became moot when Tweed died in jail on April 12, 1878. The diagnosis, according to his counsel Townsend, was simple. "If you want my opinion, he

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[122]Kelly, who had put Schoonmaker in office, played the leading part in this campaign. See Herald, March 28, 1876, p. 3, for his letter to Schoonmaker and for his role in general; also, Townsend, New York in Bondage, pp. 148-50.

[123]Tribune, Apr. 13, 1878, p. 2.

[124]An indication of this came when a reporter asked him for a comment on Kelly's demand that the attorney-general free Tweed. Whitney declined to express an opinion because, said the newspaper, "he might be called upon to act in the matter himself." Herald, March 28, 1878, p. 3.

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died of Attorney-General," Townsend told the Tribune. "All other diseases might have cured, if that fearful disease had not stepped in and killed him."[125] And in fact Townsend was probably not far off the mark. Tweed suffered from adult-onset diabetes complicated by heart disease, and in the opinion of his physician the stress he was under had seriously aggravated his condition.[126] Pursued by reporters for a comment, Whitney could only note that the city's legal proceedings against Tweed were now at an end.[127] So, too, were his last hopes of winning the Baird suit. Although he fought it vigorously, he never had a chance; by law, the contract was presumed valid unless the city could show conclusive evidence of fraud, and without Tweed the city had no such evidence. The city suffered a resounding defeat, losing both on trial and in the Court of Appeals.[128] Baird got his million dollars, and New York City became the only major city in modern America without

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[125]Tribune, April 13, 1878, p. 2.

[126]See inquest findings in ibid., p. 1, and physician's statement of May 10, 1877, in Townsend, New York in Bondage, pp. 136-37.

[127]Tribune, Apr. 13, 1878, p. 2.

[128]96 New York Reports 567 (1884). The appeal, begun under Whitney, was completed by Andrews. Trial counsel were John A. Beall of the Law Department and Frank N. Bangs of the private firm appointed by Delafield Smith in 1873.

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water meters.[129]

The Baird case and Whitney's part in the attempt to free Tweed might seem only a curious footnote to the history of the Ring. The fact that Whitney's attempts failed, however, does not mean that they do not matter. The whole affair pointed to a moral that the officials in charge of New York City government understood. They understood that the city lost the Baird case because the corporation counsel's hands were tied.

The two matters mark the arrival of a new type of corporation counsel--no longer merely litigator and adviser, but a prime mover himself in the corridors of power. By the time of the Baird case, it was understood that the role of the corporation counsel was to manage the city's suits, not to argue them himself. Whitney, however, was more than a glorified administrator. He brought new meaning to the word "manage," for he did not just oversee the work of trial counsel but actively pursued the case himself through every twisting political and legal avenue. He managed the case by lobbying for Tweed's release, by politicizing the

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[129]Not until the late 1980's did New York City, faced with a growing shortage of water, begin to install residential meters. On November 8, 1991, the Times ran a front-page article under a headline, "Fraud is Charged in Meter Program in New York City." Indicting the holder of its $290 million contract, Vanguard Meter Service Inc., for fraud and charging "shoddy installation, the cheating of workers, and program mismanagement," Manhattan district attorney Robert Morgenthau commented that the city might have to pay to replace poorly installed water meters.

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aldermanic Ring hearings, and by scheming to trump the state's judgments with the city's. Operating in that place where law and politics intersect, he showed a mastery of both--and in doing so, set the office of corporation counsel on a new course that his successors would strive to follow.

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Chapter XIII

WHITNEY AND HIS DISCIPLES

Whitney was first appointed to serve the remainder of Smith's term, and when that expired in December of 1876, he was gratified--but hardly surprised--when Mayor Wickham appointed him to a full four-year term of his own. But when that term expired in 1880 and Mayor Smith Ely, Jr., offered a second four-year term, he had mixed feelings about accepting. He had already accomplished most of what he had set out to do, and needed to get back to his own law practice, all but moribund after five years of neglect. After another four years, friends warned him, he could all but forget about reviving it.[1]

Yet at the same time he found the pull of the office irresistible. There were still a number of loose ends left over from the Ring days, important cases yet pending, officials imploring advice. There was the attraction of being

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[1]Hirsch, Whitney, pp. 120, 143, 174. For the sort of advice he was receiving from friends, see Royal Cortissoz, The Life of Whitelaw Reid, 2 vols. (New York: Harper Brothers, 1921), vol. 1, pp. 108-09.

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at the center of the city's affairs, of catching glimpses into how contractors and franchisees worked the system to their benefit--the intricacies of which, more than the law itself, had recently begun to intrigue Whitney. But above all there was the lure of politics. As the son of Boston port collector James Whitney and son-in-law of Ohio congressman (later senator) Harry B. Payne, Whitney was interested in far more than local politics. In 1876 he had stumped the country for Tilden and drafted the legal brief contesting the Florida returns. He was a state Democratic committeeman and perennial delegate to state and national political conventions, and in the 1880 Cincinnati convention had made a minor name for himself as floor manager of Payne's doomed favorite-son campaign. As a result, he was among those who by the end of 1880 were out of all patience with Tammany boss John Kelly and blamed him for sabotaging, out of spite for Tilden, the party's chances to elect a governor in 1879 and a president in 1880.[2]

Convinced that Kelly's power had to be broken, Whitney joined with other Democrats who had given up on reforming Tammany and had decided to form their own political club. In this endeavor the office of corporation counsel gave him

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[2]Hirsch, Whitney, pp. 5-11, 105-13, 151-60. In 1879 Kelly ran against the party's nominee, splitting the Democratic vote and electing Republican Alonzo Cornell. In 1880 he put forth so little effort to turn out the city vote that upstate Republicans swept the state and gave Garfield his winning electoral margin.

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not just a position of influence but literally a base of operations; the formation of the new County Democracy was first plotted in meetings held in his Law Department quarters. Although the New York County Democracy later came to be symbolized by the mayors who were elected on its ticket--Abram S. Hewitt and, for his second term, William R. Grace--Whitney was in many respects its guiding force.[3] He was on all its major committees (executive, general, finance, and county), and championed some of its most basic and innovative ideas, most notably that of giving more power to neighborhood election districts than to the central committee.[4] On August 19, 1881, he gave the keynote address in a ratification meeting that presented the new organization to the city's Democratic voters, and in October led a delegation under its banner to the state Democratic convention in Albany, where--"with a black Derby hat pulled down over his ears and a box of cheap cigars under his arm," according to the Evening Express--he successfully lobbied the credentials committee to seat its

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[3]In a retrospective article of June 10, 1900, the Brooklyn Daily Eagle called him its "dominant force." Hirsch, who quotes the article in Whitney, p. 171, also cites in support the New York Herald and World's Week.

[4]For its basic organization see New York County Democracy, Officers and Committees for the Year, With By-laws and Rules of the County Committees and Plan of Organization (1882) [pamphlet in New York Public Library].

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members instead of Tammany.[5]

Predictably, these political activities embroiled the office of corporation counsel itself in partisan controversy. Kelly attacked Whitney unmercifully in his organ the Star, questioning among other things his retainer of Roscoe Conkling in an assessment case and charging that he had taken a stock tip from Jay Gould as a bribe in a elevated railroad matter. Kelly's charges were somewhat muddled--Conklin was a Republican, not a Whitney Democrat, and had besides won $4 million for the city, and Whitney had not intervened for Gould but against him--but they stirred up controversy nonetheless, and forced two Law Department bureau chiefs, William A. Boyd and Edward T. Gale, to choose sides publicly between Whitney and Kelly. By using his office as a shelter in the political storm, Whitney had in effect planted a lightning rod on the roof of the Law Department offices.[6]

With the County Democracy recognized by the state party as the "regular" New York City organization, Whitney felt a little freer to resign, but he was cautious about what 1882

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[5]Unattributed press clipping, August 20, 1880, in Whitney Papers, Box 8, Library of Congress; Evening Express, Oct. 11, 1881. p. 1; Hirsch, Whitney, pp. 166-69.

[6]Clippings from New York Star, Jan. 7, 1881; Mar. 16, 1881; Aug. 25 and 26, 1881, in Whitney Papers, Box 9, and Hirsch, Whitney, pp. 163, 177-78. Corporation Attorney Boyd and Gales, the attorney in charge of collecting tax arrears, defected from Tammany and stood by Whitney.

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might bring. As one of the acknowledged leaders of the County Democracy he could not help gloating over its humiliation of Kelly and his cohorts, but at the same time as a state Democratic committeeman he knew that the party could not recapture the governor's office in the fall elections without the help of Kelly and Tammany. As the year went by, these elections began to loom even larger in Whitney's eyes as he sensed that not just the party's future but his own political fortunes could hinge on a Democratic victory.[7] Having perfected an ability to spot a winner and attach himself to him, Whitney was one of the first to take notice of Buffalo's ambitious mayor Grover Cleveland, and to use his influence on his behalf.

Going to the state convention with a County Democracy delegation led by Abram Hewitt and pledged to the gubernatorial bid of city comptroller Allan Campbell, he wisely kept out of the floor fight with Tammany's minority delegates and spent most of his time in Room 110 of the Globe Hotel where party boss Daniel Manning and other insiders made the decisions that mattered. When it became obvious after several skirmishes on the floor that Campbell stood little chance of winning, Whitney proposed to Manning and the others, "You upstate Democrats . . . unite with the [County] Democracy on Cleveland, and we'll not only elect

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[7]For Whitney's 1882 political activities, see Hirsch, Whitney, pp. 178-91.

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him Governor this fall but President a little later."[8] With the convention deadlocked on the third ballot between two other candidates, the County Democracy ("directed by Hewitt's iron will and Whitney's foresight," declares Cleveland's biographer) swung in a body to Cleveland and began the stampede that put him over the top.[9] Whitney had already left the convention, summoned home by family illness, but his role did not go unnoticed nor presumably would it be unrewarded.

Back in New York City Whitney flung himself into the Cleveland campaign and put pressure on his reform colleagues to support a hastily arranged "unity" ticket under which the County Democracy and Tammany would work together for Cleveland and split local offices between them. Franklin Edson, a nominal County Democrat acceptable to Kelly, was put forward as mayor, in return for which Tammany was given a number of lesser (but nonetheless lucrative) offices. More importantly, it was given a guarantee of half of all patronage appointments; a joint committee of the two factions was set up to divide the hundreds of city

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[8] Tribune, Feb. 7, 1904, p. 4. Although the article appeared long after the event it describes, Hirsch found that the Philadelphia Press of Jan. 11, 1885 carried essentially the same account [Whitney, p. 185, n. 43].

[9] Allan Nevins, Grover Cleveland: A Study in Courage (New York: Harper & Brothers, Publishers, 1935), p.

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jobs equally between Tammany and the County Democracy.[10] Despite some misgivings from the County Democrats, the agreement had its desired effect, with the Times reporting that "the 'heelers,' the henchmen, the shoulder-hitters, and the statesmen of the corner groggeries who have stood by Kelly in the cold shade of adversity are working for the election of Edson as for a political milennium."[11]

With a Democratic victory in the city all but certain, it must have occurred to Whitney that if he did not soon carry out his intention to resign, he risked having the Law Department become part of that milennium. If he waited until after Edson was elected and then decided to leave, not only would the appointment of a new corporation counsel fall under the new patronage agreement but so would every position under his control: eight assistants, seven law clerks, and thirteen clerical employees in the general office, as well the corporation attorney, the public administrator, and the eight employees in their two bureaus. Kelly, having given the mayor's office to the County Democracy, would surely insist on naming the corporation counsel, after which members of the new joint patronage committee would presumably take turns filling

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[10]Times, Oct. 12, 1882, p. 3; Oct. 22, 1882, p. 8, and Nov. 2, 1882, p. 4. See also Hirsch, Whitney, pp. 180-91. The smaller Irving Hall faction was also cut in on the deal.

[11]Ibid., Oct. 22, 1882, p. 8.

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every position from chief assistant to messenger boy. Unless Whitney was willing to serve out the remaining two years of his term, he would see his Law Department carved up like a Christmas goose.

It is hardly surprising then that he stepped down from office on November 6, one day before the voters were to go to the polls, with mayor Grace obligingly appointing his chief assistant George P. Andrews to succeed him. What is surprising, however, is that in his press release Whitney insisted he had deliberately chosen that day to demonstrate that there were no political reasons behind his resignation: "The campaign being over and the election not held, in the general ignorance as to results, no possible political motive could be attributed to such an act."[12] It is even more surprisingly that the press took this assertion at face value and so did, at least publicly, the politicians. For one thing, everyone (as Whitney had no doubt anticipated) was so distracted by the election that the resignation of a corporation counsel slipped by almost without notice. Concentrating on coverage of the campaign, editors generally took his reasons for granted and ran news items that did little more than paste together his and Grace's official statements. The Star, whose coverage was

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[12]Whitney to Grace [letter of resignation released to press], Nov. 6, 1882, Mayor's Papers, William R. Grace (1882), Letters to Mayor folder.

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pitched at turning out a massive Tammany vote, missed the story altogether, and its readers learned of the resignation only when its pages began referring to "ex-Corporation Counsel Whitney."[13]

The newspapers did, however, almost unanimously run editorials praising Whitney's services in office and predicting a bright future for him. "The City loses the services of an honest man and an able lawyer," declared the Commercial Advertiser.[14] The Sun extolled him as a man of "good sense, excellent administrative ability, winning manners, high professional attainments, and political and personal integrity" and predicted he would be chosen for higher office.[15] Even the Times, which took a dim view of his recent political activities, noted it had "but seldom found occasion for adverse criticism of Mr. Whitney's acts as a public officer."[16] There was a general expectation that he now had a brilliant future ahead of him as a corporation lawyer. "He is desirous upon entering a private

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[13]Times, Nov. 7, 1882, p. 8, and for the same date, the Tribune, p. 2; Sun, p. 2; Commercial Advertiser, p. 2. See Star, Nov. 7 [no story] and 8 [mentioned as "ex-"].

[14]Nov. 7, 1882, p. 2.

[15]Nov. 7, 1882, p. 2. He would, in fact, serve as Secretary of the Navy in Cleveland's first administration. Hirsch, in Whitney, pp. 255-336, gives him generous credit for launching the "new Navy," even though he concedes (at pp. 337-41) that Alfred T. Mahan considered him a meddlesome novice.

[16]Nov. 7, 1882, p. 4.

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legal practice and is justified in believing that with his record as Corporation Counsel he will have no lack of clients," Mayor Grace told reporters.[17]

Whitney was, in fact, less interested in clients than in carving out for himself a place in the world of high finance. His experience with the city's legal affairs had opened his eyes to the fortunes to be made in furnishing the nation's great urban centers with mass transit, gas, electricity, telephones, and other modern services. It was during these years as corporation counsel that, as an admiring biographical sketch later noted, "the fascination of money making in large sums was revealed to him."[18] Whitney began acting on this fascination as soon as he left office, first with a disastrous joint venture in 1883 in which two better-heeled investors, William H. Vanderbilt and J. P. Morgan, cleaned him out. Then, having learned to keep control in his own hands, Whitney began early in 1884 assembling the first pieces of what would soon become the largest streetcar monopoly in the nation. His rapid success as a "traction magnate" owed a great deal to the inside knowledge he had gained as corporation counsel, not just of the legal technicalities of municipal franchising but--of far greater practical value--its political

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[17]Quoted in Mail and Express, Nov. 7, 1882, p. 1.

[18]Philadelphia Press, Sept. 30, 1894, quoted in Hirsch, Whitney, p. 179.

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intricacies. The machinations by which Whitney's company absorbed its competitors and won the city's streetcar franchise in 1889 with a lone $25,000 bid made his old reform colleagues fume. In their view, he had betrayed them and the principles they had once shared. "You ought to go back and stand trial for the Metropolitan Street Railway operation," Hewitt cried, running into him in London in 1891. "You deserve to get a jail term."[19]

In 1882, however, Whitney left office to the accolades of reformers and "regulars" alike. Incredibly, he had managed to convince practically everyone that there had nothing political about a departure that had deprived Kelly of the Law Department and put it in the care of his own hand-picked successor.[20] Kelly, who was above all a realist, resigned himself to a "done deal," no doubt consoling himself that it could have been worse--instead of

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[19]Allan Nevins, Abram S. Hewitt, With Some Account of Peter Cooper (New York: Harper & Brothers, Publishers, 1935), pp. 534-35. For the founding of the Whitney fortune, see Hirsch, Whitney, pp. 207-26, and for a less flattering account, Burton J. Hendrick, The Age of Big Business: A Chronicle of the Captains of Industry (New Haven: Yale University Press, 1919), pp. 119-48. Hendrick ruminates that if Whitney had died at fifty he would have gone into history as a great public servant but instead, nurturing "the luxurious tastes of a Medici," he embarked on a career as a transit financier [pp. 131-32].

[20]Hirsh asserts that Grace appointed Andrews at Whitney's request, citing two letters I have been unable to find in the subsequently rearranged Mayors Papers [Whitney, p. 179]. Significantly, Whitney acted as Andrews' surety when he took office [New York Times, Nov. 7, 1882, p. 8] and maintained a close and continuing relationship with him [see, for instance, the letter of advice from Whitney to Andrews, Jan. 19, 1884, in Whitney Papers, Vol. 9].

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Andrews, he could have been dealing with Whitney for another two years.[21] As for the reformers, they took Whitney's disclaimer of any political motive at face value and regarded Andrews' appointment as a welcome sign the office was on its way to being removed from politics. The Times had lately run a series of articles on civil service reform and proposed extended it to City Hall as well as the White House, arguing (in an editorial entitled "Government Without Politics") that "the administration of municipal affairs has no necessary connection with party affairs."[22] The blue-ribbon Committee of Fifty adopted such reform as the first plank in its platform: "That the Government of the City of New York is essentially a business trust, which, like any other business trust, should be free from all party considerations and administered solely with respect to honesty and economy."[23]

The appointment of Andrews--a nominal Democrat who was active in no particular faction and who had served as chief assistant for the past ten years, heartened these reformers immensely. In their estimation, "[t]he appointment of Mr.

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[21]Lacking the power of removal, Edson could have replaced Andrews only as Wickham did Smith, by impeaching him for cause and securing his removal by the governor--an eventuality so unlikely no one seems even to have entertained it.

[22]Oct. 24, 1882, p. 4.

[23]Francis D. Barlow, chairman, "Resolutions of the Committee of Fifty," in Times, Oct. 28, 1882, p. 2. One of the organizers of the committee was a later corporation counsel, Francis Scott.

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Andrews to the head of the office for which he had so long furnished the brains and learning was a triumph of Civil Service Reform."[24] Certainly it seemed so at the time. Andrews made practically no changes in the staff, keeping intact the Law Department Whitney had so carefully assembled.[25] In contrast to Whitney, he kept a political profile so low as to be practically indetectable in the press, and his friendly, self-deprecating manner deflected controversy much as his Whitney's brashness had attracted it. His lack of any discernible political animus made him acceptable to Tammany and the County Democracy alike; a reporter described him at the time as "a genial gentleman, broad in his views and a friend to all classes . . . with no bigotry toward any party or faction."[26]

The pages of the minutes of the Board of Aldermen are devoid of controversy with Andrews, as is his correspondence with the mayor and department heads. Under his direction the Law Department turned out solid, professional advice on a wide variety of subjects--among others, the

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[24]Mail and Express, June 2, 1884, p. 3.

[25]A comparison of the 1882 and 1883 rosters shows only two of fifteen lawyers being replaced; moreover, biographical data shows that one of the two changes occurred during Whitney's term. See "Officers--Law Department," City Record (1882), p. 186; ibid. (1883), p. 221, and "Charles Blandy," National Cyclopaedia, vol. 9, p. 504.

[26]Quoted, without attribution, in McAdam, Bench and Bar, vol. 2, pp. 19-20.

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racial desegregation of New York City schools,[27] the employment of gas company workers on Sundays,[28] the laying of electrical conduits in the streets,[29] and the eviction of squatters from city parks.[30] The Department provided services of a more routine nature as well; for instance, its members researched a number of seemingly contradictory statutes and straightened out the confusion about the terms of certain offices, and they prepared a memorial to the legislature for a bill allowing the city to raise money for a pedestal for the Statue of Liberty.[31] They were busy as well struggling against the rising tide of litigation that still threatened to swamp the department, with the Times noting in an approving editorial that by August of 1883 their "thorough and systematic" efforts had wiped out a huge backlog of cases, including some that had been on the

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[27]Andrews to Lawrence D. Kiernan, Clerk of the Board of Education, Opinion, Feb. 1, 1883, in vol. 21, Bar Association Library, holding that the board could legally discontinue separate schools for "colored children."

[28]Andrews to George Walling, Superintendent of Police, Opinion, May 4, 1883, in vol. 22, Bar Association Library, holding that searching for gas leaks and repairing them did not violate Sunday blue laws.

[29]Andrews to Board of Aldermen, Opinion, June 11, 1883, in vol. 22, Bar Association Library, tentatively holding that there was no distinction between this and laying pipes for gas, steam, or water.

[30]Andrews to Mayor Edson, Opinion, July 7, 1883, in Vol. 22, Bar Association Library, holding that a police officer had been justified in shooting a dog set on him by a Morningside Park resident named Bridget Lynch.

[31]Board of Aldermen, Proceedings, May 9, 1883, pp. 5-7, and March 14, 1884, p. 770.

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books over fifteen years.[32]

But as consummately professional as Andrews was, he was not the apolitical creature the reformers assumed him to be. One did not remain an assistant United States attorney for six years under four changes of administration (three Democrats and one Republican) nor an assistant corporation counsel for ten years under two heads (one Republican and and one Democrat) without developing along the way some finely honed political instincts. Andrews was a survivor. He had a powerful patron in Whitney, but as corporation counsel he developed his own broad base of supporters as well. Displaying his usual adroit political footwork, he sidestepped the bickering and squabbling that marred Edson's administration, managing both to strengthen his ties with the County Democracy and to cultivate cordial relations with Tammany officeholders. As a result, he was one of the few names that came to mind when a conference committee of the two factions sat down to agree on two nominees to the state Supreme Court bench in the fall of 1883. In this off-year contest the Democratic nomination was tantamount to election, and Andrews won easily and went on to serve with distinction for the next twelve years.[33]

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[32]"The Work of the Corporation Counsel," in Times, Aug. 16, 1883, p. 5.

[33]Times, Oct. 12, 1883, p. 5, and Oct. 18, 1883, p. 1; McAdams, Bench and Bar, vol. 2, pp. 19-20. The other seat was filled by Tammany nominee George Van Brunt.

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Because he did not leave to take his seat until the June session of 1884, the city was treated to months of speculation about who would be his successor. From the tone of the gossip in the newspapers, it is clear that far from being removed from politics, the office of corporation counsel was still very much at its center. Although Mayor Edson was not expected to make his choice until the following May, speculation was already rife in December of 1883 among, as the Times put it, "people who always know about such things a long way in advance of their happening."[34] With characteristic obtuseness, Edson had let it slip that his preference at the moment was Edward T. Wood--a piece of news greeted with stunned incredulity by political observers, for aside from being a Tammany ward leader and one of the city's more obscure legal practicioners, Wood's only apparent qualification was that he was the mayor's brother-in-law.[35]

For the increasingly beleaguered Edson, this may have been reason enough; he had had more than enough of self-serving politicians, and may only have wanted a loyal family member at his side. Besides, the appointment was only for the short time remaining in Whitney's old term, which was due to run out in December of 1884. Why should anyone

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[34]Times, Dec. 30, 1883, p. 3.

[35]Ibid.

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object if the mayor wanted to install his brother-in-law as legal adviser for a few months? Why should the entire New York City political establishment, in the words of the New York Mail, become "all agog" the next few months over the impending appointment?[36] The answer, even to Edson, should have been obvious. A new corporation counsel, no matter how brief his term, would have all the patronage of the Law Department at his disposal. Some thirty positions would fall vacant, all carrying according to the Times "salaries large enough to tempt the more pretentious of the crowd of bone-hunters."[37] And although the new corporation counsel might be appointed only for a few months, he would automatically be the frontrunner among those seeking the full four-year term in December. As a result, the Times noted, "There is no end of persons who are fishing to get the place."[38]

Nor, it might have added, of persons wanting to have a say in the choice. Through the winter and spring months of 1884, Edson was visited by a steady stream of aldermen, assemblymen, state senators, department heads, judges, lawyers, and assorted "concerned citizens." Both Tammany and the County Democracy selected their own candidates and held

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[36]Mail and Express, May 28, 1883, p. 3.

[37]Times, May 23, 1884, p. 4.

[38]Ibid.

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closed-door sessions with Edson to urge them on him. And, unwilling to leave the choice to the politicians, the heads of the city's leading law firms--among them, Wheeler H. Peckham, John L. Cadwalader, James C. Carter, Frederick R. Coudert, and Joseph A. Choate--circulated a petition calling for the "merit" appointment of chief assistant David J. Dean.[39] By the end of May Edson knew he did not have the votes in the Board of Aldermen to confirm Wood, but, unwilling to admit defeat and appoint any of the opposing candidates, he pulled out of his hat an entirely new name: E. Henry Lacombe, a gifted but virtually unknown Law Department assistant. Lacombe was in many ways an inspired choice. Like Andrews before him, he was a loyal Democrat but, as the Star noted, "not of a pronounced type"--a career public servant both factions of the party could accept and work with amicably.[40] And like Andrews, it was hard not to like him; he was as proud of being a private in the old Seventh Regiment as he was of being an honors graduate of Columbia Law School. He was also someone who would satisfy those who insisted on a merit appointment. Few

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[39]Ibid., May 23, 1884, p. 4, and May 28, 1884, p. 5; Mail and Express, May 28, 1884, p. 3. According to the May 28 Times, the 75 or 80 signatures on the petition included most of the city's leading lawyers. Supporters for Wood among the bar were negligible; except for David Dudley Field--ever the maverick--the chief support for Wood emanated from the Center Street office of the redoubtable criminal lawyers Howe & Hummel. See New York Star, June 1, 1884, p. 3.

[40]Star, June 1, 1884, p. 3.

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people were as experienced with the city's legal affairs as Lacombe, who had entered the Law Department as an $1,800-a-year clerk under Whitney and since then had worked his way up to a rank second only to that of Dean.[41]

Yet Lacombe's appointment was every bit as politically motivated as Andrews' had been before him. The fact that both had been promoted from within the department was little more than a fluke. Grace had appointed Andrews because he and Whitney wanted to deny the office and its patronage to his enemy Kelly. Edson appointed Lacombe because he knew he could not get his own choice confirmed and was determined to keep the office from everyone who had kept it from his brother-in-law. Besides, political insiders knew he only needed someone to keep the seat warm until December, when the "real" four-year appointment would be made. Yet somehow the reformers convinced themselves that two promotions in a row from within the ranks of the department must surely signal, as the Mail giddily proclaimed, that "genuine and sensible Civil Service Reform" had arrived at last and that the corporation counsel had finally been taken out of "the swirl of corrupt

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[41]For a biographical sketch of Lacombe, see McAdam, Bench and Bar, vol. 2, p. 238. The son of a prominent New York City merchant, he was active in numerous civic and reform groups and along with Whitney was one of the founders of the Young Men's Democratic Club.

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politics."[42]

There were, however, some bruised feelings within the Law Department, with much of the staff feeling that by virtue of seniority the appointment should have gone to Dean. While the official story was that Dean had not really wanted the office (the petition had not been his idea, reported the Times, and he had begged off "for personal reasons"),[43] those within the department knew better. He had both wanted it and expected it, and had been angry when he did not get it. Realistically, however, even his closest friends recognized that he had stood very little chance. He may have well been the most qualified candidate in terms of experience and professional ability, but he had never been one to suffer fools or politicians gladly--with the result, as Lacombe later confided to a Times reporter, that "the 'leaders' would not have him."[44] If he wanted to promote from within, they made it plain to Edson, it would have to be someone other than Dean; so, obligingly, he went down one rung and selected Lacombe. To his credit, Lacombe demurred at being promoted over his friend and mentor and, before accepting, talked privately with Dean to make sure

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[42]Mail and Express, June 2, 1884, p. 3. The appointment was also endorsed by the Times, June 1, 1884, p. 3, and the Star, June 1, 1884, p. 3.

[43]New York Times, June 1, 1884, p. 3; the Star, June 1, 1884, p. 3, has a similar story.

[44]New York Times, June 30, 1887, p. 8.

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it would not end their friendship or cause him to resign. To his relief Dean replied, with as much grace as he could muster, that if he could not have the position himself--"if the honorable service of twenty years could not be rewarded," was the way he put it--then he would rather see the office go to Lacombe rather to anyone else.[45]

Reassured, Lacombe took office and began the difficult task of working with an administration divided between Tammany and County Democracy officeholders. Much of his work was of a routine nature. He dealt with a number of questions about the wording of the city's marriage license,[46] found statutory authority for the the Central Park zoo to buy a chimpanzee,[47] and offered a "Ring" tradesman $8,000 for a claim pending since 1869 for $118,000.[48] At the same time, however, he could not avoid being drawn into the political squabbling that marred the Edson administration. When the mayor began the practice of holding "cabinet meetings" with his department heads, Lacombe sat in both as a

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[45]Ibid. In the interview Lacombe cited another compelling reason for making sure Dean would stay; he did not think he had enough experience to run the department without him.

[46]Lacombe to Edson, Opinion, Sept. 4, 1884, in Bar Association Library.

[47]Lacombe to Comptroller Hastings Grant, Opinion, Oct. 20, 1884, in Bar Association Library.

[48]Lacombe to Comptroller Hastings Grant, Opinion, Oct. 2, 1884, in Bar Association Library, citing the difficulty of obtaining witnesses to disprove the stationery bill of T. W. Roe & Co.

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member and as legal adviser to the other participants--and when a session degenerated, as it all too often did, into a shouting match between political rivals, he was the one everyone expected to act as referee.[49] The strife within the executive branch, however, was nothing to compare with the hostility existing between the mayor and the Board of Aldermen--a situation which placed Lacombe, who was counsel to both at the same time, in a particularly awkward position.

The aldermen, of course, had a point: they wanted their own legal counsel, not someone appointed by the mayor and forced on them against their will. In June they tried to retain legal counsel of their own choosing, an attempt defeated by Lacombe with a strongly worded opinion citing the relevant state law as well as similar rulings by Smith and Whitney. Lacombe's opinion was legally binding on the aldermen and (in case they chose to defy it) discouraged any lawyer from accepting their retainer; he would have no standing in court and, more to the point, no claim for payment of his fees.[50]

Just why the aldermen thought they might shortly be in need of legal counsel became apparent on August 6, 1884,

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[49]These rancorous sessions are remarked on in an article on the origins of the mayoral cabinet in the Times, Mar. 6, 1887, p. 3.

[50]Lacombe to Edson, Opinion, June 16, 1884, in Bar Association Library, citing New York, Laws (1882), ch. 410.

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when they passed a resolution awarding the lucrative Broadway surface railroad franchise, without competitive bidding, to a streetcar promoter named Jacob Sharp. The conclusion that money had changed hands was all but inescapable, particularly when William C. Whitney--now a budding financier--let it be known that he and his partners had been prepared to bid handsomely for the same franchise at public auction. It was the opening episode in what would soon become known as the "Boodle Board of Aldermen" scandal.[51] An irate Edson vetoed the resolution and insisted the franchise be put up for public auction, and a group of reformers, fearing the aldermen would override his veto, went to court and got a temporary injunction forbidding them to meet. A few of the aldermen were beginning to waver, but Sharp still had a hard core of support in the board; they rose to the occasion by bribing the reformers' lawyer into letting the injunction lapse. Then, seizing the brief opportunity this gave them, the Sharp supporters assembled the next morning at 8:30 and called a special meeting of the board for 8:45--dutifully dispatching notice to the rest of the members, some of whom lived four miles away. While they were still struggling to get downtown,

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[51]For a full account drawn from newspaper coverage, court records, and official investigations, see Harry J. Carman, The Street Surface Railway Franchises of New York City (New York: Columbia University Press, 1919) [Columbia University Studies in History, Economics and Public Law, vol. 88, no. 1], pp. 154-72. See also Hendrick, Age of Big Business, pp. 135-38, and Hirsch, Whitney, pp. 209-22.

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the Sharp quorum overrode the mayor's veto, perpetrating what critics soon branded "one of the most outrageous thefts in the city's history."[52]

Both parties in the dispute--the mayor and the Board of Aldermen--had claim to Lacombe's services as counsel, but there was hardly any question whose side he would take. His real client was the corporation itself, whose interests were hardly being served by the aldermen. Lacombe had not taken part in the injunction; for one thing he had not been asked, and for another he knew that such prospective remedies seldom worked as well as those pursued after the fact, judges understandably preferring to overturn wrongful actions than to anticipate them. He did, however, swing into action when the board overturned Edson's veto. In a formal opinion furnished to the mayor, he held that the meeting itself had been illegal and thus the resolution overturning the veto was void. The unseemly haste in which the meeting had been called had violated the statutory requirement of "reasonably sufficient" notice not just to its members but to other interested city officials such as the mayor and the comptroller. "Such notice in the mere form without the substance is tantamount to no notice at all," he declared, citing Dillon's Municipal Corporations

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[52]Hirsch, Whitney, p. 215; For more detail, see Carman, Street Surface Railways, pp. 159-62, and New York Times, Aug. 7, 1884, p. 4, and Aug. 8, 1884, p. 4.

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in support.[53] Then, having a little more to go on now than the citizens' group had, he went to court and won an injunction restraining the aldermen from further action until the mayor could arrange a public auction. As he anticipated, however, the temporary injunction did not stand. A few weeks later the aldermen went before an obliging judge and managed to have it modified, after which, ignoring protests by the press and public, they once again awarded the franchise. Edson vetoed the award again, but this time--largely because the authors had thought to insert terms a little more favorable to the city--the aldermen were able to muster enough votes to override the veto.[54]

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[53]Lacombe to Edson, Opinion, Sept. 6, 1884, in vol. 25, Bar Association Library, citing Dillon, Municipal Corporations, sec. 263, 270. By law, notice was also due to the comptroller and certain other officers.

[54]Carman, Street Surface Railways, pp. 162-72. Although the next three mayors continued to contest the award, it was upheld by the courts in People v. O'Brien, 111 New York 1 (1889). Sharp, bled by his lawyers and lobbyist, died almost penniless with the case still pending, and Whitney and his associates built their empire on the ruins of his failed company. By the time the public auction was finally held in 1889, by a series of brilliant maneuvers Whitney's syndicate had absorbed all the competing companies and was the sole bidder for the franchise; Whitney built his "traction monopoly" on this $25,000 bid and died in 1904 with a fortune of $40 million. See Hendrick, Age of Big Business, pp. 138-41, and Carman, Street Surface Railways, pp. 204-20. As for the aldermen, a number of investigations and court cases revealed a conspiracy to give the franchise to Sharp in return for a promise of $500,000; in the end, three members went to prison, six fled to Canada, three were granted immunity in exchange for testifying, and two died under indictment [ibid., p. 169].

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Edson felt he was serving the reform cause well and, understandably enough, expected to be nominated to a second term. But in October--ironically, while he was in the thick of the battle against the Sharp franchise--the County Democracy nominated William R. Grace instead.[55] To Edson, it seemed a deliberate and outrageous slap in the face. The County Democrats had not only turned their backs on their own mayor but had replaced him with the one person they knew he could not abide, a man who had snubbed him for years and had refused to support his ticket in 1882. It was a shabby reward, Edson reflected, for all he had done over the last two years to hold together a coalition that had been, after all, their own idea. He had done his best as a "compromise" mayor--but now that that compromise was no longer needed, neither, apparently, was he.[56]

Lacombe had the misfortune to fall victim to Edson's unhappiness. His term (originally the one to which Whitney had been appointed in 1880) expired on December 10, as did that of public works commissioner Hubert O. Thompson. Thompson was chairman of the County Democracy central committee that had made the decision to dump Edson, and Lacombe, while not as politically active, was regarded as something of an errand boy for its Whitney-Grace-Hewitt

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[55]Times, Oct. 20, 1884, p. 4, and Oct. 22, 1884, p. 5.

[56]See Edson's comments in the Star, Dec. 11, 1884, p. 1.

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inner circle. Edson let it be known that he intended to replace both as soon as their terms expired--perhaps, he hinted, with Tammany men.[57]

The leaders of the County Democracy might have, however reluctantly, accepted the loss of the corporation counsel, but they knew they could not afford to lose the commissioner of public works. As head of the Department of Public Works, he controlled over 350 city jobs and millions of dollars in contracts; if the Democracy lost this appointment, it would lose its prime source of patronage and political influence. As a result, its leaders felt they had little choice but to challenge Edson over both appointments and to block them, if necessary, in court. And with that decision the office of corporation counsel--only recently proclaimed by the reformers as having been taken out of the "corrupt swirl" of politics--was back in the same old sinkhole.

In fact, one of the more remarkable things about the struggle over the appointments is that so many of its participants had ties, current or past, with the corporation counsel's office. In addition to Lacombe, two former Law Department heads and an untold number of assistants played crucial parts in the controversy. Their actions

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[57]Star, Dec. 2, 1884, p. 3, and Times, Dec. 7, 1884, p. 8, and Dec. 11, 1884, p. 5. For the law that governed mayoral appointments in 1884, see New York, Laws (1882), ch. 105.

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reveal not just how political the office had become and how far it had extended its reach, but also how blurred the line between law and politics had become. Lacombe danced around that line and may even have crossed it a time or two, particularly in a collusion (alleged, but never proven) with his predecessor Andrews, who used his office as judge in a highly questionable manner. Both Lacombe and Andrews were acting at the behest of another former corporation counsel, John E. Develin, who as president of the County Democracy directed the fight against Edson's appointments. Their efforts were blocked (temporarily at least) by another judge, Abraham R. Lawrence, who grasped what was afoot largely because he had served his own apprenticeship in law and politics as an assistant corporation counsel in Fernando Wood's heyday. The Law Department, in the person of its present and past members, was in the thick of this particular fray.[58]

Develin initially hoped persuasion would be enough. On December 10 he led a delegation of County Democracy leaders on a belated peace mission to City Hall, urging Edson to reappoint Thompson and Lacombe or at least leave their offices open for Grace to fill. It was the wrong tack to take with Edson, who was still smarting over the Grace

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[58]One Law Department figure conspicuously absent through the whole affair was Whitney, who had essential withdrawn from local politics to devote full time to business affairs and Cleveland's presidential campaign. See Hirsch, Whitney, pp. 213-18, 229, 238-41.

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nomination. According to a Star reporter, he "flushed to the temples" and demanded, "Do you think your organization has treated me at all fairly?" Taken aback, Develin protested that the organization had always treated him honorably and deserved his loyalty--at which point Edson rebuffed him firmly: "I owe no loyalty to the County Democracy."[59]

Clearly, Thompson's cause was a dead issue; Edson was not likely to appoint the chairman of the Democracy's central committee to anything. But the delegation lingered so that district attorney Peter B. Olney could make a pitch for Lacombe. "When Mr. Lacombe was elevated to his present position last June, that appointment received the approbation generally of the press and public," he reminded the mayor. "His administration of the office has been most creditable to him and advantageous to the city, and also to the general satisfaction of the public."[60] If Edson was moved by this earnest tribute to one of his appointees, he gave no indication and the delegation left empty-handed.

The Democracy's next hope was to block confirmation of the appointments in the Board of Aldermen. In the previous session of the legislature a law had been passed making

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[59]Star, Dec. 11, 1884, p. 1. The Times, Dec. 11, 1844, p. 5, and World, Dec. 12, 1884, p. 2, carry similar accounts.

[60]Quoted in the Times, Dec. 11, 1883, p. 5. Olney could have cited as well the editorial endorsement of Lacombe by the Times on Dec. 4, 1884 [p. 13].

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such confirmation no longer necessary, but it would not go into effect until January 1; to make his appointments, Edson had to get the consent of a majority of the aldermen.[61] The newspapers reported frantic lobbying by both sides for their votes, hinting darkly at bribery and extravagant promises from both sides.[62] The press was probably right with its suspicions. On December 15 Edson sent over to the Board of Aldermen the nominations of Morgan J. O'Brien as corporation counsel and Fitz John Porter as commissioner of public works. O'Brien was a "rising" 32-year-old Tammany lawyer, and Porter had ties with John Kelly going back to an earlier stint (in 1875) as public works commissioner; Edson had, it would seem, abandoned his reform colleagues and taken up with the boodlers.[63] But apparently Develin had struck a mysterious bargain of his own, for the appointments were defeated in the Board of Aldermen by an alliance of County Democrats

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[61]New York, Laws (1884), ch.

[62]See, in particular, New York World, Dec. 17, 1884, p. 3; also the Star, Dec. 11, 1884, p. 1, and the Times, Dec. 16, 1884, p. 5, and Dec. 26, 1884, p. 4.

[63]Porter, a cashiered Civil War general, held a number of local offices while lobbying to have his rank restored. See Otto Eisenschiml, The Celebrated Case of Fitz John Porter: An American Dreyfus Affair (Indianapolis: Bobbs-Merrill, 1950), pp. 210, 297-99. O'Brien, who was counsel to several ferry companies, was making his debut in politics; see McAdam, Bench and Bar, vol. 2, p. 295.

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and Republicans.[64]

Shortly thereafter, in an equally mysterious manner, the matter moved into the courts. On December 22 an attorney named Wilson S. Wolf lobbed into state Supreme Court a thick bundle of legal papers embodying a number of obscure legal questions and asking for an equally obscure action, "an injunction pendente lite action in the nature of quo warranto." The plaintiffs, William E. Demarest and others, prayed that Justice George P. Andrews (in whose court the plea had been entered) would declare unconstitutional "section 4 of the Laws of 1873, chapter 335, and the amendments to said act, passed June 13, 1873, chapter 757 of the Laws of 1873, chapter 515 of the Laws of 1874, chapter 400 of the Laws of 1878, and chapter 473 of the Laws of 1882," and then oust the sitting Board of Aldermen and install them in their places. In the meantime while the case was pending the court was asked to enjoin the board from passing any resolutions or ordinances, confirming any Commissioners or department heads, or acting "in any manner" as Aldermen. Andrews gave the papers a cursory

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[64]The vote was 14 to 9 against Porter, with one abstemtion, and 15 to 9 against O'Brien. See Board of Aldermen, Proceedings, Dec. 15, 1884, pp. 1066-68. According to the New York Times, Dec. 16, 1884, p. 5, the opposition was made up of seven County Democrats and seven Republicans, with one Tammany alderman joining the vote against O'Brien.

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inspection and granted a temporary injunction, setting a hearing for December 26.[65]

To the uninitiated, the action seemed to raise a number of novel legal questions. To those more familiar with city politics, however, it had a familiar ring. Decoded into plain English, it signified that a perennially disgruntled slate of candidates--the "Wolfe Board of Aldermen"--was once again challenging an election, demanding that the sitting aldermen explain by what warrant they, rather than the challengers, were holding office, and asking that in the meantime they be restrained from performing such duties as, say, confirming any appointments the mayor might send over.[66] The statutes being challenged were certain election laws that might or might not be in conflict with one another and with the state constitution. Although it was a complicated action, it was hardly an novel one. Demarest and the rest of "Wolfe Board" had been suing the city on much the same grounds off and on since

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[65]People ex. rel. Demarest v. Farley, printed in Board of Aldermen, Proceedings, Dec. 26, 1884, pp. 1152-63. Most newspapers gave the injunction extensive coverage; see, in particular, the Star, Dec. 25, 1884, p. 1; the World, Dec. 24 and 25, 1884, both p. 8; Commercial Advertiser, Dec. 24, 1884, p. 1, and the Times, Dec. 25, 1884, p. 4.

[66]"The complaint simply strung together several separately familiar legal actions or terms: an injunction, which "enjoins" or halts; pendente lite, "while litigation is pending," and quo warranto, a writ asking by what warrant or right an officeholder holds his office and performs its duties. [Definitions paraphrased from entries in Black's Law Dictionary, pp. 923, 1290, 1417.]

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1875.[67]

Both the mayor and the Board of Aldermen found the timing of this particular suit to be, at the very least, curious. They suspected that there was something more behind the suit than a desire to serve as aldermen for the two weeks remaining in the term--and it was not very hard to figure out what this was. The courts, always finding sufficient reason to rule against the Wolfe Board on other grounds, had never reached the constitutional questions in the earlier suits. These were still open issues, and if a judge could found who would examine them, it would likely be a very long case. The one thing that was new about this case was the coupling of its familiar quo warranto with a petition for an injunction; if the judge agreed to an injunction pendente lite--while the case was pending--then there was no way that Edson, who had little more than a week in office, would be able to have any appointments confirmed. It was, the press and politicians alike suspected,

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[67]The "Wolfe Board" took its name from a common misspelling of its attorney's name. Losing their seats when state law abolished the post of assistant aldermen and reconfigured the board, its members brought suit after several elections and carried four cases (unsuccessfully) to the Court of Appeals: Demarest v. Wickham, 63 New York 320 (1875); Demarest v. Mayor, 74 New York 161 (1878); People ex. rel. Angerstein v. Mayor, 92 New York (1884), and Demarest v. Mayor, 147 New York 203 (1895). For origins of what it also called the "Cromwellian Board," see the Times, Oct. 27, 1874, p. 2; Dec. 22, 1874, p. 5, and Jan 1, 1876, p. 8.

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a "sham" suit.[68]

It also seemed to place Lacombe in a quandary, his personal and political interests on one side and his duty on another. "Mr. Lacombe, the Corporation Counsel, is in a position for which he is rather to be pitied than blamed," the Times observed.

> He is the official counsel to the Board of Aldermen, while he is commonly supposed to act with the faction of city politics which will be immediately injured if the Board of Aldermen are permitted to go on exercising their official functions. . . . He can scarcely be very zealous in vindicating the right of his clients to commit an iniquity injurious to the whole community, and especially injurious to Mr. Lacombe's own political associates.[69]

At the same time, however, the Times recognized the bogus nature of the suit, and fretted that more harm than good would come of it. "Nothing can be permanently gained for good government by entering upon a competition with the Aldermen in 'sharp practice,'" it warned Lacombe.[70]

And at the moment that is exactly what the aldermen thought was afoot. When the injunction papers were served on the board on the afternoon of Tuesday, December 23, the chamber erupted into cries of defiance and denunciations of

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[68]For a detailed look at the reaction of the city's politicians, see the World, Dec. 24, 1884, p. 8. There is also extensive discussion in the Star, Dec. 25, 1884, p. 1, and the Times, Dec. 24, 1884, pp. 4 and 8.

[69]New York Times, Dec. 25, 1884, p. 4.

[70]Ibid.

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the County Democrats. While two members slipped out to ask Andrews if "not acting in any manner" really meant what it said, President William Kirk beat back a motion to adjourn. "I don't know if we have the power to adjourn," he said plaintively. "Let us disperse then," alderman James Sheils suggested. Alderman John O'Connor rose ponderously to his feet. "I move," he declared, "that the Sergeant-at-Arms of the late Board of Aldermen be directed to bring beds into the chamber for the members of the Board, inasmuch as we are enjoined even from adjourning." The aldermen were engaged in spirited debate on that motion when the two members returned to report that Andrews had abruptly left the city and would not be back until Friday, December 26. There was nothing to do but adjourn--or, to be on the safe side, disperse. "I don't want to spend Christmas in prison," remarked president Kirk, banging his gavel and suspending all business pendente lite.[71]

The board had automatically referred the injunction papers to the corporation counsel upon receiving them, but now two members--Hugh Grant and O'Connor--had second thoughts. They hurried to the office of Tammany's premier lawyer, Bourke Cochran ("the great-lunged, deep-chested brave of the Tammany tribe")[72] and retained him to act on

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[71]Quoting from the World, Dec. 24, 1884, p. 8.

[72]From "The Windiest Roman of 'Em All," in the Times, Oct. 18, 1890, p. 5.

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their personal behalf. Cochran was not at all worried by Andrews' absence and instead saw it as an opportunity to begin shopping for another judge. That evening he called on judge Noah Davis, the presiding judge of the Supreme Court, and convinced him that the city faced a true emergency. The injunction prevented not just the Board of Aldermen from meeting but also--during their busiest time--the Board of Estimate and the Commissioners of the Sinking Fund.[73] Davis saw Cochran's point and agreed to make the hearing the court's first item of business the next morning. And although he hesitated to take a case out of one judge's hands and give it to another, Andrews' absence left him no choice; Abraham R. Lawrence's calendar happened to be open, so he gave it to him. It was a choice that suited Cochran's purposes perfectly. Lawrence was not in Tammany's pocket--he had helped put Tweed away--but he was a fair and unbiased judge, and that was all that Cochran felt he needed.[74]

The next morning Lawrence's courtroom was packed with a crowd of the curious, as well as most of the aldermen,

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[73]The president of the Board of Aldermen was an ex-officio member of both, and if he was enjoined from performing any duties, presumably so were they.

[74]An account of this meeting appears in the Star, Dec. 24, 1884, p. 8. For a description of Lawrence's no-nonsense style of courtroom management, see the Times, May 31, 1891, p. 6, and for his career as judge and reformer-from-within, McAdam's Bench and Bar, vol. 2, p. 217.

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Demarest and the rest of the "Wolfe Board," their attorney Wilson S. Wolf, assistant attorney-general Ira Shafer for the People,[75] Lacombe and Dean for the aldermen, and Cochran. As soon as Lawrence opened court, Cochran rose to ask if he would hear a motion to vacate the injunction. At this, Lacombe jumped to his feet (the Star had him "rising in a fluster")[76] and demanded, "Whom do you appear for?"[77]

"I represent Aldermen Grant and O'Connor," Cochran replied.

Lacombe entered a heated objection:

> Well, I appear for those gentlemen and the other members of the Board. I have received no communication from either of these gentlemen that they desired to have special counsel to represent them. I, in my official capacity, appear for them, and under the circumstances it seems to me that this gentleman has no standing in court.[78]

But Lacombe had strayed onto dangerous ground. "I trust I will not be forced to state why Aldermen Grant and O'Conor desire special counsel in this matter," Cochran said. He then proceeded to make, in the words of the Times, "some obscure hints" which, despite their elliptical

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[75]By the nature of its origins in English law, a writ of quo warranto had to involve the attorney-general's office.

[76]Star, Dec. 25, 1884, p. 1.

[77]Commercial Advertiser, Dec. 24, 1884, p. 1, which is the fullest account of the hearing and, except where otherwise noted, the source of my quotations.

[78]Ibid.

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nature, were instantly grasped by everyone in the room.[79] Cochran noted the corporation counsel's familiarity with the suit; he had, in fact, appeared for the aldermen in its previous versions. "But," Cochran mused aloud, "it was not in the nature of the man for a moment, I thought, that that suit should be developed into an injunction in the closing days of December."[80]

"I see no reason why any insinuation should be cast upon me!" Lacombe cried.

Lawrence rapped his gavel and asked Cochran whether he had a letter of retrainer. When he produced one--predictably, with a flourish--Lawrence ruled that he would recognize him as counsel for the two aldermen as individuals, and Lacombe for the board as an entity.[81]

With that, essentially the game was over. The parties put on their arguments, but the only one that really mattered was Dean's. (As in the previous cases, the corporation counsel "appeared" for the aldermen, but it was Dean who actually argued the case.) He pointedly ignored the convoluted constitutional arguments the plaintiffs' attorney made and instead bored in on the fatal flaw in

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[79] Times, Dec. 25, 1884, p. 3, and ibid.

[80] Ibid.

[81] Ibid. Lawrence probably made more use of his gavel than that; some years later the Times [May 31, 1891, p. 6] ran a feature story describing his no-nonsense style of courtroom management as "Bang! bang! bang!"

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their action. There was, he argued, simply no such remedy as the one they sought, the courts of New York having consistently ruled that they would not issue injunctions in connection with quo warranto proceedings. The courts instead adhered to a sensible rule: they would hear a challenger's claim to an office, but while it was pending someone had to govern and the logical person was the person already in office. Consequently, Dean pointed out, Lawrence had no choice but to vacate the injunction issued by Andrews.[82] Cochran barely bothered to put on an argument, for that was exactly what he had told Grant and O'Connor the night before.[83]

Lawrence adjourned court for the Christmas holiday and then returned on the morning of December 26 to make his ruling. Hardly surprisingly, he vacated the injunction and in words practically lifted from Dean's argument declared it "settled law" that such injunctions would not be granted in connection with quo warranto proceedings.[84] And in a brief but telling criticism--one in which he stopped just short of branding it a sham suit--he wondered aloud why

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[82]See People ex. rel. Wood v. Draper, 14 Howard's Practice Reports 233 (1857) and other cases cited in the case report in Board of Aldermen, Proceedings, Dec. 26, 1884, pp. 1160-61.

[83]World, Dec. 24, 1884, p. 8.

[84]Ruling printed in full in Board of Aldermen, Proceedings, Dec. 26, 1884, pp. 1152-63. See also the Star, Dec. 27, 1884, p. 2, and Times, Dec. 27, 1884, p. 8.

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"the relators have slept so long upon their rights, if any rights they have, and have not sought to restrain the defendant[s] from exercising the powers and performing the duties of their office until just before the expiration of the term for which the defendants claim to have been elected."[85]

The consensus of political insiders was that it had indeed been a collusive suit and that Develin, Andrews, and Lacombe had all conspired in it.[86] Certainly Develin had known that Tammany had deeper pockets than the County Democracy, and he would have wished to head off a further bidding war for votes in the Board of Aldermen. But he also knew that while money may have been on the side of Tammany, time was on the side on the County Democracy; after the December 15 vote, all that was needed was to stall for another couple of weeks and Edson would be gone. And as a former corporation counsel he was well aware of the law's proverbial delay. Consequently, so the theorizing of the insiders went, Develin must have gone to Andrews (who owed the Democracy for his elevation to the Supreme Court bench) or to Lacombe (whose survival in office was at

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[85] Ibid., pp. 1159-60.

[86] At least, such is the impression which emerges from a reading of most of the major newspapers. See, in particular, the Times, Dec. 25, 1884, p. 3 [news item] and p. 4 [editorial]; Star, Dec. 25, 1884, p. 1; World, Dec. 24, 1884, p. 8, and Commercial Advertiser, Dec. 24, 1884, p. 1.

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stake), or to both, and suggested they contrive somehow to tie up Edson in court.

Or perhaps Andrews and Lacombe had come up with the idea themselves. Who knew? At any rate, the finger of suspicion pointed unerringly in their direction. In its coverage of the hearing, the Star noted that the main topic of gossip among courtroom observers was why Andrews had issued the injunction in the first place. "It was generally considered that his course was extra-judicial," the newspaper reported.[87] The World unearthed much the same gossip about Andrews in the Board of Aldermen. "He is identified with the County Democracy faction of the Democratic Party. This fact led to the rumor in the chamber . . . that the serving of the injunction at the present time was more than an 'accidental coincidence.'"[88] And Cochran's "obscure hints" only gave voice to an already widespread belief among politicians that Lacombe had been a willing partner in cooking up a suit that would save his job.[89]

These stories were long on speculation and short on fact. The Star, however, published an detailed account disclosing exactly how and where the conspiracy had been

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[87] Star, Dec. 25, 1884, p. 1.

[88] World, Dec. 24, 1884, p. 8.

[89] Times, Dec. 25, 1884, p. 3, and Commercial Advertiser, Dec. 24, 1884, p. 1.

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hatched. It reported among other things that "the injunction papers were drawn up by Wolf and Abbott (the latter one of the employees in the office of the Corporation Counsel) in the office of the Corporation Counsel, and that in an adjacent room Judge Andrews and the Corporation Counsel were at the same time engaged in consultation." Its sources? Not only the usual political ones ("it was said at the Hall") but two people who actually knew what was going on in the offices of the Law Department--an elevator operator who had taken Wolf and Andrews up to the second floor and a janitor who had seen them there.[90]

Of course, the Star--an unabashed Tammany organ--could have been making up the whole story. Yet neither it nor the other gossipy accounts can hardly be dismissed out of hand. They fit together too well with what is known, and make sense of otherwise puzzling circumstances. For instance, why else would Andrews--who knew the law as well as Dean--have issued such an injunction? And why would Lacombe have been thrown into such consternation by the appearance of Cochran? Associate counsel were not that unusual; lawyers representing officeholders as individuals routinely appeared in court alongside the corporation counsel without exciting much comment. Lacombe's reaction

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[90]Star, Dec. 25, 1884, p. 1. "Abbott" was Edwin I. Abbett, later a County Democracy congressman. See Officers--Law Department, City Record (1884), p. 206, and the Times, Oct. 18, 1890, p. 5.

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was out of all proportion to the explanation he offered after the hearing: that the two aldermen's unannounced retainer of Cochran had violated a "decent respect for the dignity of my official position."[91] Instead, to courtroom observers it looked more as if Lacombe was upset because he realized that Cochran had taken control of the case away from him and Andrews, and that the case--which they had intended to keep alive through the waning days of the Edson administration--would instead be thrown out of court.

The Star, for all its pro-Tammany bias, was probably closer to the truth than the Times, for the real dilemma Lacombe faced was not whether to defend the aldermen against the injunction but whether to play along with the politics of bringing it. From all indications he chose the latter. And in doing so he was guilty of a worse breach of ethics than the disgraced Smith had ever thought of committing: he betrayed his own clients, colluded in a lawsuit against them, and perverted the machinery of justice to save his own job. These accusations may be rather harsh; Lacombe probably thought he was justified in his actions, and he may even have been motivated less by personal interest than by a desire to prevent Edson from making two corrupt appointments. And he may well have believed that he was acting in the best interest of the corporation itself,

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[91]From a note he sent Grant and O'Connor after the hearing, the text of which appears in New York Times, Dec. 25, 1884, p. 3.

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which would be best served by saving the appointments for Grace.

Delafield Smith had been impeached and removed for his shortcomings, which in the end were adjudged to be scarcely more than having failed to be a very good lawyer. Lacombe was never charged with anything, although he probably deserved it more than Smith. He had two advantages: first, to have been on the winning side, and second, to have been on the reform side. In New York City of the late nineteenth century the reformers were able to play fast and loose with the law in a manner that would have landed regular politicians in jail. Lacombe was simply following in the footsteps of O'Conor, Tilden, Peckham, and other reformers who had bent the legal process to put Tweed behind bars. Together with Andrews, he bent it a little more and made it serve his party's political ends. Even with Cochran's interference, the Demarest suit accomplished much that had been hoped of it: it had bought the County Democracy valuable time, tying up the mayor and aldermen for five of the ten days remaining in the Edson administration.

As it turned out, that was all that was needed. On December 27 the mayor and aldermen were hit with another injunction, this one brought not by the County Democracy but by a bi-partisan group of civic leaders and businessmen

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headed by Theodore Roosevelt.[92] Suing as taxpayers, they complained "that the mayor of the city of New York is about to make certain nominations for certain offices, and that such nominations are about to be confirmed through a corrupt combination with the Board of Aldermen."[93] In what may or may not have been yet another "accidental coincidence," their attorney was Develin's law partner, Charles P. Miller.[94] Because the Demarest case had touched off so much criticism of the Supreme Court bench, Miller could not find anyone on it willing to issue another injunction against the Edson administration. But, reaching all the way down into the Court of Common Pleas, he convinced judge Miles Beach to issue one restraining the mayor and aldermen from "appointing, nominating, or confirming the nomination of any person to the office of commissioner of public works [or] the office of counsel to the corporation of and for the city of New York."[95] The injunction differed from the Demarest case in two respects: it left the mayor and aldermen free to discharge all their other duties, and it

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[92]Roosevelt v. Edson, 51 Superior Court 227 (1885); 51 Superior Court 236 (1885), and 11 Howard's Practice Reports (new series) 231 (1885). Co-plaintiffs were Oscar S. Straus, Henry A. Oakley, and George H. Putnam.

[93]Roosevelt v. Edson, 51 Superior Court 227, at 234.

[94]Miller had also been a top Law Department assistant under both Smith and Whitney. See "Officers--Law Department," City Record (1875), p. 180, and succeeding rosters through ibid. (1880), p. 178.

[95]Roosevelt v. Edson, 51 Superior Court 227, at 228.

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offered witnesses who claimed to know of actual bribery. On the basis on the affidavits before him, Beach issued a temporary injunction on December 27 and set a hearing in Superior Court (which had jurisdiction over such matters) for December 31.

This time around the aldermen wanted nothing further to do with Lacombe and insisted on retaining counsel of their own, as did Edson. The Board of Aldermen retained Cochran and another attorney, and Edson retained David Dudley Field, then at the height of his fame as a brilliant courtroom tactician.[96] The Roosevelt injunction was just as transparently political as the Demarest case, and the mayor and aldermen were furious. "Everybody has a pretty clear estimate of the situation, despite the attempts to befog it," declared the Star. "There is a tremendous lot of patronage at stake, which the County Democracy and their allies cannot afford to let out of their grip, and which their opponents are naturally eager to take from them."[97]

Time was running out for Edson. Even if he won the case, he lost; his term would be over before the case was, and he would not be able to make the appointments. The fact that the case was scheduled before judge Charles H. Truax was itself a tip-off. Truax was a slow, deliberate

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[96]Ibid., and Board of Aldermen, Proceedings, Dec. 30, 1884, pp. 1207-09.

[97]Star, Dec. 31, 1884, p. 3.

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jurist who had such a horror of being reversed that he fussed over every detail of his cases, in particular delving into every possible precedent before he would issue a ruling. Edson's only chance was to have the case thrown out on the spot, an eventuality which--given Truax's reputation--was a forlorn hope.[98] His attorney Field pointed out a better, though far riskier, possibility: expecting the injunction to be vacated eventually, Edson could ignore it and hope the courts would uphold him. Wait until the hearing, he counseled the mayor, and see what the evidence looks like.

As it turned out, the evidence looked like hearsay. On December 31 Edson and Field sat in court and listened to Miller put on his case. One affidavit after another was entered into the record, couched almost without exception in the same language: the person making it "believed or was informed" that certain corrupt bargains were being made, but had not actually seen anything himself.[99] The injunction will never hold, Field whispered to Edson; the

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[98]Truax, a patrician reformer from an old New York family, devoted his life to the bench, sitting in Superior Court from 1880 to 1894 and elevated to the state Supreme Court in 1896. See McAdam, Bench and Bar, vol. 2, p. 392.

[99]Roosevelt v. Edson, 51 Superior Court 117, at 234-36. The one exception was contractor John O'Brien, who testified that Edson had promised him extra work on the new aqueduct if he would deliver two votes for Porter's confirmation.

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plaintiffs have no case at all.[100] Edson nodded and ducked out of court; he dashed off a note to the Board of Aldermen, then sitting in a regular meeting, and asked for a special evening session.[101] Late that afternoon Field joined him and reported that the hearing had just ended with Truax, predictably, adjourning court and reserving his decision for later--probably, knowing him, much later.

Consequently, when the Board of Aldermen reconvened at five o'clock, the clerk read them the following message from the mayor:

> I am advised by the counsel assigned me by the Counsel to the Corporation, that the injunction served upon myself in the case of Roosevelt and others against the Mayor and Aldermen, restraining the nomination to your Honorable body, of persons to fill the vacancies now existing in the public offices of this City, is void.
>
> I therefore send you the accompanying communications.

These communications were the nominations of Rollin M. Squire as commissioner of public works and William E. Dorsheimer as corporation counsel. To the surprise of the press, which had never heard of him, Squire's appointment sailed through by a vote of 22 to 0. "'Who is Rollin M. Squire?' was the universal conundrum which followed this confirmation," declared the Herald, which reported that

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[100]Times, Jan. 1, 1885, p. 1, and Herald, Jan 1, 1885, p. 3.

[101]Board of Aldermen, Proceedings, Dec. 31, 1884, p. 1226.

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even the aldermen who voted for him had no idea who he was. "He's a good Tammanyite," hazarded one aldermen, but no one could remember ever having seen him around the Hall. All that was really known about him was that he was a retired Boston lawyer and a boyhood friend of the mayor; in view of of the size of the vote for him, it was generally conceded that considerable money must have changed hands.[102]

Dorsheimer, a former lieutenant governor and counsel for several railroads, was another matter. Although he was a demonstrably well-qualified candidate and had the backing of Tammany, he could not overcome the same coalition of County Democrats and Republicans that had defeated O'Brien. His nomination went down to defeat by a vote of 15 to 7, apparently ending any hope that Edson had of replacing Lacombe.[103]

It was not the end of the matter, however. Edson and William P. Kirk, the president of the Board of Aldermen,

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[102]Herald, Jan. 1, 1884, p. 3. See also Times, Jan. 1, 1885; Sun, Jan. 2, 1885, p. 1; World, Jan. 1, 1885, p. 1, and Tribune, Jan. 2, 1885, p. 1. It was another year before the Times, alerted by scandals in his department, dispatched a reporter to Boston and found that Squire was a former prize fighter, spiritualist, mining stock salesman, self-taught lawyer, lobbyist, and dealmaker. He had retired from his law practice so hurriedly that he had to borrow carfare to New York City. [Times, May 11, 1886, p. 5.] Indicted for peculations in the Public Works Department, Squire testified that the incumbent Thompson, not Edson, had put up the money for his confirmation in exchange for a promise to leave actual control of the department to him and a partner. [Ibid., Aug. 11, 1886, p. 1.]

[103]Board of Aldermen, Proceedings, Dec. 31, 1884, pp. 1236-37. For Dorsheimer's background, see New York Times, Feb. 6, 1884, p. 5.

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had one last outlandish trick up their sleeves. They had discovered--or at least thought they had discovered--one brief twelve-hour window of opportunity to appoint their own corporation counsel. The new law permitting the mayor to appoint department heads without the necessity of having them confirmed by the aldermen was to go into effect on January 1, 1885. By law the new mayor would be sworn into office on noon of the same day. Edson and Kirk asked themselves a question that no one else had ever asked: who was the mayor of New York City between midnight, December 31, of one year and noon, January 1, of the next?[104]

Edson took the position that his own term expired at midnight, and as evidence of his sincerity notified the police that he intended to vacate his office in City Hall at that time.[105] But if Edson was not mayor, then who was? The answer relates to another peculiarity in the law: the outgoing Board of Aldermen remained in office until the first Monday of the new year, which in this instance was January 4.[106] As president of the board, Kirk was first in the line of succession to the mayor and would accede to the office as soon as it became vacant. The two tried to keep

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[104]The long-standing custom by which the mayor took office at noon had been made a matter of law in 1882; see New York Laws (1882), ch. 410, sec. 31.

[105]The text of this note appears in the Herald, Jan. 1, 1885, p. 3.

[106]New York, Laws (1882), ch. 410, sec. 29.

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their plan a secret, but politicians and reporters sensed that something was afoot. The Times reported that late into the night the corridors of City Hall were thronged with people and that "conjectures and rumors of every kind and every degree of absurdity were rife."[107]

These rumors--and the absurdity--became reality when Edson departed at midnight, and Kirk strode into the mayor's office and was sworn in by Charles Donohue, a Tammany Supreme Court judge. The reason behind their actions was revealed a few minutes later; as his first (and only) official act, Kirk appointed Edward T. Wood as corporation counsel. "Assuming that he was Mayor of the City from midnight to noon," wrote the Times, "Mr. Kirk was able to given Mayor Edson's impecunious but persevering brother-in-law the position for which the brother-in-law had been itching, but which Mr. Edson had not the courage to hoist him into."[108] But how could Mayor Kirk do what Mayor Edson had been unable to do? The reason was simple, at least by Edson's and Kirk's logic (which may have had a timely assist by David Dudley Field): it was now January 1, 1885, and mayoral appointments did not have to have the confirmation of the Board of Aldermen. Kirk could appoint Wood, and no one could do anything about it.

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[107]Times, Jan. 1, 1885, p. 1.

[108]Times, Jan. 2, 1885, p. 1.

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Or at least so he and Edson claimed. But in fact a good many people were trying to do something about it, to the delight of the reporters who had staked out City Hall. To begin with, the city clerk refused to take the city's seal out of his safe and make the appointment official. Kirk dismissed this as a mere formality; the appointment was official enough without it, he assured reporters.[109] More worrisome was the sudden appearance at the mayor's office of the president of the new Board of Aldermen, Adolph L. Sanger. He announced that if Edson was no longer in office then he, not Kirk, was mayor, and that as his first order of business he was reappointing Lacombe as corporation counsel.

The newspapers reported the episode like a municipal comic opera. "The Municipal Muddle--New York's Double Team of Mayors in City Hall" blared the headlines in the Tribune.[110] "Three Mayors in Office," claimed the Sun.[111] "Disgraceful to the End!" cried the Times.[112] Depending upon which newspaper one read, New York City had either no mayor at all or as many as four mayors all at the same time. The press described in gleeful detail how Kirk and

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[109]Sun, Jan. 2, 1885, p. 1.

[110]Tribune, Jan. 2, 1885, p. 1.

[111]New York Sun, Jan 2, 1885, p. 1.

[112]Times, Jan. 1, 1885, p. 1.

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Sanger both held court at opposite ends of the mayor's office, shaking hands and accepting the congratulations of their cronies. Supporters and office seekers crowded into the mayor's office, perching on desks and radiators and generating so much cigar smoke that the windows had to be thrown open. In the midst of the merriment a messenger from Big Tim Sullivan's club arrived with an arrangement of roses and daisies in the shape of a harp, with a card reading "Congratulations, Mr. Mayor." "Who gets this?" he asked uncertainly. "The scene," wrote the Tribune, "was simply a farce."[113]

The goings-on in the mayor's office, however, were nothing compared to the drama taking place across the way in the Staats-Zeitung building that housed the offices of the Law Department. Tipped off that something was afoot, Lacombe had recalled clerks and assistants from New Year's Eve parties all over town and mobilized them to defend the department's second-floor offices. "The iron gates at the entrance to the Corporation Counsel's offices were closed, and nobody without a pass from Mr. Lacombe was allowed to pass," reported the Times. "A long rubber hose stretched from the interior of the building to the office of Mr.

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[113]Tribune, Jan. 2, 1885, p. 1.

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Lacombe, and this was intended to deluge the invading hosts, should any hosts invade."[114]

None did, at least immediately. Reporters shuttled back and forth between City Hall and the Staats-Zeitung building, informing Lacombe of the developments in the mayor's office. With Wood not expected to appear until later in the morning, a handful of Lacombe's clerks and assistants stood guard while the rest bunked down on the floor or at their desks. Lacombe himself caught an hour or two of sleep on a couch in his office and then was up at dawn, nervously awaiting the coming confrontation. Reports filtered in through the iron gates that Wood had appeared at City Hall and had been sworn in by Kirk. Shortly before eleven he marched on the Law Department, flanked by two friends who had posted his bond of office and trailed by a crowd of reporters. Lacombe waited for him at the entrance, a small force of assistants mustered behind him with the fire hose primed and ready.

Wood peered through the iron bars, nonplussed. "I have been appointed as counsel to the corporation and ask admission to these rooms," he announced. "Please let me enter."

Lacombe refused. "I do not recognize the validity or legality of Mr. Kirk's appointment," he said firmly.[115]

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[114]Times, Jan. 1, 1885, p. 1.

[115]Times, Jan. 2, 1885, p. 1.

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"I see you have a force to defend the office," Wood commented.[116] He had heard that Lacombe had an armed guard, so he took pains to assure him that he had no intention of trying to seize the office by force. However, he pointed out, by law it was now his office.

Lacombe disagreed and suggested that if Wood felt that way, he should ask the courts to settle the question with a quo warranto action. In the meantime, though, he intended to keep physical possession of the office and all its books and papers. He would most definitely not open the door to Wood.[117]

The new appointee left, disgruntled and empty-handed. Lacombe smiled--according to the Sun, "not merely the smile of a Happy New Year's greeting [but] the happy smile of conscious power and security."[118] He had held his ground, and with only an hour left in Kirk's "administration" the danger was all but over. As noon approached reinforcements began arriving, employees who had belatedly learned of the siege and were rushing to the barricades. Last night's grim air gave way to giddiness. "Young men disappeared up the stairway leading to the office, with suspicious looking packages," reported the Sun. A "robust odor of beef and

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[116]Sun, Jan. 2, 1885, p. 1.

[117]Ibid.; Times, Jan. 2, 1885, p. 1, and Tribune, Jan. 2, 1885, p. 1.

[118]Sun, Jan. 2, 1885, p. 1.

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beans" wafted down the stairs, and "connoisseurs thought they detected a suggestion of beer."[119] Grace was sworn in at noon and promptly dispatched a squad of policemen to guard the corporation counsel's office. Relieved of their duties, the Law Department irregulars disbanded and returned to their homes. Lacombe stayed behind, electing to maintain a physical presence until the courts opened the next morning and he could get a judicial order restraining Wood. At midnight he collapsed on the office sofa, guarded over by four of New York's finest and one Law Department clerk.[120]

The next morning Lacombe appeared in state Supreme Court and obtained an injunction restraining Wood from any attempt to take possession of the office. As soon as the order was served on Wood, he retained David Dudley Field and agreed on a test case to settle the title to the office.[121] Lacombe was more than happy to cooperate; he had already checked with six of the city's most eminent lawyers and all had assured him that Kirk's appointment was worthless.[122] The Times had also consulted its own experts

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[119]Ibid.

[120]Ibid.

[121]Times, Jan. 3, 1885, p. 2.

[122]They were Charles F. Southmayd, Frederic R. Coudert, Franklin C. Barlow, Thomas Allison, Wheeler H. Peckham, and Francis M. Scott. See the Times, Jan. 2, 1885, p. 1.

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and issued an editorial in support of Lacombe:

> There is no reason to imagine that Alderman Kirk's appointment of Col. Wood is worth the paper that it is written on. The 'point' which made it seem a feasible trick is one of those quibbles which occur in multitudes to the minds of shysters, only to be promptly scouted as soon as they are brought before a competent Judge.[123]

The case was not as cut and dried as the Times thought, and Edson and Kirk came very close to pulling off their scheme. Wood came into court with a battery of high-priced legal talent--Field, Aaron Vanderpoel, and three other lawyers--all of whom made convincing arguments that by law Kirk had been mayor, however briefly, and had legally appointed Wood. Lacombe's attorneys--James C. Carter, Charles F. Southmayd, and Thomas Allison--had their hands full refuting these claims, for in fact there were perplexing gaps and contradictions in the law. In the end, the court gave up trying to reconcile these conflicts in the law and instead based its decision on conjecture. That is, what was the "legislative intent" behind these laws? In essense, the case came down to justice Theodore Miller's reading the minds of several different groups of state legislators. And in his own mind,

> . . . it was never designed by the legislature . . . to leave a period of time, consisting of a few hours between the close of the term for which the mayor was

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[123]Times, Jan. 2, 1885, p. 4.

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> elected and the time when his successor should commence to serve, during which the president of the Board of Aldermen should be vested with the power of making appointments without the consent of those over whom he presided. . . .[124]

Even if one believed that Kirk really had been mayor, he explained, he still could not have made the appointment without having it confirmed by the Board of Aldermen. He would have been under the same constraints as Edson, Miller believed--again reading the legislative mind--because the legislature had intended the new law to go into effect when the new mayor took office at noon.[125]

The case, even with the courts expediting it, did not reach final decision until April 14, but the ruling was a complete vindication of Lacombe's defense of the Law Department. In the meantime Grace had reappointed him to a full four-year term on January 14.[126] A number of other things had happened as well, tying up all the loose ends. Judge Truax vacated the injunction restraining Edson from making any appointments (on January 26, almost a month after he had left office), noting in his opinion that he had "examined carefully the reports of this state, of the other states, and of Great Britain, and the text books on corporations, injunctions, and equity, and I have not been

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[124]People ex rel. Wood v. Lacombe, 99 New York 43, 51-52 (1885).

[125]Ibid.

[126]Times, Jan. 15, 1885, p. 2.

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able to find a case like this."[127] As Field had predicted, Truax declared that the allegations were "too indefinite and uncertain" to sustain an injunction, being no more than hearsay.[128]

Edson, who had been relying on Field's assurances, was relieved; he had got away with defying the injunction. But Roosevelt and the other plaintiffs were not done with him yet. They immediately instituted proceedings to punish Edson for criminal contempt of court for "willful disobedience" of the injunction while it had been in force. The former mayor found himself back in court again, with Field once again at his side. Clinging to an illusion of safety because Truax had found the injunction baseless, he was given a rude awakening on February 10 when justice John J. Freedman delivered a stern lecture (as mayor he "should have set an example of devotion and submission to the supremacy of the law") and sentenced him to fifteen days in jail and a $250 fine.[129] Edson was stunned, and spent two uneasy months before his criminal conviction was overturned on appeal in April--and then only narrowly, on a fine technicality. The appellate court held that Miles Beach, the

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[127]Roosevelt v. Edson, 51 Superior Court 227, at 237 (1885).

[128]Ibid., at 236.

[129]People ex rel. Roosevelt v. Edson, 51 Superior Court 238, at 262-63 (1885), or 1 Howard's Practice Reports (new series) 231, 255-56.

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judge who had issued the injunction, had no power to do so; an injunction of this nature was not within the purview of the Court of Common Pleas. Holding that the injunction had thus been void from the beginning, the court ruled that there had been nothing for Edson to violate and that he had been guilty of no contempt.[130]

With these two decisions--People ex rel. Wood v. Lacombe and People ex rel. Roosevelt v. Edson--one of the most bizarre episodes in New York City municipal history had ended. The newspapers had treated it as one extended comic opera, but in fact it was much more. It went to the very heart of the sovereignty of the law, as the courts themselves recognized. As justice Freedman pointed out in his opinion, the confidence of the people in their government (including, presumably, municipal government) rests on a belief that, like themselves, those serving in that government will be "a law-reverencing, law-obeying and law-abiding people." If instead these government servants evade, manipulate, and pervert the law to their own political purposes, the people will lose faith not only in their government but in the law itself. "Hence," declared Freedman, "none are more dangerous enemies to our country and its institutions, by whatever pretext they may seek to veil their conduct, than those who seek to destroy or impair

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[130]People ex. rel Roosevelt v. Edson, 1 Howard's Practice Reports (new series) 482 (1885).

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this necessary confidence, by rash denunciation, groundless imputations, open disrespect, and public disobedience."[131]

Freedman had in mind Edson's flouting of the injunction, but he might as well have been speaking of Roosevelt and the others who had brought the injunction, of the County Democrats (including, most likely, a sitting judge and the corporation counsel) who had conspired in the earlier injunction, or of Edson and Kirk, who had tried to jigger the law so they could appoint the mayor's brother-in-law. But he was mourning for a day long past, if indeed it had ever existed. The hard truth was that in New York City of the late nineteenth century, as in the rest of the nation, the line between law and politics had become so blurred as to be only a faint smudge. The question for the corporation counsel had become whether he should fight a rear-guard action, sharpening that line and keeping officials on the right side of it, or whether he should join the game and become a master of it. Lacombe, who had started as a "non-political" corporation counsel, had quickly learned what the game was and had become one of its most political players. In doing so, he had survived to play another day.

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[131]People ex rel. Roosevelt v. Edson, 51 Superior Court 238, at 261 (1885) [quoting from People v. Compton, 1 Duer 512.

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Chapter XIV

THE DEMING REVOLUTION

Lacombe served as corporation counsel for three years before leaving to become a federal circuit court judge in June of 1887. In those three years he accomplished a great deal, but his most enduring legacy was an administrative one: he refined and institutionalized the changes made in the office by Whitney a decade earlier. Whitney had not set out to make any permanent transformation of the Law Department; although he had expanded and reorganized the staff, he had intended it as a stopgap measure that would end once his enlarged staff had plowed through the backlog of Ring cases. "It was a war measure, so to speak--the organization of an extraordinary force for a temporary purpose," he explained to the World in 1878. "I employed the best men that I could reach, paying the necessary salaries. But it is a temporary organization, which will disappear with the necessity which created it."[1]

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[1]World, March 20, 1878, p. 1.

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At the time he wrote, Whitney oversaw ten assistants and eleven clerks in the general office, as well as another six lawyers in the bureaus of the corporation attorney and the public administrator. He had no discretion over the size of the two bureaus--their numbers were set by their own chiefs--but he saw no reason why the staff of the general office should not return to the size it had been before the unusual demands placed on it by the Ring litigations. Smith had operated with some half-dozen clerks and assistants in his office, and Whitney expected to return to something approximating that number.[2] He trimmed five clerks in 1879, and dropped two assistants and another three clerks the following year.[3] But there the retrenchment stopped. Even while absorbing his department's share of a ten-percent cut in municipal salaries, over the next two years Whitney found enough money for eight assistants and edged the number of clerks back up to seven.[4] No matter what his intention might have been in 1878, he left

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[2]See "List of Officers and Subordinates in the Departments of City Government--Law Department," City Record (1875), p. 180, and ibid. (1878), p. 154. Hereafter cited as "Law Department Officers," City Record. Smith listed one assistant and seven "clerks," but at least two of the latter were general clerical workers and not law clerks.

[3]Ibid. (1879), p. 166, and (1880), p. 171.

[4]Ibid. (1881), p. 194, and (1882), p. 186. Whitney reduced individual salaries (including his own), applied excess "extra counsel fees" to staff salaries, and secured special funds for extraordinary expenses such as that entailed in park proceedings, street openings, and the like.

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office in 1882 with a legal staff more than twice the size of Smith's. And his successor Andrews not only refrained from cutting it further but added another another four assistants himself.[5]

Thus when Lacombe took office in 1884, he inherited a staff of nineteen lawyers in the general office, only two fewer than Whitney had employed in the peak year of 1878.[6] Yet by the time he was reappointed in 1885, Lacombe realized that even this was not enough, and made enlarging the office his first priority. What had happened? As Lacombe himself acknowledged, except for perhaps a half-dozen cases the Ring litigation had ended--and with it, one might suppose, the need for such an extraordinary number of lawyers. But, he argued in a report to the mayor, "the growth of the City in population and as a center of commercial and manufacturing industry has induced a purely normal increase of its legal business, so great as to call for quite as large, in fact, for even a larger working force than that employed in 1877."[7]

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[5]Ibid. (1882), P. 186, and (1884), p. 206.

[6]This figure is exclusive of the attached bureaus, which had grown to include a third, the "Attorney for the Collection of Arrears in Personal Taxes." In 1884 these three bureaus employed six lawyers and seven clerical workers [ibid. (1884), p. 206].

[7]New York City Law Department, Annual Report (1885), p. x. With this report, the Law Department began publishing annual accounts of its activities, a practice which has essentially continued ever since. Why Lacombe used 1877 for his base line is unclear; 1878, the department's peak year to that point, would have offered a better comparison.

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When Whitney had won permission to place the department on a "war footing," there had been 3,800 suits and proceedings pending against the city; now, noted Lacombe, there were almost 5,000. What was important, however, was not the gross number of such actions but the actual amount of work involved in them; depending on their nature, some suits and proceedings took very little time, while others bogged the staff down for days on end. Unfortunately, Lacombe argued, it was precisely the latter type of legal business which had increased the most. In particular, the number of accident cases--notoriously time-consuming--brought against the city had increased by almost five times in only ten years. The department's lawyers had argued 63 accident cases in 1885 as opposed to only 13 in 1875, each involving many hours of preparation: tracking down and interviewing witnesses, finding experts to testify for the city, preparing models and photographs, and researching points of law. Considering that these cases in 1885 alone involved almost $800,000 in claims against the corporation, the city could hardly afford to economize on their defense.[a]

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[a]Ibid., p. xii. This is the first mention I have found of the department's pioneering use of forensic photography, which it would later exploit brilliantly in Tenement House Department v. Moeschen, 203 U.S. 583 (1906).

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Lacombe recognized that the city was at a crossroads in its legal affairs. Up to this time the officers of municipal government had treated each increase in legal business as an aberration--an extraordinary condition arising from a singular event, whether the great fire of 1835, the draft riots of 1863, or the fall of the Ring in 1871. And until Whitney had insisted on using his own staff lawyers, the mayor and aldermen (and, indeed, the corporation counsel himself) had generally assumed that the emergency could best be handled by retaining outside counsel for its duration. But Lacombe realized that things had changed now; the city was facing not a temporary spurt in legal business but a growth likely to persist as long as that of the city itself. The traditional response--farming the excess out to special counsel--no longer made sense. If this "excess" was not really excess at all but, in Lacombe's words, "purely normal," then hiring outside counsel would not get rid of it but only lead to the hiring of more outside counsel--the wisdom of which, judging from the recent example of the Ring cases, was questionable.

Still fresh in Lacombe's mind was the lesson Whitney had delivered in municipal arithmetic: clerks and assistants cost far less than outside counsel and, in general, got just as good results. The logical response to an increase in the city's legal business, then, should be to hire more clerks and assistants. It was this course that

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Lacombe began to urge on the officers who set the city's budget, the four members of the Board of Estimate--at this time, the mayor, comptroller, president of the Board of Aldermen, and president of the Department of Taxes and Assessments.[9]

But these officers had difficulty accepting Lacombe's request, however logical his reasons. For one thing, they were under ferocious pressure to cut the municipal workforce. The state legislature considered city government so bloated that in 1880 it forced an across-the-board reduction of ten percent in municipal salary appropriations.[10] A state senate report of 1881 charged that New York City's government was "badly regulated, badly administered, exorbitantly and inexcusably expensive, and in its various parts substantially irresponsible."[11] A blue-ribbon citizens' committee, the "Council of Reform," charged that because of reckless spending by department heads, New York City's per capita cost of government was three times the

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[9]Law Department, "Provisional Estimate," in Board of Estimate, Minutes, Oct. 9, 1884, p. 123, and ibid., Oct. 13, 1885, pp. 127-40. For a description of the pre-1898 Board of Estimate, see William Kaufman, The New York City Board of Estimate (typescript in New York City Municipal Reference Library, 1963), pp. 1-8.

[10]The so-called "Public Burdens" bill (New York, Laws (1880), ch. 521).

[11]Report of the Special Committee of the Senate Appointed to Investigate Matters Relating to the Government of the City of New York, p. 2, published in New York State Senate, Documents (1881), no. 25. The Board of Estimate, Minutes, Oct. 30, 1883, p. 321, makes note of this charge.

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average of the twenty leading other cities.[12] And among the "most grossly and unjustifiably extravagant" spenders the Council cited was the Law Department itself, whose per capita spending in 1884 was reported as being six times that of its closest rival, the Brooklyn corporation counsel's office.[13]

Lacombe's pleas for a larger staff ran counter to this rising chorus of cries for "economy in government." But there was another reason as well why members of the Board of Estimate had trouble accepting the notion of a larger Law Department. It took a considerable stretch of the imagination to draw a mental picture of a law office like the one contemplated. When they discussed the corporation counsel's office, they thought in terms of all the other law offices with which they were familiar--and the law offices of nineteenth century America were exceedingly small operations. Most were, in fact, one-man practices, for until well into the twentieth century the legal profession was primarily "a cottage industry of single prac-

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[12]Council of Reform, "Memorial" in ibid., pp. 320-27, and "Report," Dec. 10, 1886, in Mayors' Papers, William R. Grace (1886), Board of Estimate folder.

[13]Charges discussed in Law Department, Annual Report (1885), pp. xiii-iv. I have been unable to find a copy of the report itself; the Board of Estimate Minutes for Dec. 22, 1885, notes its arrival (p. 746) but gives no text, nor does a copy survive in its archival papers.

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ticioners."[14] Even the leading big-city law firms were of modest size, typically consisting of one lawyer, occasionally in association with one or (more rarely) two partners, with perhaps a couple of young clerks or junior "associates." As late as 1887 only twenty-two firms in the whole country had five or more lawyers, including clerks and associates; only one had as many as eight.[15] Public law offices were equally small. The New York attorney-general operated with a legal staff of only two deputies and one assistant.[16] The U. S. attorney for the Southern District of New York had five assistants in his New York City office and one each in Brooklyn and Poughkeepsie.[17] Even the attorney-general of the United States had only two deputies, six assistants, and three clerks in his Washington, D.C., office.[18] With twenty-five lawyers in its gen-

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[14]Robert Stevens, "Aging Mistress: The Law School in America," Change, Jan.-Feb. 1970, p. 34, quoted in Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (New York: Oxford University Press, 1976), p. 22.

[15]See Kermit L. Hall, The Magic Mirror, pp. 212-14, and Wayne K. Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915," pp. 2-17, and Gawalt, The New High Priests, Table 1, p. 7.

[16]New York State, Legislative Manual (1885), p. 271. The manual lists seven clerks as well, but these were "general" as opposed to "law" clerks.

[17]U.S. Dept. of Justice, Register of the Department of Justice (1886), p. 118.

[18]Ibid., 11. Most of the employees in the Washington office were clerical workers, chiefly engaged in examining real estate titles.

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eral office and three bureaus, the New York City Law Department was a goliath among law offices, public or private.[19] To picture it even larger called for a stretch of imagination the Board of Estimate found difficult to make.

But not Lacombe. He was one of the bright young men Whitney had brought into the office in 1876, and he took such size for granted. If it had taken nine assistants and twelve clerks to deal with 3,800 pending actions back then, then it stood to reason it would take that many or more to deal with 5,000 now. The trick lay in convincing the Board of Estimate of this, and here Lacombe had an advantage: he was, among his other duties, the board's own counsel, and he knew how its members thought. They had learned to discount in advance the perennial pleas of department heads for budget increases; in their minutes for 1883, they noted wryly that if the various department heads were to be believed, "not an assistant or subordinate . . . could be dispensed with; not a salary could be reduced, [and] to compel the one or the other of these would be to sacrifice the interests of the city."[20] They would not likely be any

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[19]In 1885 the Law Department included the general office of the corporation counsel, with twelve assistants and seven clerks, and three bureaus under his direction--the corporation attorney, with two law clerks; the public administrator, with another two clerks, and the newly created "attorney for the collection of arrears in personal taxes," with a clerical assistant who was not a lawyer. See "Law Department Officers," City Record, Jan. 30, 1885, p. 188.

[20]Board of Estimate, Minutes, Oct. 30, 1883, p. 330 (quoting the 1881 report by the State Senate).

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more impressed by Lacombe's pleas than by those of the sewer commissioner.

Lacombe knew, however, that what did impress the board was the word of the Commissioners of Accounts, a watchdog bureau they employed on occasion to ferret out instances of waste, corruption, and general inefficiency in municipal agencies.[21] When the commissioners swooped down on an office, it tended to strike terror in the bureaucratic heart; an agency chief knew that not only would all his secret slush funds be uncovered, but he would have to justify every penny of his spending.[22] Thus it was practically unheard of when in January of 1885 Lacombe asked the Commissioners of Accounts to audit his department. He was gambling, though, that any fair examination of the Law Department would make his case for him--it would show an office run honestly and efficiently but without the manpower to handle the burdens placed on it.[23]

The report that emerged marks an important moment not just in the history of the Law Department but in American

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[21]For the establishment of the Commissioners, see New York, Laws (1870), ch. 187; (1873), ch. 234, and (1880), ch. 345.

[22]E.g., Commissioners of Accounts, Detailed Statement of Moneys Paid for Salaries, etc. to the Commissioners of the Central Park and the Landscape Architect, in Board of Aldermen, Documents (1875), no. 6, and Charges . . . Against Rollin M. Squire, Commissioner of Public Works (1886) [pamphlet in New York Public Library].

[23]The reason for Lacombe's requesting the audit is a supposition on my part, but not the fact that it was his idea and not the board's. See New York Times, Feb. 15, 1885, p. 10.

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legal practice in general. The Commissioners of Accounts had no idea how to go about evaluating a law office, so they engaged Horace E. Deming to do the audit for them. Deming was a lawyer by training, but his real passion was reforming the administration of America's cities. At thirty-five, he was just beginning the life's work that is suggested by his later writings: "The City as a Business Corporation," "Civil Service Reform and Municipal Government," and the classic Government of American Cities.[24] When he evaluated the New York City Law Department, he looked at it not just as a lawyer but as an urban political scientist. For him the operant model was not that of a traditional law firm but a modern government bureaucracy. As a result, he broke the mold that had for so long constrained everyone's thinking; he freed the Law Department to be, in fact as well as in name, a department of city government--an office, it finally dawned on everyone, which had more in common with the Water Department or the Docks Commission than with Evarts, Southmayd & Choate or Root & Clarke.

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[24]Horace E. Deming, "The City as a Business Corporation," in Addresses Delivered Before the City-Wide Congress of Baltimore (1911), pp. 52-73; "Civil Service Reform and Municipal Government," National Civil Service Reform League pamphlet (1897), and The Government of American Cities: A Program of Democracy (New York: G. P. Putnam's Sons, 1909). For biographical data, see Who Was Who in America, vol. 1, p. 313.

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Deming was a municipal counterpart of the industrial efficiency experts like Frederick Taylor and Frank Gilbreth who revolutionized American factories in the latter years of the century. Like them, he approached the Law Department with tape measure and notebook in hand; had he thought of it, he would likely have brought a stopwatch. He went over literally every square inch of the department's rented quarters in the Staats-Zeitung building on Centre Street, noting for instance that Room No. 1 ("of irregular shape") was 20 feet wide, 38 feet deep on one side and 25 feet deep on the other, and that it contained 600 four-by-ten-inch pigeon holes for papers in completed cases and 184 for pending ones; 150 pigeon holes for assessment proceedings, as well as 37 four-inch-wide boxes; 115 boxes for manuscript opinions, and 69 shelves (four feet long, ten-and-a-half inches apart) for printed appeals cases. His description of the department's eight rooms revealed for the first time the conditions under which the city's legal affairs were transacted. The chief assistant and his deputy worked from a corner of the library; four assistants were squeezed into the department's storeroom, six others into the corporation counsel's anteroom. Three assistants, one law clerk, and a copyist camped out in the department's conference room, sharing their quarters with noisy throngs of

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claimants, witnesses, lawyers, clerks, and stenographers.[25]

In addition to the physical surroundings (which, understandably, he urged expanding), Deming scrutinized in detail every item of work conducted therein. He presented a itemized table showing who had conducted each trial the previous year, the type of case, the sum involved, the amount of time spent in trial, the number of witnesses, and the outcome. On January 7, 8, and 9 of 1884, for instance, assistants David Dean and Francis Wellman spent two days in court successfully litigating a $40,000 contract case, Vogel v. Mayor, while on January 25, Lacombe and law clerk Walker Hartwell spent only ten minutes getting a $25,000 personal injury case, Lambert v. Mayor, dismissed.[26]

From this table Deming was able to work backward and analyze how each member of the staff had spent his time during the year and--more to his interest--which types of cases he had handled. A few assistants had apparently developed special niches of their own; of the twenty-six cases Thomas Wickes handled, for example, twenty-one were negligence actions, and of Wellman's eleven trials, nine were for personal injury. Most, however, handled a little

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[25]Commissioners of Accounts, Report of Horace E. Deming, Special Counsel to the Commissioner of Accounts on the Office of the Counsel to the Corporation of the City of New York (1885), pp. 5-6, published as an official document by the Board of Aldermen and available as a pamphlet in the New York Public Library; hereafter cited as Deming Report.

[26]Table 6, in ibid., pp. 8-15; the two cases, 8, 9.

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bit of everything. In addition to arguing an incredible thirty-two appeals, David Dean was senior trial counsel in three personal injury cases, three salary cases, three tax cases, and five miscellaneous cases. The resident tax expert, Arthur Masten, managed seven tax cases, but also two negligence, two contract, and two salary cases, as well as a mandamus proceeding. John Townsend handled seven negligence cases, four mandamus procedings, two equity cases, one contract case, and one replevin action. [27]

The reason that there was no more specialization than this was that new cases were not assigned according to subject matter. The closest thing to a "system" was a division of labor based on the various stages of completion of the cases themselves. That is, one lawyer drew all the answers, another all the complaints; one examined claimants, another defendants; one tried the cases, another appealed them. In Deming's view, the department would operate far more efficiently if it were organized into divisions according to subject matter--contracts, torts, real estate and waterfront matters, taxes, and so forth. By having certain assistants concentrate on certain types of cases, they would develop an expertise in given fields of the law, and not only win more cases but be able to ans-

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[27] Ibid., pp. 14-15 (bottom half).

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wer the questions of city officials quickly and accurately.[28]

In addition, Deming discovered, like other offices of city government the Law Department had become too large for its chief to manage every detail of its operation. The corporation counsel needed "a thoroughly systematized and graded office" that would run with a minimum of supervision while he tended to the broader responsibilities of his office: setting overall policy, making major decisions, and representing the department to the mayor and other officers. With a department organized into divisions, the corporation counsel could assign a senior assistant to supervise each one and then be free to concentrate on his larger duties.[29]

Deming thought it obvious that the Law Department, like any other office of municipal government, should be organized "with reference to its permanent character" and not in such a way that "its efficiency and methods depend solely or principally on the capacity and energy of its accidental head for the time being."[30] He was too much a gentleman to name names, but his meaning was unmistakable;

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[28]Ibid., pp. 16-17. By the nature of the work involved, this system also assigned waterfront proceedings, police questions, and assessment proceedings to certain assistants.

[29]Ibid., p. 17.

[30]Ibid., p. 16.

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everyone who read his report could place recent Law Department heads on a scale that ranged from Smith at one end to Whitney at the other. They could appreciate Deming's warning that the office should be organized so that its work would go on with "reasonable efficiency and certainty" no matter who happened to be--that startling phrase again--"its accidental chief."[31]

The solution that Deming proposed was quite simple--but, as applied to a law office, revolutionary. He argued that it should be reorganized like other government offices into a typical bureaucratic pyramid: in the case of the Law Department, a broad base of clerical workers and law clerks on bottom, a middle level of "junior" and general assistants, an upper level of senior assistants, and on top the corporation counsel himself. Each level would be accountable to the one above it, with information flowing smoothly up and down a chain of command. As it was, however, there was no discernible structure. There was no chain of command, and if there was a pyramid it was an inverted one. The corporation counsel struggled to oversee everyone and everything personally in a department that was, in Deming's words, "strong at the top and weak at the bottom."[32] Its small clerical force of messengers,

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[31]Ibid. Italics mine.

[32]Ibid., p. 17.

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copyists, and stenographers was "inferior and entirely inadequate," and the law clerks were few in number and poorly utilized. There were in fact only four clerks actually available to help the assistants, the other two having been assigned to special duties.[33] The assistants themselves carried most of the load, working independently of one another and with no overall direction. "At present," wrote Deming, "the miscellaneous business is miscellaneously done, now by this and now by that assistant."[34]

This disorganization created a serious problem for the corporation counsel when an assistant was absent for any length of time or, worse yet, left the department. Only rarely was there someone familiar enough with his work to step into his shoes. The other assistants were busy with work of their own and had only a vague notion of what he had been doing. The clerks, even those who might have worked under him, were seldom of much help; moving from one case to another and from one assistant to another, their experience was too scattershot to be of much use. Consequently, when a top assistant left, the work of the department suffered. The corporation counsel had to arrange coverage of his work while he found and trained a replace-

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[33] Ibid., pp. 2, 23. One clerk had been put in charge of the office register and diary, and another assigned as personal aide to the corporation counsel. Ibid., p. 2.

[34] Ibid., p. 21.

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ment; usually he coped by retaining the former assistant as special counsel to wind up the work he had been doing, an arrangement which in some instances went on for years.[35] To Deming, this made no sense at all. No other department in the city had to re-invent the wheel every time an employee left. Why should the Law Department?[36]

In Deming's mind, the Law Department had to quit pretending it was an overgrown law firm and make itself over into a municipal bureaucracy. Accordingly, he recommended that it be organized pyramid-fashion, with an enlarged and enhanced support staff at its base. At this base he proposed adding, at a minimum, a deputy chief clerk, two stenographers, and two copyists. With an increased number of clerical workers, he wrote, "the ability to put to profitable use time now spent in waiting for work to be finished or in hunting up misplaced papers and records . . . would be equivalent to adding several effective men to the present corps of assistants. There would seem to be no more economical method of improving in every way the condition of the Department."[37] As for the

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[35]Francis Lynde Stetson, for instance, was assigned Develin v. Mayor in 1877, took it with him when he left in 1881, and held onto it through its final appeal in 1895. See Stetson to William H. Clarke, Dec. 29, 1894, in Mayors' Papers, William L. Strong (1895), Law Department folder, and also Law Department, Annual Report (1895), p. xvii.

[36]Deming Report, pp. 16-17.

[37]Ibid., p. 23.

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legal staff itself, he saw no need for more assistants--there were plenty of them, if they were properly organized--but he thought the number of law clerks should be roughly doubled.[38]

Proper organization was the key to Deming's calculations, and he based this organization on his scheme of subject-matter divisions. Under his plan, the legal staff would form not one big pyramid but seven smaller ones; a senior assistant would supervise each division and report directly to the corporation counsel. There would be a torts division, for example, with a senior assistant at its head and under him a general assistant and two clerks, and a land acquisitions division with a senior assistant, a general assistant, and one clerk. Altogether Deming proposed setting up seven separate divisions requiring a legal staff of seven senior assistants, six general assistants, and eleven clerks--five more clerks than presently in the office.

Deming believed that this reorganization was the key to improving the department's efficiency and solving most of its problems. It offered a clear, definable chain of command; the corporation counsel could delegate authority to division heads and easily keep track, through them, of everything that was going on. At any given time, several

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[38]Ibid., p. 22/

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lawyers would be familiar with the business of their own division, and its work would go on smoothly through illness, vacations, or resignations. Efficiency and accuracy would improve; the clerks and assistants would become so familiar with their division's work that they could handle most matters automatically, without asking questions or thumbing through the law books. The office would make better use of its more experienced assistants as their clerks took routine work out of their hands and freed them to work on more important matters.

The idea of using clerks this way was, of course, nothing new; Whitney had done essentially the same thing, and done so with remarkable results. Deming's particular genius was to refine Whitney's system and carry it one step further: he took the old clerking system and grafted it onto an office organized into new subject-matter divisions. Instead of just putting the new clerks into the office and letting the assistants vie for their services, he assigned each one more or less permanently to a specific division head so that they would not only provide much-needed help but gain specialized experience. Deming envisioned clerking not just as a system of cheap labor but as way for the Law Department to develop within its own walls the expertise it needed. As he explained it,

> . . . always and at all times there should be competent men in training to supply the places of those who may,

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> at any time, become incapacitated to look after the city's interests. Indeed, it should be one of the most important functions of the Corporation Counsel's office to be a training school where able and ambitious young men should be eager to enter with the reasonable certainty before them of promotion through the various well marked grades and the possibility of attaining by distinguished services the Corporation Counselship itself.[39]

Deming's report created an immediate stir. The New York Times printed it practically in toto, and the Board of Aldermen published it as an official document.[40] Lacombe embraced the report enthusiastically; it provided just the ammunition he had been hoping for. In October he went before the Board of Estimate and used it to justify "a very marked increase" in the approrpriation for staff salaries. An increase of the permanent force, he argued, would greatly increase the department's efficiency; it would enable the office to work its way through both new and old business. "In this connection I would refer to the report of Mr. Horace E. Deming, made to the Mayor last May, upon the organization of the Department," he noted. "It very clearly and forcibly points out the necessity of a reorganization and reinforcement of the permanent force."[41]

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[39]Ibid., p. 18.

[40]New York Times, May 10, 1885, p. 3 ["A New System Needed"].

[41]Law Department, "Departmental Estimate," in Board of Estimate, Minutes, Oct. 13, 1885, pp. 127-39; quoted, pp. 130-31.

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Backed into a corner by Deming's report, the Board of Estimate reluctantly approved the increased salary appropriation--with the implicit understanding that the Law Department had better produce the promised results.[42] Lacombe promptly began to reorganize the office more or less along the lines suggested by Deming. He designated David Dean as "first assistant," and organized the newly augmented legal staff into ranks: nine senior assistants, five junior assistants, three senior law clerks, and seven junior law clerks.[43] Although his own reports do not mention how many divisions he organized or what categories he adopted, he made at least a beginning toward implementing Deming's divisional structure and by the end of the year was able to report "highly gratifying" results.[44] Although the office received even more new cases in 1886 than in 1885, its lawyers had disposed of most of them and had made substantial inroads into the backlog. Specifically, they had disposed of 2,369 actions and proceedings, as compared with 1,052 the previous year, and had reduced the number of pending cases by 686.[45]

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[42]"Final Budget," in Board of Estimate, Minutes, Dec. 31, 1885, p.

[43]"Law Department Officers," City Record, Jan. 30, 1886, p. 234.

[44]Later annual reports date this reorganization to his administration. See, for instance, Law Department, Annual Report (1887), p. v, and ibid. (1888), p. xvi.

[45]Law Department, Annual Report (1886), pp. vi-x.

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They had, moreover, done so with remarkable success. Although in general the cases that reached trial were the more difficult ones (the others generally being settled out of court), the department's lawyers had won 65 percent of them. Some of the most spectacular results had come in accident cases against the city; of the $682,969 sought by plaintiffs, recovery had been held to $13,903. And besides turning back claims against the city, the corporation counsel's staff had been hugely successful in pursuing claims on the city's behalf. They had collected and turned into the city treasury $373,232; including the amounts collected by the three attached bureaus, the Law Department had returned to the city a total of $443,013 for the year.[46]

These collections proved to be Lacombe's trump card. He was able to show that the Board of Estimate had made a staggering profit on its investment in the Law Department. From a total expediture in 1886 of $200,163 on the department, including all its bureaus, the city had received back $443,013--amounting, in business terms, to a profit of over 120 per cent. Not a shabby rate of return, even by Gilded Age standards. Just to drive the point home, Lacombe appended a list of collections by the corporation counsel since 1875; with a single exception, they were all

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[46]Law Department, Annual Report (1886), pp. vi-x.

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under $100,000, and for five of those years less than $10,000. But with the increased appropriation for its staff, he noted, "for the first time in twelve years, the law offices of the City have been able to figure as the attorneys of a persistent creditor."[47]

It was an arithmetic the members of the Board of Estimate could appreciate. For 1887 they gave Lacombe everything he asked for, including (as suggested by Deming) a modernized and increased clerical force. The old copyists were on their way out, although one graying survivor would hang on for ten years. The number of stenographers jumped from two to four, and for the first time three "female typewriters" invaded what had previously been an exclusively male domain. The total office force, including all the bureaus, for the first time reached fifty-one persons.[48] It would be another test of the Law Department: whether, as Deming predicted, an enhanced clerical force would be the labor-saving equivalent of several additional lawyers.[49]

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[47] Ibid., p. x.

[48] "Law Department Officers," City Record, Jan. 30, 1886, p. 234. Besides the three typists, one of the new stenographers was a woman. The surviving copyist was John Foy, who entered in 1868 [Deming Report, p. 2] and retired in 1897 [compare "Law Department Officers," City Record, Jan. 31, 1897, and ibid., Jan. 30, 1898.

[49] Deming Report, p. 23.

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As it turned out, 1887 proved to be even better than 1886. On a budget of slightly more than $200,000, the Law Department returned over $500,000 to the city, of which about four-fifths was generated by the general office.[50] The 1887 report was made by Morgan J. O'Brien, interim corporation counsel between Lacombe, who became a federal judge in July, and Henry Beekman, who took office the following January. O'Brien credited the "highly gratifying result" to the "admirable organization of the office" undertaken by Lacombe and to the energy and ability of the assistants he had appointed--all of whom O'Brien had taken care to retain in office.[51] Impressed, the Board of Estimate continued to fund the Law Department on an enhanced level and even added another stenographer and two more typists for 1888.[52]

At the end of his first year in office, Beekman urged that the city make permanent the expansion and reorganization of the Law Department. "I cannot exaggerate the importance of the continuance of the policy which has thus far brought together and retained in public employment so able a body of men, who have become, by their experience, specially educated in branches of the law particularly

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[50]Law Department, Annual Report (1887), pp. x, and "Departmental Estimate," Board of Estimate, Oct. 29, 1887, pp. 395-404.

[51]Law Department, Annual Report (1887), p. v.

[52]"Law Department Officers," City Record, Jan. 30, 1888, p. 300.

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relating to the interests of the City, and of which little is known by the general practicioner," he declared. "Under no other circumstances could the law business of the City be done to greater advantage than under the present system and organization of the office."[53]

The Board of Estimate agreed and continued to fund the Law Department generously, even though that year it had barely broken even with $191,419 in collections. The decline in receipts was hardly surprising, considering that the office had by now mined the pending cases for all they were worth and was essentially collecting only from current cases. The department would have two more years of high collections ($510,000 in 1889 and $230,000 in 1890), and then would lapse back into running in the red.[54] Yet there is no indication that this bothered either the corporation counsel or the Board of Estimate. For one thing, everyone understood that the Law Department was never intended to be a profit center for the city. And for another, the lower level of collections by the Law Department could be taken as a positive sign. It indicated that the corporation counsel had, in Lacombe's words, established the city as a "persistent creditor" and that municipal deadbeats and

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[53]Law Department, Annual Report (1888), p. xvi.

[54]Law Department, Annual Report (1889), p. viii [figures for 1888 and 1889], and (1890), p. viii. The lowest level was reached in 1897 with $69,222 [ibid., (1897), p. viii.

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delinquent taxpayers were now paying up without being taken to court--and the only thing that made city officials happier than winning in court was not having to go to court at all.

By all other measures, moreover, the Law Department was performing impressively. Through the rest of the 1880's and the 1890's, it handled an ever-increasing volume of legal business, and handled it well. It tried more cases, argued more appeals, rendered more opinions, wrote more contracts, drafted more legislation, and handled more real estate transactions than any other law office, public or private.[55] In 1897, the last year before the merger of the five boroughs into Greater New York, the corporation counsel's office completed 3,320 actions and proceedings, argued 262 cases in court, wrote 9,570 pages of opinions and letters, drafted or examined 1,183 contracts, opened 23,164 lineal feet of streets, and acquired sites for ten parks, 44 schools, three bridge approaches, eight fire houses, two police precinct houses, the Hall of Records, four docks, and extensive water supply easements in Westchester and Putnam counties. Of all the cases reaching decision, the city's lawyers won 137 and lost 99, and held the rate of recovery in contract and personal injury cases

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[55]A state of affairs recognized within city government as early as 1887 [Law Department, Annual Report (1887), p. xii], but not by the public until 1903 ["World's Largest Law Office Here," New York Times, May 5, 1903, pt. 2, p. 9].

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to four and six percent respectively. It was a most impressive record.

The department accomplished this feat not just because it had hired more employees but because it had begun to make better use of them. The number of lawyers in the department as a whole, including all its bureaus, increased by more than 50 percent, from 24 in 1885 to 38 in 1897.[56] Impressive though this increase was, it was not really as great as might have been expected given the increase in the department's business. Moreover, the legal staff was top-heavy, with thirty assistants or bureau chiefs and only eight clerks. What had happened to Deming's pyramidal scheme? A maturing of the legal staff, for one thing: clerks stayed on and were promoted, swelling the ranks of assistants. But to a greater extent the law clerks had been displaced by general clerical employees. Many of their old responsibilities--handling routine paperwork, fetching case reports, interviewing witnesses, gathering evidence, sitting in court to see when a case was going to be called--had been taken over by typists, stenographers,

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[56]"Law Department Officers," City Record (1885), p. 188, and (1897), p. 221. I have used departmental numbers because structural changes make it difficult to compare the general office of 1885 with that of 1897. The general office had only one more lawyer in 1897 than in 1885, but only because part of its staff had been shifted into new bureaus within the department; the new Bureau of Street Openings, for instance, employed eight lawyers who previously would have been counted in the general office. The departmental roster is the best yardstick of growth, albeit one flawed by the loss of the Public Administrator's bureau in 1895.

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examiners, messengers, "general clerks," and others. By 1897 the broad base of the pyramid was made up not of bright young law school graduates but of an army of eager clerical workers, many of them young women.

The real growth in the Law Department was in their ranks. The number of clerical workers in the general office tripled, from twelve to 1885 to thirty-six in 1897. In the department as a whole, the number more than quadrupled, from seventeen in 1885 to seventy-seven in 1897.[57] The importance of this change goes far beyond the mere increase in numbers. In fact, much of the success of the office was due to the fact that it underwent, slightly ahead of the city's private firms, a "clerical revolution." When Deming made his study in 1885, the clerical force of the general office was, although larger, essentially that of an archaic quill-driven law office: a chief clerk, four copyists, two stenographers, two examiners,[58] and three messengers, one of whom was charged with keeping the library in order.[59] The office had bought a typewriter in 1874--one of the first out of the Remington factory--but

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[57] Ibid.

[58] "One who works up the evidence in a case, e.g., inspects the locality where an accident occurs, interviews the persons who saw it, etc." Deming Report, p. 2.

[59] "Law Department Officers," City Record (1885), p. 188. Deming's own list differs slightly; he counts as clerical employees one of the law clerks and two steno-typists from a secretarial agency.

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more than ten years later only two of the copyists knew how to use it.[60]

The chief clerk kept the office accounts, audited disbursements, supervised printing, and essentially ran the practical side of the office--all without any help. "There can scarcely said to be any system at all except such as may spring from a determination on his part to get done somehow or other, and as well as may be, those things which are most pressing," noted Deming.[61] One of the things for which the chief clerk was not responsible, however, was supervising the other employees and assigning work to them. Most had been in the office for some years, were paid more than beginning lawyers, and balked at taking orders from anyone but the corporation counsel himself. In Deming's view, they exhibited "a lamentable lack of discipline . . . such as would not be tolerated for an instant in a private office."[62] To catch up with the work, the corporation counsel periodically tapped the office contingency fund and brought in typists and stenographers from the several sec-

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[60]"Law Department: One type writer, October, 1874 . . . $125.00" in Report of the Auditor of Accounts for the Quarter Ending Dec. 31, 1874, p. 15 [Board of Aldermen, Documents (1875), No. 12]. For the two "typwriter-copyists," see Deming Report, pp. 2, 23.

[61]Ibid., p. 23.

[62]Ibid.

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retarial agencies who supplied temporary help to other law offices.[63]

By 1897, thanks largely to Deming's recommendations, the office had the sort of clerical force characteristic of a modern government bureaucracy: a chief clerk, a deputy chief clerk, a register clerk, two general clerks, a full-time librarian, three copyists, two examiners, seven stenographers, eight typists, six messengers, and three office boys. There were another forty clerical workers in the attached bureaus, including twenty "computers" in the Bureau of Street Openings.[64] Some of the job titles were anachronistic and did not accurately describe the work being done. The messengers (as opposed to "messenger boys") were more probably administrative aides of various types, carried on the roster as messengers out of convenience or for lack of more descriptive job titles.[65] And

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[63]Two of these temporary workers were in the office during Deming's survey; see Deming Report, p. 2.

[64]Law Department, Annual Report (1897), p. ix. These included 23 "computers," 5 stenographers, and 3 typists, all in the Bureau of Street Openings.

[65]There was, in fact, a long and creative tradition of getting employees past the budget by disguising them as messengers. Law clerks who were cut from the budget one year reappeared the next as messengers ["Law Department Officers," City Record, Jan. 31, 1878, p. 154, and Jan 30, 1879, p. 177], and "messenger" James Valles was acting librarian for years before assuming the position formally [ibid. (1886), p. 234]. John H. Greener, who wrote the department's own History of the Office of the Corporation Counsel in 1907, was carried on the roster for twenty years as a messenger; it is a good guess that he had been doing something other than delivering messages.

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the three copyists were almost certainly not traditional scriveners, but male typists anxious to make a distinction between themselves and the "office girls."[66]

The secretarial ranks of the office had become an almost exclusively female province since the first pioneering "typewriters" ventured into the department in 1886. Overwhelmingly Irish (Mulcahy, Loughran, Kennedy, O'Reilly, O'Toole, Breslin, Kehoe, etc.), they were part of an eager wave of young women flooding into office work and claiming the newly invented typewriter as their own.[67] They transformed the Law Department much as they would a short time later transform the city's private law firms.[68] To appreciate their impact, one has to visualize the Law

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[66]Except for the venerable John Foy, copyists virtually disappeared from the roster after 1888; their reappearance in 1897 suggests they were of that ilk known as "typewriter-copyists," a designation commonly shortened to "copyist." Because by this time all the "typewriters" in the office were women, it probably seemed necessary to call these men something else.

[67]For the femininization of American work, see Margery W. Davies, Woman's Place Is at the Typewriter: Office Work and Office Workers, 1870-1930 (Philadelphia: Temple University Press, 1982), pp. 51-78. By 1880, 40 per cent of all stenographers and typists were female; by 1900, 70 per cent, and by 1930, 95 per cent.

[68]Most law offices were slower than business and government offices to accept women employees, as evidenced by the firm histories cited in Hobson, "Large Law Firms," p. 25, notes 23-25. The Seward firm, a predecessor of Cravath Swaine and Moore, was typical. When a junior partner hired a woman stenographer in 1891, the firm history relates, "When Seward saw her he asked of the first associate at hand: 'Who brought her in?' "I understand it was Mr. Guthrie,' was the reply. 'Well, Mr. Guthrie will get her out!' said Seward." And, very shortly, she was. See Robert T. Swain, The Cravath Firm and Its Predecessors, 1819-1947, 3 vols. (New York: privately printed, 1946), vol. 1, pp. 450-51.

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Department as what it had in fact become: a law factory. It turned out certain products of the legal process: complaints, answers, arguments, briefs, opinions, reports, letters, memoranda, legislative bills, and the like. These represented the thought, experience, and skills of a lawyer, but before this mental work could leave the office--before it could, so to speak, be shipped to the marketplace--it had to be reduced to paper. And one of the great drawbacks of legal practice, both in the Law Department and in private firms, had always been the excruciatingly slow pace of translating thought onto paper; a common scene in offices of the past had been that of a lawyer pacing the floor and checking the minutes ticking away on his pocket watch toward an injunction deadline, while a copyist stood at a slanted desk writing an answer in elaborate Spencerian script.[69]

With the advent of the typewriter and the stenographer-typist, lawyers discovered that they could increase their output tremendously. One young woman with a typewriter and a sheaf of carbon paper could turn out in a couple of hours what would have taken several traditional copyists all day. The best estimate of the day--that of attorney Theron G. Strong--was that "with the use of a competent stenographer

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[69]A Cravath partner, Paul De Fere, relates the story of how the firm's first typewriter--stubbornly resisted by the senior partner--rescued the office during precisely such an emergency, in Swain, The Cravath Firm, vol. 1, pp. 449-450.

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and typewriter the busy lawyer is capable of producing in one day as much work as he could formerly produced in three; his work will be of equally high quality, and his documents much more legible and accurate."[70] Strong was speaking of the private offices with which he was familiar; the ratio was probably even better in the Law Department, which, given its better organization and higher volume of business, operated virtually in assembly-line fashion. In 1897 its stenographers and typists turned out 9,570 typewritten pages of letters and opinions and over 10,000 pages of testimony in park acquisition proceedings, in addition to typing uncounted pages of complaints, answers, briefs, arguments, and the like.[71]

The true significance of their work is not just that it was better and faster than that of the old-fashioned copyists. The real point is it could not have been done at all without them and that the Law Department could not have become a "law factory" but would have remained, as most private firms still were, a virtual cottage industry. And it was not just stenographers and typists who made a difference, but the rest of the clerical force as well. The chief clerk and his deputy oversaw the practical operations of the office, relieving the corporation counsel of that

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[70]Theron G. Strong, Landmarks of a Lawyer's Lifetime (New York: Dodd, Mead and Company, 1914), p. 393.

[71]Law Department, Annual Report (1897), pp. vii, xiii.

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necessity. The register clerk kept a record of all the office's business, ensuring that deadlines were met and lawyers were where they were supposed to be. The examiners located and interviewed witnesses, determined the facts of accidents and other cases, arranged for photographs and physical models, and in countless other ways saved the time of trial attorneys. The department's self-taught librarian not only kept the library but compiled and periodically updated two valuable finding tools--an Index of Cases, Points, and Opinions[72] and Table of Cases, Involving Questions of Law Peculiar to the City.[73] With these, and with law clerk Edwin J. Freedman's Index to Opinions of the Corporation Counsel, the department's lawyers could not only find legal precedents for their cases but also determine if a question had already been answered by the department. A large part of their work became, in effect, a scissors-and-paste job to be turned over to a typist. The saving in time was tremendous, and it explains how the department got

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[72]New York City Law Department, Index of Cases, Points and Opinions, three editions (1887, 1891, 1898), all compiled by James M. Valles. Beginning with 335 pages in 1887, the index ran to 883 pages in 1898, and included a table of assessments.

[73]New York City Law Department, Table of Cases, Involving Questions of Law Peculiar to the City and County of New York, 4 editions (1882, 1888, 1895, 1916). The first edition (no pages given) was compiled by assistants Lacombe and Arthur Masten, and the next two (with 85 and 155 pages) by Valles.

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so much done without hiring any more lawyers than it did.[74]

In addition, the department eagerly adopted new techology at a time when it was still suspect in many leading private firms. The Remington Company manufactured the first commercially feasible typewriter in 1874--a crude machine that printed only capital letters--and the corporation counsel snapped up one of the first models demonstrated in New York City. The Law Department was one of the first telephone subscribers in the city, appearing in the city's first telephone book in 1879.[75] The city's private firms were considerably more cautious in adopting the new office technology, with the senior partners of the old "white-shoe" firms particularly resistent to its intrusion. The Seward firm, for instance, did not get its first typewriter until 1886, and then only after the Remington salesman and office manager James Hillhouse smuggled it past Clarence Seward.[76] Even after buying typewriters,

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[74]Edwin J. Freedman, Index to the Opinions of the Counsel to the Corporation on Questions Relating to the Administration of the Various Departments of the City of New York from 1874 to 1888 (1888). This 660-page index was supplanted by the much less detailed Index to Cases, Points, and Opinions above.

[75]See Law Telegraph Company, Telephone Exchange System (1879). This book, containing the numbers of 800 subscribers, was actually the city's second telephone directory; the first, published the previous year, listed its subscribers on a single sheet.

[76]As Swaine tells the story in The Cravath Firm (pp. 49-50), "The next morning Mr. Seward opened the door, and the first thing he saw was his pet aversion. 'What's that?' asked Seward. 'I don't know, sir,' replied Hillhouse, very nervously. 'I believe it is a typewriter.' 'How did it get here?' asked Seward. 'I don't know, sir,' stammered Hillhouse. 'Well, it's not going to stay, is it?' asked Seward. 'Oh no, sir,' Hillhouse replied." In the end, of

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most firms used them sparingly, fearing that valued clients would take a typewritten letter as meaning they were not considered important enough for a "personal" one.[77]

Similarly, there was a great deal of suspicion toward the telephone. Sullivan & Cromwell hung one on the wall in 1881 and then forbade its clerks to touch it unless it rang.[78] The Seward firm, both of whose partners detested the instrument, banished it to a "telephone closet" in the outer office.[79] There were two great fears: one, that would eliminate the personal touch on which lawyers depended, and the other, that wires might get crossed somehow and rival firms eavesdrop on their business. For these and other reasons, as in the case of the typewriter, senior members of many firms avoided use of the telephone even after it had been in their offices for years. As late as 1914, when John Foster Dulles joined Sullivan & Cromwell as a clerk, he discovered that the firm had not yet really

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course, it saved the day and Seward grudgingly allowed it to stay--but adamantly refused to allow it used to be for his own correspondence.

[77]For the adoption of typewriters, see Hobson, "The Large Law Firm," p. 10, and the individual firm histories cited at p. 24, notes 23-25.

[78]Arthur H. Dean, William Nelson Cromwell, 1854-1948: An American Pioneer in Corporation, Comparative and International Law (New York: privately printed, 1957), p. 28.

[79]Swaine, The Cravath Firm, pp. 448-49. Swaine notes that it was a small closet built of cheap pine for $22, installed after the partners refused to spend $40 for a "more commodious and luxurious mahogany one."

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accepted either the telephone or the typewriter. "Some of the older partners felt that the only dignified way of communication between members of the legal profession was for them to write each other in Spencerian script, and to have the message thus expressed delivered by hand," he observed.[80]

The corporation counsel and his assistants were under no such constraints. Lacking any need to preserve the office as a male sanctuary or to flatter their clients with "personalized" service, they embraced the clerical revolution and the new technology with enthusiasm and made maximum use of it. If, in the words of one scholar, "the telephone, the typewriter, and probably the female stenographer-typist made the proliferation of the large law firms possible," they even earlier made possible the rise of a gigantic New York City Law Department.[81] The senior partners of the old law firms were reluctant to adopt the new ways because they seemed contrary to the genteel professionalism they associated with legal practice. Clattering typewriters, jangling telephones, and Katie O'Reilly behind the desk did not quite cut the picture Evarts, Southmayd & Choate had of its office.

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[80]John Foster Dulles, "Foreword," in Dean, William Nelson Cromwell, p. iii.

[81]Quotation from Hobson, "The Large Law Firm," p. 10.

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But to the corporation counsel--whose choice was between embracing these changes or letting much of the city's practice go to outside counsel--the clerical revolution and the new technology came as a welcome deliverance. The heads of the great private firms were repelled by the changes because they associated them with organizational trends they disliked in business and industry.[82] The corporation counsel, on the other hand, associated them with recent trends in government offices in general, and saw nothing particularly demeaning in them--particularly inasmuch as they enabled his office to keep control of the city's legal business. What is significant about the New York City Law Department during the late nineteenth century was not that it grew so rapidly, but that it made itself into a hugely successful legal bureaucracy.

The word "bureaucracy" has taken on an unfortunate pejorative connotation, but at heart it is simply a rationalized system for getting huge amounts of work done with large numbers of people.[83] What held back law firms, even as they began to organize themselves as "law fac-

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[82]Wayne K. Hobson, The American Legal Profession and the Organizational Society, 1890-1930 (New York: Garland Publishing, Inc., 1986), p. 143.

[83]See the classic discussion in Max Weber, The Theory of Social and Economic Organization, A. M. Henderson and Talcott Parsons, trans. (New York: Oxford Press, 1947), pp. 330-40, as well as Peter M. Blau and Marshall W. Meyer, Bureaucracy in Modern Society, 2nd edn. (New York: Random House, 1971; orig. 1956), pp. 18-21, 105-110.

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tories" in the twentieth century, was their reluctance to embrace bureaucracy wholeheartedly; as late as 1964, sociologist Erwin Smigel found them still "under-bureaucratized."[84] By absorbing Deming's lesson that it was basically just another a department of city government, the New York City Law Department bureaucratized itself and became not just a large government office but a great law office.

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[84]Erwin Smigel, Wall Street Lawyer (New York: Free Press of Glencoe, 1964), p. 62.

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Chapter XV

THE END OF AN ERA

The Law Department had for some years been moving toward the sort of structure described in the Deming Report: at its top a corporation counsel who came and went with the fortunes of politics, and at its base a staff whose longer tenure gave the office its "permanent character."[1] When Deming made his study in 1885, chief assistant David Dean had been in the office almost twenty years and had seen five different department heads come and go. Nine other clerks or assistants had been in the office five years or more, including four who had been there over ten years.[2] And although Andrews and Lacombe had risen from their ranks, both were quintessential examples of the "accidental chief"; that is, they owed their selection as much to the exigencies of politics as to their professional qualifications. The distinction that Deming drew between

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[1]Deming Report, p. 16.

[2]Calculated from the dates of their appointments, as shown in Deming Report, pp. 1-2.

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the "political" corporation counsel and his more purely "professional" staff was well taken, and it grew even more pronounced through the remaining years of the century. The next four department heads after Lacombe--Morgan J. O'Brien, Henry R. Beekman, William H. Clark, and Francis M. Scott--were all highly political choices.

Lacombe had been appointed to a full four-year term in January of 1885 and after serving two years under Grace expected that he would serve another two under his successor, Abram S. Hewitt. It was not long, however, before all this changed. Early in March of 1887 a bill was introduced in Congress adding another judge to the busy Second Circuit Court, and Whitney called in his political chits in the Cleveland administration to secure the appointment for his protege Lacombe.[3] Although the appointment would not be formally made until May and would not go into effect until July 1, it was common knowledge by the end of March that Lacombe would be named to the new post--which was, next to the Supreme Court, the most prestigious in the federal judiciary.[4]

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[3]Whitney's role may be deduced from a note to Cleveland's private secretary (Whitney to Daniel S. Lamont, May 1887, in Cleveland Papers, microfilm reel no. 3), which Hirsch (in Whitney, p. 359) confuses with Lacombe's appointment as corporation counsel.

[4]Times, March 19, 1887, p. 8. For a history of the Second Circuit Court, see Jeffrey B. Morris, Federal Justice in the Second Circuit (New York: Second Circuit Historical Committee, 1987).

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Once again the city was thrown into an uproar over the selection of a corporation counsel. Hewitt had come into office as another "unity" mayor, chosen because the County Democracy and Tammany Hall had been forced to close ranks against two alarmingly popular candidates--Henry George, the hero of an insurgent labor movement, and Theodore Roosevelt, the Republican Party's newest and brightest star. Hewitt owed his election not just to his own reform colleagues in the County Democracy but in a special sense to the new boss of Tammany Hall, Richard Croker, who had engineered the deal between the two factions and had furnished most of the election-day muscle behind his victory. Like Edson before him, he came into office indebted to both factions of the party and owing both a share of the city's patronage jobs.[a]

Having inherited Lacombe, Hewitt had not expected to have his office to fill and was completely unprepared when it fell into his hands. He had already put the man who would have been his first choice, his close friend and fellow reformer Henry R. Beekman, in a strategic post--president of the Board of Aldermen--from which he was loath

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[a]Kelly, who had been in failing health for some time, had died the previous year. For three perspectives on the 1886 municipal election, see Allan Nevins, Abram S. Hewitt, pp. 447-69; Charles Albro Barker, Henry George (New York: Oxford University Press, 1935), pp. 453-481, and Edmund Morris, The Rise of Theodore Roosevelt (New York: Coward, McCann & Geohegan, Inc., 1979), pp. 342-57.

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to remove him.[6] His second choice was another close friend, Charles H. McLean, who had long been associated in business with him and his brother-in-law Edward Cooper. There were, however, two problems with McLean. The first was that he and Croker were old and bitter foes, and Croker--already disgruntled because Hewitt had recently filled five major offices with County Democrats--would consider his appointment the last straw. Moreover, McLean had invested heavily in some of Hewitt's enterprises, and Hewitt felt that under the circumstances it would be unseemly to appoint him to such an important office.[7]

In fact, Hewitt discovered that the mayor's freedom to make appointments without aldermanic confirmation had actually changed matters very little. Needing the cooperation of the aldermen in getting his programs enacted into law, he could not afford to alienate the board or the bosses who controlled it. The leaders of both major machines--Croker of Tammany Hall and Maurice J. Power of the County Democracy--paid visits on City Hall and presented the mayor with the names of candidates acceptable to

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[6]Times, Dec. 28, 1887, p. 8.

[7]Ibid., July 4, 1887, p. 4. Characteristically close-mouthed about his finances, Hewitt did not volunteer details about exactly what this debt was; the supposition is that McLean had invested money either in one of Hewitt's businesses or in some joint financial venture. McLean was a cousin of Tilden, to whom he bore a striking resemblance and in whose service he had made a number of enemies, including Croker. For his political career, see ibid., Oct. 10, 1895, p. 1, and Mar. 21, 1925, p. 19 [obituary notice].

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their organizations. Hewitt heard them out and promised to consider their recommendations, but made no outright commitment to either.[8] He was, in fact, under considerable pressure from a number of prominent lawyers, businessmen, and officeholders to appoint a quite different set of favorites: among them, Franklin Bartlett, Peter B. Olney, Wheeler H. Peckham, William J. Marrin, and General Daniel Sickles.[9]

When Lacombe formally notified him in May that he would be leaving on July 1, Hewitt was no closer to a decision than he had been in March. Lacombe urged him not to delay much longer; he needed to brief his successor on a number of pending cases and other matters, including a review he had recently ordered of all Ring litigation still on the books.[10] As the weeks went by, he watched with growing frustration as Hewitt continued to take his time mulling over the choice. Nor was Lacombe the only one irked by the mayor's indecision; by the end of June it had become such

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[8]Croker offered the names of O'Brien, John M. Bowers, and George M. Forster, and Power put forward McLean and Francis M. Scott. Ibid., June 30, 1887, p. 4, and New York Star, July 2, 1887, p. 4.

[9]For a sampling of the letters to the mayor on the subject see F. R. Coudert to Hewitt, March 30, 1887; Daniel Lord, Jr., to same, March 21, 1887; Robert Ogden Goelet to same, March 24, 1887; C. C. Baldwin to same, May 5, 1887; John E. Parsons to same, June 1, 1887; William J. Marrin to same, June 1, 1887, and E. R. Meade to same, June 4, 1887--all in Mayors' Papers, Abram S. Hewitt (1887), Mayor's Correspondence (Appointments).

[10]New York Star, July 1, 1887, p. 4.

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an item of gossip that the Times memorialized it with a fable entitled "The Lion Who Had Many Minds and None of Them Made Up."[11]

In need of a corporation counsel, so the story went, a certain "King of Beasts" roamed the political field in search of wisdom. He sought "a prominent Wolf"[12] and asked whom his tribe would suggest. Eager to please, the Wolf replied that anyone His Majesty chose would be fine with his tribe.

> "There's the rub!" exclaimed His Honor. "I have a Dear Friend who wants this place, but it is known that I am under great Obligations to him, and I cannot stoop so low as to use the Appointing Power in discharging Personal Debts--unless your Organization demands it of me."
>
> "Pooh!" said the Wolf. "Why didn't you make a McLean[13] breast of it in the first place? Certainly, we demand it of you, and if you wish, I will put it in writing."[14]

Next the King of Beasts chanced upon the Shepherd,[15] who answered firmly that he should, of course, fill the position through the merit system. The irony of this

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[11]Times, June 29, 1887, p. 4.

[12]Wilson S. Wolf, chief of the "Cromwellian" Wolfe Board of Aldermen.

[13]An obvious reference to the mayor's friend Charles H. McLean.

[14]New York politicians had been gibing one another to "put it in writing" ever since the 1886 bribery trial of public works commissioner Rollin Squire, in which his written promises to political backers had come back to haunt him. See the Times, Aug. 11, 1886, p. 1.

[15]Civil service reformer Edward M. Shepard.

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advice was lost on no one; Hewitt, an ardent supporter of civil service reform as a congressman, was conspicuously lax in applying it to his own administration.[16]

> The noble Beast thoughtfully perused the Ceiling for a time. "There is much sense in what you say, my good friend," he remarked at length, "but the Executive Mind is constantly subjected to a Pressure of about 167 pounds to the square inch, and since I have held this great Office, scores of my good intentions have been sent Below for Paving Stones."[17]

At this point the "Cassowary"[18] rushed into his presence and asked when he expected to make his choice. "I know your Honor must have some time for deliberations," he blurted, "but some of the Boys have got up a little Pool on this thing, and we would like to know when you will announce."[19]

With a mighty roar the King of Beasts banished him from the realm and dashed off a letter to to the superintendent of police demanding rigid enforcement of the law against gambling pools. Leaving His Honor in virtuous contempla-

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[16]Ari Hoogenboom, Outlawing the Spoils: A History of the Civil Service Reform Movement, 1875-1883 (Urbana, Ill.: University of Illinois Press, 1968), pp. 198, 247, 249.

[17]Times, June 29, 1887, p. 4.

[18]A large bird related to the emu, probably intended to evoke the name of Bertrand Casserly, a local political character who was the brother of the late senator Eugene Casserly. See ibid., Nov. 13, 1873, p. 2 ["a well-known politician in the city"], and Apr. 14, 1889, p. 12 [cashiered in disgrace from the Manhattan Club for stuffing its ballot box].

[19]Times, June 19, 1887, p. 4.

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tion of the pending appointment, the Times ended its fable with a solemn observation:

> Moral, if any: It is hard for any man to be as Good and Great as he seems.[20]

Hewitt had reached an impasse that was strikingly similar to the one Edson had faced some three years earlier, fueling speculation that he would turn to the same solution--a "merit" promotion from within the department that would offend no one. The longer he delayed announcing an appointment, the more likely it seemed that this would be the case. Otherwise, why should he ignore Lacombe's repeated reminders that he needed to familiarize his successor with the business of the department? The main beneficiary of this theory was David Dean, the veteran chief assistant whom many considered long overdue for the honor. Dean's partisans were many, well-placed, and highly vocal, and they did not hesitate to ventilate their feelings on the matter to Hewitt. It was inexplicable to them that a man they considered their professional peer--one whom many considered the most outstanding appellate litigator in the American bar--should never have been advanced beyond the status of an associate in their own offices.

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[20]Ibid.

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The same leaders of the bar who had pressed him on Edson now pulled out all the stops urging him on Hewitt.[21]

One of Dean's most vocal supporters was Lacombe himself, still feeling pangs of conscience for having consented to being promoted over his head. In a revealing and unusually emotional interview with the New York Times on the eve of leaving office, Lacombe looked back over their years together and spoke affectionately of his friend and mentor. He recalled how Dean had stifled his own disappointment to insist that Lacombe accept the appointment offered him by Edson, assuring him that he felt toward him as "an older brother toward a younger one." In Lacombe's opinion, Dean was "pre-eminently fitted for the place" and, more than anyone else, entitled to it. But did he think Dean was likely to be chosen? "About that, I know nothing," Lacombe admitted to his interviewer. "I do not suppose the politicians want him."[22]

Lacombe left office on June 30 still in the dark as to his successor and leaving behind, as a parting gesture, a thick stack of papers on his desk addressed "To the Great Unknown."[23] The next morning City Hall was crowded with politicians gossipping about the chances of the various

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[21]Post, July 1, 1887, p. 2.

[22]Times, June 30, 1887, p. 8.

[23]Ibid., July 1, 1887, p. 4.

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candidates and giving long odds that it would be Dean. "Just before noon Mayor Hewitt sent his private secretary Mr. [Arthur M.] Berry to ask Mr. Dean to come to the City Hall," reported the Evening Post. "This was accepted by the associates of Mr. Dean as a sure sign that he was to be appointed, and as he left the office he was heartily congratulated."[24]

Dean entered the mayor's office only to come out a little less than an hour later, trailed by Hewitt and a visibly discomfited Morgan O'Brien. As Dean stood silently by, the mayor administered the oath of office to O'Brien. The members of the press were momentarily stunned into silence, and not until Dean disappeared with O'Brien--presumably to show him around the office--did they begin to pepper the mayor with questions. Why had he chosen O'Brien rather than Dean? When had he decided? When had he told them? Characteristically testy, Hewitt fielded their questions crossly. He had chosen O'Brien because "after very careful consideration" he had believed him to be "the most available man for the place." Neither O'Brien nor Dean had known which would be chosen, he went on, nor in fact had he; he claimed he had not made up his own mind until that very morning. There was, he said, "the best of feelings"

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[24]Post, July 1, 1887, P. 1.

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between the two men, and Dean would stay on as chief assistant.[25]

If Hewitt had halted there, his attempt to smooth matters over might have worked. But still resentful of the lofty tone that Dean's supporters had taken with him, he could not resist sending a parting shot in their direction. "Mr. Dean is a most capable officer, and it is not because of any lack of ability on his part," he informed the reporters, "but because of the very injudicious and indiscreet manner in which his friends have acted, that he has not been appointed."[26]

It was this demonstration of malice that, as much as the appointment itself, infuriated the press. "The course of Mr. Hewitt in the selection of the Corporation Counsel has been unworthy of a statesman of his pretensions and is calculated to seriously shake the confidence of the people of New York in his sagacity, consistency, and good faith," the New York Times fumed.[27] "The way in which the Mayor has filled the Corporation Counsel's office will, we think, cause general disappointment and regret," observed the Evening Post.[28] Even those journals which, like the Sun,

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[25]Ibid.

[26]Ibid.

[27]Times, July 2, 1887, p. 4.

[28]Post, July 1, 1887, p. 2.

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regarded O'Brien as "a creditable appointment," flayed the mayor for his shabby treatment of Dean. "In other words," exclaimed the Sun, "Mr. Dean would now be the chief law officer of the city instead of Mr. O'Brien, if Mr. Dean's friends had not talked to the Mayor too much!"[29] The editors of the Herald were likewise astonished by the mayor's reasoning and pronounced it "a novel principle to act on in making one of the most important appointments in the municipal service."[30]

The choice of O'Brien was a baffling one to the press. The son of Irish immigrants of modest circumstances, he was the product of the city's public schools and of St. John's College. He had attended Columbia Law School and clerked in the office of John T. McGowan, a minor Tammany figure. At thirty-five, he had been practicing law barely a dozen years, specializing in riparian law and serving as counsel for several ferry companies.[31] The Evening Post noted that "it is as a Tammany politician, and not as a lawyer, that he is best known in this city, to the few who have ever heard of him."[32] Yet he was not particularly well known even as a Tammany politician; he was a district leader and

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[29]Sun, July 2, 1887, p. 2.

[30]Herald, July 2, 1887, p. 3. For other press comments, see the editorial comments quoted in the Times, July 4, 1887, p. 4.

[31]McAdam, Bench and Bar, vol. 2, p. 195.

[32]Post, July 1, 1887, p. 2.

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a sachem, but had never held office before and was not part of the organization's inner circle. The general supposition was that he was a mid-level Tammany hack, beholden to Croker and appointed as a sop to the Irish vote. "Mayor Hewitt has yielded," the Herald groused. "Dick Croker has won his point."[33] Even those newspapers friendly to Tammany were at a loss in finding words to describe O'Brien's qualifications for the post. The Star--the only newspaper to endorse him outright--extolled his youth, energy, and "adequate" experience.[34] The Post, which had been fretting editorially for some time that the mayor might appoint "a low grade of Tammany politician," pronounced itself relieved he had done no worse than O'Brien.[35] And the Tribune, whose editors would have preferred Dean, concluded, "It can nonetheless be said that the Mayor's concession to Tammany Hall does not seriously threaten the city's interests."[36]

The mystery behind O'Brien's appointment began to clear in October, when Hewitt arranged for the County Democracy to join with Tammany in nominating O'Brien for a state

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[33]Herald, July 2, 1887, p. 3.

[34]Star, July 2, 1887, p. 4.

[35]Post, July 1, 1887, p. 2.

[36]Tribune, July 2, 1887, p. 4. "If ever faint praise would damn an executive act, that would!" commented the Times [July 4, 1887, p. 4].

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Supreme Court judgeship. O'Brien had been in office barely three months, and such speedy elevation to a judgeship struck the editors of the Times as highly unusual. Their suspicions were raised further when, after O'Brien was elected to the court in November, Hewitt hinted he would be replaced by Henry Beekman, who was "retiring" from the presidency of the Board of Aldermen. The Times began to fit the pieces together, and on December 28 ran a long exposé purporting to reveal the machinations behind the O'Brien's appointment.

When Lacombe had announced his impending departure back in March, the Times said, Hewitt had found himself in a quandary. He wanted to appoint Beekman, but could hardly afford to do so. Hewitt's health was poor and he had already been forced several times to call on Beekman, in his capacity as president of the Board of Aldermen, to serve as acting mayor in his absence. If he removed Beekman from that position to make him corporation counsel, then the vice-president of the board, saloonkeeper Patrick "Paddy" Divver, would step into his shoes. Unable to face the prospect of "a Chatham Street rum-seller" acting as mayor in his absence, Hewitt begged Beekman to stay put and let him work out something for the next year. "After a great deal of consultation," the Times reported, "an arrangement was made by which Morgan J. O'Brien agreed to

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keep the place warm for Mr. Beekman, provided that he should be given a Supreme Court judgeship in the fall."[37]

The mayor promptly denied any such "deal" but offered no explanation other than, predictably, to brand the Times account "a pack of lies."[38] To most readers, however, the Times account--while it was wrong on one or two minor details[39]--had the ring of truth. It made sense of many things that otherwise simply did not add up. In particular, it explained why Hewitt would appoint a little-known Tammany lawyer rather than any number of far better qualified candidates; he could hardly have asked a lawyer of the stature of Wheeler Peckham, for instance, to be a party to such a ruse. O'Brien--young, ambitious, accommodating--fit the bill perfectly, and had the additional advantage of being a Tammany man at a time when the mayor owed Tammany a favor or two.[40]

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[37]Times, Dec. 28, 1887, p. 4.

[38]Post, Jan. 3, 1886, p. 4.

[39]It said, for instance, that the term to which Lacombe had been appointed expired at the end of 1887.

[40]Hewitt could hardly have made the same arrangement with Dean; even if he could have overcome Dean's abhorrence of political "deals," he would not have been able to guarantee him the spot on the court. Hewitt could deliver only the County Democracy's endorsement, which was enough for O'Brien--who already had Tammany on his side--but not for Dean, who most emphatically did not. And even assuming he could have made the deal, there is one compelling reason why he would not have wanted to do so: a good chief assistant to the corporation counsel was hard to find while Supreme Court judges, if not exactly a dime a dozen, were relatively easy to come by.

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Although O'Brien was essentially only passing through, he still left a mark on the office--ironically, more by what he did not do than by what he did. Part of his bargain with Hewitt was that he would make absolutely no changes either in policy or personnel, and he kept his word. "I will be no bull in a china shop, you may be sure," he told a Times reporter. "Everything will be conducted on the most conservative basis, and there will be no revolution in the management of the office."[41] And there was none; true to his word, he kept the staff intact and the office on the same course Lacombe had set for it.[42]

In doing so, he reinforced the growing belief--as enunciated by Deming--that the strength of the department was its professional staff, and that the continuity of this expert body should be respected by those who found themselves temporarily at its head. That there had been no great upheaval in the personnel of the office in the transitions between Whitney, Andrews, and Lacombe was not particularly remarkable inasmuch as they all belonged to the same political organization. But the accession of

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[41]Times, July 2, 1887, p. 2.

[42]In writing the department's annual report, O'Brien gave generous credit for the year's accomplishments to Lacombe and his assistants and pronounced himself fortunate to have retained all the staff [Law Department, Annual Report (1887), p. v]. A comparison of "Law Department Officers," City Record (1887), p. 234, with ibid. (1888), p. 228, shows a change in only four clerks and assistants, all of which could have happened under either Lacombe or Beekman.

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O'Brien was another matter. The fact that a Tammany corporation counsel had succeeded a County Democrat and then had made no change at all was an astonishing political event. Far more than the earlier turnovers, it reinforced the notion that the "permanent character" of the Law Department existed separate and distinct from its many "accidental heads" and should not be unduly interfered with by them.

O'Brien was in office only six months altogether, but long enough to become a convert to the new "Deming system" and to give it a ringing endorsement in the department's annual report for 1887. Noting that the department had just completed a record year--had, in fact, handled more transactions than any other law office in the nation--he declared that its success was due to the recent reorganization of the office begun by Lacombe and continued by himself.[43] This endorsement of the Deming system was a crucial one. Without it, when Tammany rode back into power in the next election the new system might easily have been dismissed as the joint brainstorm of a Republican efficiency expert and a "reform" corporation counsel. Instead, by virtue of O'Brien's sponsorship, it had become identified as much with Tammany as with the County Democ-

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[43]Law Department, Annual Report (1887), pp. v, xii.

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racy, with the result that its retention never became an issue.

O'Brien went on to serve as a Supreme Court judge and then as presiding justice of the Appellate Division, eventually winning a place of honor in McAdam's Bench and Bar as "an able and careful jurist."[44] For him, the office of corporation counsel had been a career-maker, the springboard that propelled an obscure practicioner from the middling ranks of the law to a distinguished place on the bench. For the man who succeeded him, however, it served no such function; Henry Rutgers Beekman took such high rank for granted, having been born into the nearest thing New York City had to an aristocracy. The scion of one of its oldest and most distinguished Knickerbocker families,[45] he belonged to all the right clubs (Union, Century, Manhattan,

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[44]McAdam, Bench and Bar, vol. 2, p. 295. Typical of a spate of celebratory volumes that appeared in practically every state around the turn of the century, this work is generous with its adjectives, ascribing eminence and distinction to all its subjects. What is significant is not the praise accorded O'Brien--one would expect as much--but his inclusion in the work at all; it is evidence that he was not the archtypical "Tammany judge" but a jurist of genuine merit. Richard O'Gorman, sitting on the same bench as O'Brien, did not make the cut for inclusion in Bench and Bar.

[45]One of Beekman's forebears arrived on the same ship as Peter Stuyvesant and promptly began buying large chunks of Manhattan Island; others later added to the family fortune with an immense land grant--Dutchess County's "Beekman Patent"--as well as several successful businesses. The family name is memorialized today in several Manhattan place names: Beekman Street, Beekman Place, Beekman Tower, and Beekman Hospital. See Philip L. White, The Beekmans of New York in Politics and Commerce, 1647-1877 (New York: New-York Historical Society, 1956).

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University, St. Nicholas), the right reform groups (the Committee of Seventy, the County Democracy, the City Reform Club, the Real Estate Exchange's legislative committee), and the right civic movements (public schools, small neighborhood parks, tenement reform, clean streets, and rapid transit).[46] Lacking any necessity to work for a living, he became a pioneer in what would later be called public interest law; that is, he used his legal expertise to further certain causes that he felt were in the public interest, developing along the way an unusual ability to size up an organization's goals, translate them into workable legislation, and get them enacted into law. His "clients" included a host of civic and professional groups and their members--the Real Estate Exchange, the Chamber of Commerce, the City Reform Club, and others. "Hardly any measure of real importance to the progress of the city lacked the impress of his active, fertile, and constructive mind," the Times would later note.[47]

Beekman was no stranger to municipal office--or, for that matter, to the Law Department. He had been a school

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[46]Ibid., pp. xxv-xxvi; McAdam, Bench and Bar, vol. 2, pp. 40-41; National Cyclopaedia of American Biography, vol. 12, p. 469, and the Times, Dec. 18, 1900, p. 9, and Dec. 19, 1900, p. 8.

[47]Ibid. I put the word "clients" in quotation marks because there is no evidence that any of these groups ever executed a formal retainer, let alone paid him a fee. Instead he seems to have represented them as a member himself (the Real Estate Exchange, City Reform Club) or as a favor to friends (the Chamber of Commerce).

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trustee under Edson, head of the Parks Department under Grace, and president of the Board of Aldermen under Hewitt. In the latter two posts he worked closely with Andrews, Lacombe, and O'Brien, and with their assistants, on a number of matters. He made frequent requests for legal opinions and for help in examining contracts and drafting legislation, and although he is credited with writing the landmark Small Parks Act, it is almost certain that he farmed out the actual drafting of the bill to the Law Department.[48] As a result, he came into office with considerable familiarity with its work and an appreciation for its staff--and with no inclination to change either. Like O'Brien before him, he made a point in his annual report of endorsing the specialized organization of the office. And like O'Brien, he was careful not to tamper with the staff; he replaced only assistant--Francis Scott, who left in August 1888 to take a coveted post as aqueduct commissioner--and two very junior law clerks.[49]

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[48]For opinions and contracts furnished the Parks Department and Board of Aldermen during his tenure, see Law Department, Annual Report (1885), p. vi; ibid. (1886), p. viii, and ibid. (1887), pp. viii, xi. The annual reports do not detail the numbers of legislative bills drafted, but they do indicate that one assistant did nothing but legislative work; it would have been unusual for Beekman not to have depended on him for the actual writing of the act [New York, Laws (1887), ch. 221]. The New York Times [Oct. 10, 1890, p. 1] remarks that assistant Francis Scott prepared "all" the city's legislative bills between 1885 and 1888.

[49]"Law Department Officers," City Record (1888), p. 300, and (1889), p. 352.

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Beekman had no interest in building an empire of his own (the office, in his mind, belonged to the city and not to the man)[50] or in using the post to advance his career. He, after all, hardly had a career; the Law Department was simply part of his ongoing involvement in civic affairs, a means rather than an end in itself. His interest in it was the opportunity it afforded him to pursue through official channels the causes he had been promoting with mixed success in private life. As corporation counsel, he occupied the same relationship toward Hewitt that he had filled unofficially for several years: adviser, counsellor, legislative lieutenant. One of their pet reforms--small neighborhood parks for the city's poor--had (or at least so it seemed to them at the time) already been effected the previous year, with the passage of the Small Parks Act.[51] But there were plenty of other matters the two intended to pursue from City Hall: rapid transit, a reorganization of the corrupt Aqueduct Commission, ridding the city of

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[50]For Beekman's philosophy of office, see his inaugural address as president of the Board of Aldermen--a peroration that must have been all but incomprehensible to that assemblage of saloonkeepers, horsecar conductors, and courthouse "fixers" [Board of Aldermen, Proceedings, Jan. 9, 1887, pp. 79-83.]

[51]The authorship of which is credited to Beekman, although he probably drew on the Law Department for its composition. As it turned out, however, it would be another twenty years before the parks were actually funded and in existence--practically a textbook example of the tendency of reformers to believe they had solved a problem once they had passed a law about it. See Nevins, Abram S. Hewitt, pp. 504-06.

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dangerous overhead wires, clearing the streets of peddlers and other impediments, and closing down the city's notorious "dives" and disorderly houses.[52]

For all their official standing, however, Hewitt and Beekman were essentially outsiders in the government that mattered--the shadow government of Tammany Hall. They lacked the support of the organization that controlled the Board of Aldermen, most of the municipal workforce, and much of the legislature. And for all his success in business and social life, Hewitt proved appallingly inept as a politician. He did not bother to keep his fences mended with Croker and treated the Board of Aldermen with an indifference that bordered on contempt. Worse yet, he offended several powerful constituencies. In a series of bizarre outbursts he denounced the Knights of Labor as "worse than highwaymen," disparaged the Grand Army of the Republic as a horde of office seekers, and then, to cap it off, refused to review the annual St. Patrick's Day parade. In the memorable words of Matthew Breen, he "gnawed to pieces as it were, like a ferocious tiger, the political bands that bound him."[53]

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[52]For the Hewitt administration's goals, see ibid., 470-506.

[53]Breen, Thirty Years of Politics, p. 769. These and other bizarre episodes are described in ibid., pp. 766-8`70; Hammack, Power and Society, pp. 137-39, and Nevins, Abram S. Hewitt, pp. 507-20. Hewitt's irascibility may be explained at least in part by the torment he suffered with arthritis. "I have not had as much sleep as three or four hours per night for the last forty years," he lamented to a friend in 1892 [letter quoted in ibid., p. 507].

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Unfortunately, these were also the bands that were necessary for the success of his program, without which Hewitt and his hand-picked department heads had little power to do the things they wanted. Yet Hewitt seems not to realized this. He tried to run New York City the way he ran the Trenton Iron Company: gathering a few directors in the boardroom, determining what to do, and then issuing orders. His notion of municipal government consisted of holding cabinet meetings with his department heads, thrashing out policy decisions with them, and sending these decisions to Albany to be enacted into legislation. In these meetings Beekman was a prime participant, serving the same indispensable function that "corporate counsel" were increasingly occupying in business, where hardly any corporate decision of consequence could be taken without considering its legal ramifications.[54]

Hewitt no more thought of involving the aldermen in these decisions than he would have invited iron puddlers into the Trenton boardroom. In his scheme of government, he and his cabinet determined policy, the corporation counsel drafted the necessary legislation, the legislature enacted it into law, and the Board of Aldermen followed

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[54]The role of corporate counsel [the "new high priests"] has been the subject of several studies, most notably Twiss, Lawyers and the Constitution; Gawalt, New High Priests, and Wayne K. Hobson, The American Legal Profession and the Organizational Society, 1890-1930 (New York: Garland Publishing, Inc., 1986).

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through with any necessary ordinances. Needless to say, the aldermen had a quite different understanding of city government. After a series of mayoral cabinet meetings in the first months of 1888, the Times reported, "The Board of Aldermen has conceived the idea of a deliberate design on the Mayor's part to deprive it of its power of municipal affairs."[55] The aldermen were hardly mollified by the inclusion in the cabinet of their president, George Forster. He had no more voice in its meetings than any department head and, "severely alone in opposition," was invariably outvoted in its decisions. It suddenly dawned on the aldermen that their entire Board of Aldermen now had no more power in city government than a single commissioner. Its members could not tolerate this state of affairs, so they passed a resolution appointing a policy committee of their own and charged it with drawing up the board's own legislative program and informing Albany what the city really wanted.[56]

At first Hewitt and his department heads did not take the board's challenge seriously. The whole scheme was the occassion of merriment at the next cabinet meeting, with, in the words of the Times, "President Forster and his beer

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[55]Times, March 14, 1888, p. 5. Some of these meetings had been carried as news stories by the Times; see ibid., Jan 24, 1888, p. 8; Feb. 21, 1888, p. 3; Feb 28, 1888, p. 5.

[56]Board of Aldermen, Proceedings, Mar. 13, 1888, p. 963, and Times, Mar. 14, 1888, p. 5.

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garden affording an animated subject of conversation."[57] It was not long, however, before Hewitt and his cabinet realized they had real trouble on their hands. With the encouragement of Croker, who saw a chance to revenge himself against Hewitt and to display his own power, the aldermanic committee opposed almost every item of the mayor's program. Croker masterminded an alliance in the legislature with the Republican "easy boss" Thomas C. Platt and brought down to defeat practically every measure the Hewitt administration introduced--among them a bill requiring police justices to be lawyers, an act permitting streets to be repaved without passage of an ordinance, and a bill for financing the new small parks. But above all Croker sabotaged the measure that Hewitt intended as the capstone of his administration, the "Mayor's Rapid Transit Act"--so named because the Board of Aldermen had beat the corporation counsel to the legislature by ten days with a rival bill, the "Aldermen's Rapid Transit Bill." Faced with a city seemingly at odds with itself, the legislature sensibly turned down both measures.

Beekman's relations with the aldermen were almost as rancorous as Hewitt's. One of his first acts as corporation counsel was to send the Board of Aldermen a legal opinion that it had no discretion over the way its clerical

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[57] Ibid.

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budget was spent; the members were not free, as they had been doing, to allocate the salaries for some positions to others instead. It was an exceedingly minor matter, one he could well have overlooked; the same sort of internal budgetary juggling went on all the time in practically all city agencies. One of the aldermen interrupted the reading of the opinion to ask if it had been called for by any resolution of the board. Told that it had not, the members promptly voted to table the message, and went on spending their clerk hire as they saw fit.[58]

It was a small matter, but one that rankled with the aldermen. They resented as well the way Beekman seemed automatically to take the mayor's side against them in every controversy. In May they briefly considered (but laid aside) a resolution declaring that the corporation counsel should not "appear before any legislative committee, or in any other manner favor or oppose the passage of any bill, except in pursuance of a resolution of the Common Council."[59] They endured with ill grace the many legal opinions from Beekman that Hewitt sent their way accompanying his veto messages; it was not only the opinions they resented but also the supercilious tone he so frequently adopted--as, for instance, in terming a recent ordinance of

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[58]Board of Aldermen, Proceedings, Jan. 17, 1888, pp. 163-76, and Times, Jan. 18, 1888, p. 8.

[59]Board of Aldermen, Proceedings, May 8, 1888, p. 368.

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the board "crude in form and [calling] for amendment providing a more intelligent treatment of the subject."[60] Beekman proved so unpopular, in fact, that at one point the Board of Aldermen sent a delegation to Albany to petition for its own counsel. As reported in the Times,

> Some of the Aldermen think their board should have a special legal adviser. They think the Corporation Counsel is inclined to take views of law tending to the diminution of their powers. Three of them, Messrs. Walker, Carlin, and Oakley, went to Albany yesterday to ask the Legislature to provide for the appointment of a special counsel to the board at an annual salary of $10,000. Orator Carlin will tell the Albany legislators that the board needs a lawyer in full sympathy with the working people, because the Aldermen represent them.[61]

The aldermen's quixotic mission was the culmination of years of frustration with the corporation counsel, but events were already under way that led them to abandon it. In the fall election of 1888 the voters, fed up with Hewitt, had turned him out of office and for the first time in years elected both a Tammany administration and a Tammany Board of Aldermen. The new mayor, handsome young Hugh J. Grant, was hand-picked by Croker to front for him in the

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[60]Beekman to Hewitt, May 22, 1888, in Bar Association Library [accompanying mayor's message vetoing a parking ordinance]. See also Beekman to Board of Aldermen, June 23, 1888 [board cannot regulate weighing of wood, coal, hay, etc.], and same, Sept. 6, 1888 [board is limited in authority to grant exemptions from laws dealing with sidewalk obstructions], both in Bar Association Library.

[61]Times, Mar. 14, 1889, p. 5. If a bill embodying their request was ever drawn, it died in committee.

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new administration. Heir to a prosperous liquor business, Grant had attracted his attention in 1884 when he had been one of only two aldermen with the presence of mind to refuse Jacob Sharp's money. Croker made him sheriff in 1885, and then in 1888 secured his nomination as mayor. With Grant's election, Tammany captured not only the mayor's office but all the patronage at its disposal: twenty-three commissioners and department heads, and all the jobs under their control.[62]

It was the death knell for the County Democracy, which never again mounted a serious campaign. Beekman--the object of the aldermen's ire--was swept from office along with all the other department heads from that organization.[63] If the Tammany victory ushered in a new era of corruption, it also brought an end to the factional wrangling that had crippled the Edson and Hewitt administrations. For the next six years, for better or worse, every-

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[62]Which is to say, virtually all city jobs. Although the state legislature had passed a civil service law covering municipal employees in 1883, the city evaded its implementation until 1894. See Hoogenboom, Outlawing the Spoils, pp. 256-260. For a biographical sketch of Grant, see David C. Hammack, "Hugh J. Grant," in Melvin G. Holli and Peter d'A. Jones, Biographical Dictionary of American Mayors, 1820-1980: Big City Mayors (Westport, Conn.: Greenwood Press, 1981), pp. 138-39.

[63]That is, they were not reappointed when their terms expired in 1889. Beekman went on to pursue his reform agenda through his connections in the Real Estate Exchange, the Chamber of Commerce, and the City Club. He was elected a Superior Court judge in 1894 and taken onto the Supreme Court bench in 1896, serving there until his death in 1900. See McAdam, Bench and Bar, pp. 40-41.

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one in city government--from the mayor all the way down to the man who emptied the cuspidors at night--was pulling in one direction, albeit it one chosen by Richard Croker. The aldermen did not need their own lawyer because they had been issued one by Croker, in the person of corporation counsel William H. Clark.[64]

Clark was not a major Tammany figure but instead was a last-minute substitute for the man originally slated for the post--one of Tammany's legendary "Big Four," his law partner Bourke Cockran. Part of Croker's grand design for gaining control of New York City was for the Big Four--himself, Grant, Thomas F. Gilroy, and Cockran--to take the most strategic posts in city government for themselves.[65] That is, Grant would take office as mayor and then appoint Croker as chamberlain,[66] Gilroy as commissioner of public

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[64]For Croker's strategy, see Martin Shefter, "The Emergence of the Political Machine: An Alternative View," pp. 14-44, in Willis D. Hawley and others, Theoretical Perspectives on Urban Politics (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1976), pp. 35-38.

[65]The "Big Four" was an informal executive committee acting on behalf of Tammany's 24 assembly district leaders, its composition changing with the vagaries of politics. Breen, in his Thirty Years [p. 464], dates it to the vacuum left by Kelly's death in 1886, and lists as members Croker, Gilroy, Cockran, and 21st district leader James J. Martin. Hammack, in his Power and Society [pp. 162-62], identifies them as Croker, Grant, Gilroy, and Martin. For the period of the Grant and Gilroy mayoralties (1889-1894), I have used the composition attributed to it at the time by E. L. Godkin in The New Tammany: Interesting Biographical Sketches of its Leaders (New York: The New York Evening Post, 1894), p. 5.

[66]The keeper of the municipal checkbook; significantly, the same post held under Tweed by Peter B. Sweeny. Under investigation in 1890, Croker turned the post over to a trusted associate and absented himself in Europe.

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works,[67] and Cockran as corporation counsel.[68] Cockran was a natural choice for the office, with its duties essentially an extension of his own function within Tammany as legal adviser, litigator, and "idea man." "It was a matter of common knowledge," writes his biographer, "that from 1886 to 1893 Bourke Cockran, who was by far the ablest and most influential member of the 'Committee,' was the author of every expression of the organization's policy whether proceeding from a convention, a committee or an individual."[69]

Grant came into office on January 1, 1889, but it was May before he actually made his appointments, a new law having gone into effect changing the terms of most city offices.[70] Croker and Gilroy took their offices as planned, but Cockran demurred, unwilling in the end to give

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[67]Tweed's old post; its holder awarded most of the city's contracts and patronage jobs, both crucial elements in Croker's scheme of control.

[68]With its control of all the city's legal affairs, now recognized as "a very important office" [Times, July 2,1887, p. 4]; "of the highest importance" [Tribune, May 27, 1887, p. 4]; "one of the most important appointments in the municipal service" [Herald, July 1, 1887, p. 3].

[69]James McGurrin, Bourke Cockran: A Free Lance in American Politics (New York: Charles Scribner's Sons, 1948), p. 114, echoing similar sentiments in the New York Times, Jan. 8, 1893, p. 17.

[70]Actually, an old law--Chapter 335 of the Laws of 1873--which, for a number of complicated reasons, did not go into effect for most departments until 1889. For its tangled history, see Beekman to James C. Carter, Opinion, Dec. 1888, in Bar Association Library.

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up his law practice for a $12,000-a-year salary as corporation counsel.[71] Coming as it did at the last minute, his withdrawal created a problem; Cockran did not want the post, but he did not want a rival in it either. The solution he proposed was a simple one: Grant would appoint his partner Clark in his place.

Because in their minds Cockran "owned" the position, Croker and Grant went along willingly with his wishes. There was, in fact, something of a precedent for the arrangement. When Croker had put Grant in the sheriff's office in 1885, he had also arranged that he retain Cockran's firm as counsel; Cockran, busy with other matters, had assigned the actual work itself to his young associate Clark. Serving as sheriff's counsel was no small matter, but from all accounts Clark--although he had only recently been admitted to the bar--acquitted himself well. In the course of seizing vast amounts of property and selling it at auction, Grant was slapped personally with $10 million in lawsuits and was saved from financial ruin only by Clark's astute and aggressive defense.[72] Clark's work so

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[71]For Cockran's law practice, see McGurrin, Bourke Cockran, pp. 89-99. Cockran, not an independently wealthy man, depended on the income from his practice and had only recently declined a second term in Congress to devote more attention to his clients; ibid., pp. 111-12.

[72]Rather than being paid a salary, the sheriff received fees of office, and he personally--not New York County--was liable for his actions and those of his deputies. For an explanation of the operation of the office and the financial risks run by its holder, see Cockran's testimony in Testimony Taken Before the Senate Committee on Cities Pursuant to Resolution of the Senate, Adopted January 20, 1890

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impressed Cockran that he rewarded him with a partnership in the firm and designation as his office manager. It also impressed Croker, who took particular note of the fact that Clark had kept strictly to his place--tending to the sheriff's legal affairs--and had not strayed outside it into Tammany's own "business" in the sheriff's office.[73]

Consequently, there was no objection from Croker or anyone else in Tammany to his appointment as corporation counsel. Nor, surprisingly, was there hardly any from the reform press; in the eyes of their editors, the rest of Grant's appointments were so bad that they made his look good in comparison. Moreover, in their view it was also vastly preferable to the alternative. "It is certainly better than taking Mr. Cockran himself, as [Grant] was suspected of an intention of doing," declared the New York Times.[74] "Mr. Cockran discovered that his private practice

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[Fassett Committee], 5 vols. [New York State Senate, Documents (1891) vol. 9, no. 80], pp. 80-84; hereinafter cited as Fassett Committee, Report.

[73]The extent to which Grant's administration of the sheriff's office amounted to perfectly legitimate entrepreneurship (his version) or "a sinkhole of corruption" (the Fassett Committee's version) cannot be nicely determined. It is difficult to apply normal standards to a "privatized" office whose holder paid all its expenses and was compensated only by the extent to which he could make its fees and gratuities exceed them. That Grant managed to turn a profit of $60,000 to $75,000 a year suggests, to paraphrase M. R. Werner, that he "made the most of it" but not necessarily, as he put it, "more than was legal" [Werner, History of Tammany Hall, p. 323].

[74]Times, May 23, 1889, p. 4.

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was worth more to him than the office," the Herald gossipped, "and at the eleventh hour the Mayor found himself free to appoint his personal friend and comrade, William H. Clark."[75] As the Herald hinted, Grant was delighted to be working with the easy-going "Billy" Clark instead of the more distant, cerebral Cockran. He and Clark were the same age--thirty-six--and had become warm friends in the sheriff's office. They lived in the same newly fashionable Upper West Side neighborhood, ran with the same "sporting crowd," and took the same wry view of the older generation of "downtown" politicians.[76]

In fact, as time went on Grant began to claim the appointment as his own idea rather than one dictated to him by Croker and Cockran. In 1890 a state senate committee investigated Grant's administration and asked, among other things, some pointed questions about why he had appointed so many of Croker's Tammany cronies. "Will you state why, out of the entire bar of the City of New York," asked its

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[75]Herald, May 23, 1889, p. 4. For other positive notices, see the issues of the same date of the Star, p. 2, and Tribune, p. 8.

[76]Grant and Clark were mainstays of a social set that flaunted a hearty "masculine" interest in horseracing, high-stakes gambling, popular sports and entertainments, and drinking and dining on a grand scale. For particulars, see Hammack, Power and Society, pp. 101, 163, and for the distinction between Tammany's "uptown" and "downtown" elements, pp. 163-64. For the relationship between Grant and Clark, see the Herald, May 23, 1889, p. 4; Star, May 23, 1889, p. 2; Times, May 23, 1889, p. 1, and Feb. 18, 1900, p. 4.

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chairman, "you selected Mr. Clark as the Corporation Counsel?"

"For the reason," shot back Grant, "that he brought me out of the sheriff's office without having lost one dollar of money in 793 suits, and what was good for me personally, when my own reputation and my own fortune were at stake, I thought was good enough for the city."[77]

And to a great extent it was. Clark was not a legal scholar or even a "distinguished member of the bar," but he was smart, hard-working, and--above all--practical. He came from a family of modest circumstances in Newark and, to judge from the silence in his press release, was not a graduate of any college; his professional training consisted of having "read" law in someone's office rather than having studied it in law school.[78] He had stayed discreetly in the background in Cockran's office, but it was widely understood among other lawyers that he had done far more than carry his illustrious partner's briefcase. Besides handling all the work of sheriff's counsel, he had supervised three associates and handled all of Cockran's clients while he was in Washington. It was an open secret that he had done much of the work that had made his famous boss famous--in particular, the appeal that overturned

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[77]Fassett Committee, Report, p. 31.

[78]Times, May 23, 1889, p. 1; Star, May 23, 1889, p. 2, and Herald, May 23, 1889, p. 4.

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Jacob Sharp's conviction for bribing the "boodle" Board of Aldermen.[79] There was, in short, much more to Clark's appointment than "cronyism."

Clark demonstrated this by displaying a surprising amount of independence in his administration of the office. Despite dire predictions in the press of a "patronage feast," the turnover when he took office amounted to little more than a snack.[80] He kept Dean in place--he was by now a fixture in the department--and fired only one of the senior assistants, placating Tammany's appetite with a handful of clerks and junior assistants.[81] As the months went by, he kept the promise he made the members of the staff when he was appointed: if they could do the work, he would keep them.[82] He was, in fact, far more concerned with keeping assistants than getting rid of them; the real problem he faced, as had his predecessors, was how to retain experienced lawyers who could make much more money

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[79]A remarkable feat inasmuch as several of the aldermen had already been convicted of accepting the bribes; Sharp died technically an innocent man, passing away as the district attorney readied new charges. For coverage of the case, see the Times, Sept. 9, 1887, p. 8 [trial]; Sept. 15, 1887, p. 8; Nov. 30, 1887, p. 8, and Dec. 1, 1887, p. 1 [appeal], and Apr. 6, 1888, p. 5 [death].

[80]"Making Way for Tammany Men," Times, June 11, 1889, p. 8.

[81]According to Clark, the senior assistant, Frank Irish, was discharged "for cause," having bungled a particularly important case [Times, June 23, 1889]. For gossip about the other changes--five junior assistants and two clerks--see ibid., May 26, 1889, p. 9; May 28, 1889, p. 8, and June 11, 1889, p. 8.

[82]Quoted in the Times, May 24, 1889, p. 8.

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on the outside. In November 1889 Thomas P. Wickes, next to David Dean the most experienced man in the department, announced he was leaving to open his own practice.[83] A few months later the office's legendary accident litigator, Francis Wellman, followed a budding interest in criminal law into the district attorney's office.[84] In the next year or two Clark lost three other senior assistants as well: John Townsend, George Coleman, and Charles N. Harris. What is significant is not their leaving, which seems to have been of their own volition, but the care he took in replacing them.

That he chose "Tammany men" is hardly surprising. After the demise of the County Democracy, who else was left? Unless, that is, one appointed Republicans--and Clark had no need to do that. Despite the scathing opinion of the Times that "Tammany has never been known as a nursery of jurists",[85] the party in fact had a plentiful pool of legal talent, and Clark had no difficulty finding highly qualified candidates or getting them past Croker and the

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[83]Wickes had been in the office since 1876 and was one of the city's top trial lawyers; he had just won an important appeals case keeping Whitney's Metropolitan Transportation Company from running a four-track elevated railroad through Broadway [Times, Nov. 11, 1889, p. 9].

[84]With an eye toward entering private practice, he wanted to broaden his experience and at the same time gain more attention from the press. See Francis I. Wellman, Success in Court (New York: The Macmillan Company, 1941), p. 32.

[85]Times, July 6, 1889, p. 4.

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rest of the Big Four. Confounding everyone who had expected appointment of a "Tammany hack," he replaced Wickes with Charles P. Blandy, a Whitney protege with broad experience in the department and a growing reputation, since leaving it, as "one of the best equipped lawyers in the city."[86] Recruiting him to return as "second chief assistant" was a major coup for Clark, and a clear signal that merit would be his chief consideration in making appointments. During the rest of his time in office, Clark chose other assistants just as carefully and, in fact, stocked the Law Department with its next generation of "stars"--John J. Delany, who became corporation counsel himself in 1904; Theodore Conolly, who succeeded Dean as appeals chief and forged an equally brilliant record; Terence Farley, who after 25 years as the office's chief trial lawyer became counsel to governor Al Smith, and Charles D. Olendorf, who headed the condemnation division for 31 years and whose encyclopedic knowledge of real estate values saved the city millions of dollars.[87]

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[86]Quoting his biography in National Cyclopaedia of American Biography, vol. 9, pp. 504-05; see also The Brown Book, pp. 108-09.

[87]Times, Dec. 8, 1903, p. 1 [Delany]; Bar Association, Yearbook (1914), pp. 193-96 [Conolly]; Times, Feb. 17, 1925, p. 17 [Farley], and ibid., Feb. 26, 1927, p. 15 [Olendorf]. None of these could be characterized as a Croker loyalist. Delaney denounced the bosses and bolted the party in 1895; Farley was an outspoken member of the reform element within Tammany; aside from dutifully paying party assessments, Conolly and Olendorf held themselves severely aloof from politics.

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Clark not only made careful appointments but also meticulously followed the recommendations of the Deming report. Except where it was clearly necessary, he avoided retaining outside counsel and insisted on keeping the city's legal business where he felt it belonged--in the Law Department.[88] To ensure that the legal staff did not fritter its time away on routine paperwork, he added thirty clerical employees and assigned as much work as possible to them.[89] He continued the subject-matter divisions (real estate, torts, taxation, and the like) within the corporation counsel's office and established three of them, probably for budgetary reasons, as separate bureaus: the Office of Special Counsel for Water Supply Proceedings, the Bureau of Street Openings, and the Office of the Attorney for Street Improvements in the 23rd and 24th Wards.[90]

Clark's mission as corporation counsel was to put these vast resources at the use of the de facto governing body of

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[88] Times, May 28, 1889, p. 8. Clark justified this policy in presenting his 1890 departmental estimate, in Board of Estimate, Minutes (1889), pp. 297-98.

[89] "Law Department Officers," City Record (1889), p. 352, and (1895), p. 390; Law Department, Annual Report (1894), p. ix. There was remarkably little turnover in the department's clerical force, suggesting that the growth in jobs satisfied Tammany's appetite for patronage.

[90] For a detailed breakdown of the staff in each of these, as well as the older bureaus (Corporation Attorney, Public Administrator, Collector of Arrears of Personal Taxes), see ibid. The most notable appointee was the Attorney for Street Improvements in the 23rd and 24th Wards--Matthew Breen, who must have been working even then on his classic Thirty Years of New York Politics.

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New York City, Croker and his famed Big Four. The Big Four was, in the opinion of one observer, "the board of strategy that controlled the general policies of the city government and of Tammany Hall."[91] In essence, it took over the policy functions of the mayor's cabinet, which was disbanded in 1891 for lack of anything to do.[92] Because its meetings were informal and not subject to public scrutiny, it is impossible to tell exactly what went on or who decided what. Judging from the frequency of their appearances in the press announcing the city's position on various issues, however, Croker and Cockran appear to have been the dominant figures in the group. Instead of interviewing the mayor, for instance, the Times went to Croker in 1890 for his views on rapid transit legislation, and in 1892 reported on his--not the mayor's--meeting with the governor about a pending bill for the inspection of elections.[93] In 1892 it interviewed Cockran about the bills the city would be sending to the legislature and, significantly, ran the article under the headline, "Policy

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[91]Harold C. Syrett, The Gentleman and the Tiger: The Autobiography of George B. McClellan, Jr. (Philadelphia: J. B. Lippincott Company, 1956), p. 96.

[92]Times, March 23, 1891.

[93]Ibid., Jan. 22, 1890, p. 8, and Apr. 12, 1892, p. 8. In every session of the legislature between 1889 and 1894, Croker's name is prominent in newspaper accounts about city bills.

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Forecast."[94]

Clark's role in their deliberations is obscure, but it would appear on the face of it that he conceded a large part of the corporation counsel's policy function to Cockran. Yet at the same time he played an important role in furnishing the means by which they translated policy into action. The legislature in Albany was the main battlefront on which questions of city policy were decided, and Clark's Law Department served not only as the city's official lobbyist but also as a highly efficient, if unofficial, gatherer of intelligence. It was in this area that the "Deming system" proved its worth for the city. For some time the work of drafting bills, lobbying in Albany, and monitoring the progress of legislation affecting the city had absorbed most of the time of one assistant during the legislative session. Clark made this work one of the informal divisions within the office and involved not just the legal staff but the clerical side as well. He assigned Blandy as its head and gave him a support staff which varied according to need; at periods of peak activity he could draw on a full-time junior assistant or clerk and as much clerical assistance as he needed--which, when bills

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[94]Ibid., Jan. 2, 1892, p. 25; see also the follow-up of May 8, 1892, p. 13, and his opposition to bills before the legislature in ibid., Feb. 23, 1893, pp. 8, 9, and Feb. 26, 1893, p. 16. For Cockran's involvement in city policy in general, see the sketch of his career in ibid., Jan. 8, 1893, p. 17.

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were going through several draftings, could be considerable.

With this support staff backing him in the main office, Blandy decamped to Albany for the entire legislative session. In 1890 (a typical year) he examined 1,943 bills and identified 155 as applying directly to New York City, many of which had been introduced without the knowledge of its officials. Blandy monitored the progress of all 155 bills by visiting, in addition to the official committee meetings, the hotels and watering holes favored by the legislators. Throughout the day he scrawled notes about the progress of various bills and each evening dispatched these back to the office by overnight express. The first thing each morning a young "typewriter" transcribed these notes and made carbon copies for the mayor, the corporation counsel, the president of the Board of Aldermen, and all relevant department heads.[95] While a messenger rushed these around, an assistant used the information to update a wall chart showing the progress of each of the bills.[96] He put the daily report into a binder holding the ones that

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[95]"Abstracts of Legislative Bills," in Mayors' Papers, Hugh J. Grant (1890), Legislation Folder.

[96]The 1890 chart, made up of five 18-by-30-inch sections, survives in ibid., and details (among other things) each bill's sponsor, date of introduction, reference to committee, progress through the committee (including the dates of any scheduled hearings), and advancement to consideration by the whole senate or assembly (including the date of its third and final reading).

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had come before, assigned each new page a number (there would be 370 by the end of the session), and then entered each bill mentioned, by page number, into a separate 60-page index.[97]

It all amounted a huge amount of paperwork, but with it the office had at its fingertips up-to-date information about every bill affecting the city. When a question about a bill came into the office, Blandy's assistant (or anyone else for that matter) could give an immediate answer by looking it up in the index and flipping through the binder to the pages where Blandy had reported on it.[98] Armed with this information, the city was able to scotch some 50 bills in committee (including one that would have run a cross-town railroad through Central Park), and to push through others it wanted--among them, a new bridge over the Harlem River, removal of the 42nd Street reservoir, and the lighting of tenement halls. Tammany was not able to pass its major piece of legislation--the "mayor's transit bill"--but on the other hand it succeeded in defeating a rival one sponsored by the Republicans.[99]

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[97]"Index to Abstracts of Legislative Bills," in ibid.

[98]As an example, see his reports on the two rapid transit bills in "Abstracts of Legislative Bills," pp. 2, 18, 61, 75, 91, 112, 227-9, 237, 264, 276, 273, 282, 296, 299, 305, 329, 321, 331, 344, 352, 354, and 370. On pp. 319 and 321, for instance, Blandy alerted the city to an attempt to sneak one of the bills to a speeded-up final reading.

[99]For a round-up of legislation affecting New York City in the 1890 session, see the Times, May 5, 1890, p. 5.

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When Croker and the Big Four had an intense interest in a certain piece of legislation--rapid transit, for instance--they managed it closely themselves, issuing statements and even lobbying personally in Albany.[100] A great deal of legislation, however, concerned matters in which they had little interest, and they left these largely to the various department heads. Parks commissioner Albert Gallup, for instance, managed several bills relating to his department, and at one point inquired of the mayor, rather peevishly, whether Croker had already "directed" the corporation counsel to draw a certain one.[101] In some instances no one gave instructions, and in these cases, surprisingly, Clark often left it up to Blandy whether to support or oppose the bill. "If left to my own judgment I should oppose it," Blandy wrote him from Albany about a bill compelling the removal of an elevated structure in Battery Park. ". . . If you have any different instructions let me know."[102] There were a number of similar letters in the same year, suggesting that this was not an isolated case. The city's policy on several important pieces

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[100]On rapid transit, for instance, see the Times, Jan. 5, 1890, p. 4; Jan. 22, 1890, p. 8; Jan. 23, 1890, p. 2; Feb. 27, 1890, p. 28; March 15, 1890, p. 4; Apr. 15, 1890, p. 4, and Apr. 24, 1890, p. 4.

[101]Gallup to Grant, April 4, 1892, in Mayor's Papers, Hugh J. Grant (1892), Legislation folder.

[102]Blandy to Clark, Apr. 7, 1891, in ibid. (1891), Legislation folder.

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of legislation affecting it was being decided by a $7,500-a-year assistant in the corporation counsel's office.[103]

Clark was, in fact, too preoccupied with all the other duties of his office to pay such minute attention to the details of legislation. His arrival in the Law Department coincided with one of those periodic spurts of activity that strained its resources to the limit--in this case, a rapid expansion of the city's infrastructure, with all the attendant legal problems and complications. During his six years in office (May 1889 to February 1895) the city began building one colossal public works project, the New Croton Aqueduct system, and planning another, its first subway. In addition, it acquired hundreds of acres of new parkland, opened a record number of streets and avenues, acquired land for high-speed urban thoroughfares ("speedways"), launched a massive waterfront modernization program, and went into a frenzy of building new sewers, bridges, docks, schools, firehouses, police stations, courts, armories, hospitals, and other facilities.

All this activity brought an enormous amount of work--everything from finding the requisite legal authority and drafting the necessary legislation to searching titles, condemning land, drafting contracts, answering legal ques-

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[103]The percentage of gross receipts to be paid the city by new cable railroads, for instance; see Blandy to Grant, Feb. 25, 1891, in ibid.

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tions, and litigating disputes--to an office already strained to the limit handling its "normal" workload. In 1889, for instance, the office undertook the condemnation of sites for sixteen schools and began proceedings to acquire title to almost 150,000 acres of parkland.[104] In Clark's 1894 annual report he mentioned street improvements in the "Annexed District," the widening of College Place and Elm Street, the inauguration of the Harlem Speedway, the opening of 39 new streets (the most ever in one year), proceedings to acquire 928 separate tracts in Putnam and Westchester counties for the city's water supply, and the condemnation or other acquisition of sites for seven schools, ten firehouses, two police police stations, six parks, the Third Avenue bridge, and fifteen pieces of wharf property--the latter pending a court case to reconcile conflicting terms of in two grants, one made in 1666 and the other in 1686.[105]

In the meantime, the office each year wrote 300 to 500 legal opinions, drafted or examined 700 to 1,000 contracts, and argued 200 to 400 cases.[106] Many of these cases involved large sums of money or complicated legal ques-

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[104]Law Department, "Departmental Estimate for the Year 1890," in Board of Estimate, Minutes (1889), pp. 300-03.

[105]Law Department, Annual Report (1894), pp. x-xxi.

[106]See summaries in Law Department, Annual Report, 1889 through 1894.

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tions, often at the same time and, not uncommonly, arising from bizarre circumstances. In the great August gale of 1893, for instance, one of the city's floating bath-houses tore loose into the East River and mowed down every vessel in its path; the resultant litigation in U. S. District Court established, according to the Law Department's 1894 annual report, "novel principles of admiralty law."[107] The District Court also held in favor of the city in a complicated case brought by an engineer who claimed that the Roeblings had infringed on one of his patents in setting the piers to the Brooklyn Bridge.[108] In addition, two long-standing litigations were finally decided in favor of the city: the "Hackley Street Cleaning Case," a $689,000 suit that had been in one court or another ever since 1864, and the "Wolfe" board of aldermen's claim for $1-million in past-due salaries.[109] The city also won a $700,000 test case involving overcharges by the new aqueduct's prime contractor; a jubilant Clark (who had scrupulously assigned the case to outside counsel on finding that the contractor

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[107] Ibid. (1894), p. xvi [case described but not named; "novel principles" not identified].

[108] Ibid. (1893), p. xii.

[109] Both celebrated in ibid. The city won the Hackley case in that the court awarded Hackley's assignee's heirs (both Hackley and his original assignee having died in litigio) $200,000, which the city had always argued was all it owed. The "Wolfe" case, Demarest v. Mayor, 147 New York 203 (1895), marked the end to the whole controversy, which had been in court in one form or another since 1875.

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was represented by Cockran) expected the decision to govern the outcome of another $8 to $10 million in similar claims.[110]

If Clark served the city well, he did even better for himself. He entered the office in moderate circumstances but left, as the Times put it, "a very wealthy man."[111] In the words of popular song of the time, "How He Did It His Books Don't Show."[112] The size of his fortune--estimated at nearly a million dollars shortly before his death five years later--raises the question of whether he was a venal public official. The answer has to be, "By the standards of his time, probably not." There is no reason to believe that he stole from the public treasury, colluded in law-suits, or took bribes.[113] There is ample reason, however,

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[110]Mayor v. O'Brien, 139 New York 543 (1893); Clark to Aqueduct Commissioners, July 3, 1889, in Aqueduct Commissioners, Minutes (1889), p. 377 [recusing self]; Law Department, Annual Report (1893), pp. xi-xii.

[111]Times, Feb. 18, 1900, p. 4.

[112]Song cited in Werner, Tammany Hall, p. 329, as exemplifying Croker's finances as well.

[113]One cannot, of course, prove a negative, but if Clark engaged in any criminal activity he covered his tracks extremely well; neither the Fassett Committee of 1890 nor the Lexow Committee of 1894 found anything worth pursuing, nor did any of the enterprising reporters employed by the reform press. Such criticism of him as appeared in the press was of a guilt-by-association nature. For instance, on May 2, 1893, the Tribune ran in the same issue both a long article lauding his record in office [p. 3] and an editorial including his name on a long list of Tammany appointees whose unfitness proved that the mayor had "sunk to as low a level as was ever reached by a Chief Executive of the metropolis" [p. 6].

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to believe that he made the best of the inside knowlege that came his way as head of the Law Department. His obituary in the Times mentions--with a casualness that is startling today--that as corporation counsel he "made a number of shrewd real estate investments," which he later parlayed into a fortune on Wall Street.[114] It is not beyond the realm of possibility that the advance knowledge he had of such things as street openings, reservoir sites, or bridge approaches had something to do with this shrewdness. Today no public official would dare be caught using such inside information to make a killing in real estate, but in Clark's day it was regarded almost as a perquisite of office; as Tammany statesman George Washington Plunkitt solemnly justified it, "It's just like lookin' ahead in Wall Street or in the coffee or cotton market."[115]

There is also more than a hint that Clark's success on Wall Street might have had something to do with his position as corporation counsel. Characterized in his obituary as "a noted patron of the turf and, above all things else,

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[114]Times, Feb. 18, 1900, p. 4. Similar allusions appear in the Tribune, Feb. 18, 1900, p. 9. The figure of a million dollars may be overly generous, relying as it does on journalist guesswork as to his worth.

[115]William L. Riordon, Plunkitt of Tammany Hall (New York: E. P. Dutton & Co., Inc., 1963; orig. 1905), p. 4; for an elaboration, see his chapter on the distinction between "honest" and "dishonest" graft, pp. 3-10. For a less self-serving (and, it should be noted, less contemporary) view, see Milton Mackaye, The Tin Box Parade: A Handbook for Larceny (New York: Robert M. McBride & Company, 1934), pp. 50-58.

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a good fellow" (he once threw a $5,000 party in his stables and poured champagne in a trough for his horses), he hobnobbed with the likes of August Belmont, Grant, Croker, state senator Thomas F. Grady, and other "sharp operators."[116] It is a good guess that at the track they shared tips on more than the horses. If Clark shared a little Law Department gossip--from the Bureau of Street Openings, say, or the assistant assigned to the Aqueduct Commission--it is reasonable to suppose that the grateful recipients let slip the names of a few stocks. The existence of such an exchange is guesswork of course, but it is asking almost too much to attribute to "luck," for instance, the $66,000 Clark made in one day's trading in Brooklyn Rapid Transit stock.[117] In the words again of Senator Plunkitt, "Every good man looks after his friends."[118]

Clark clung to his office even after dry goods' merchant Theron Strong's "fusion" ticket won the 1894 election and swept a bipartisan reform administration into office.

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[116]Herald, Feb. 16, 1900, p. 5, and Feb. 18, 1900, Pt. 6, p. 2 [quote]; Times, Feb. 17, 1900, p. 7, and Feb. 18, 1900, p. 4, and Tribune, Feb. 18, 1900, p. 9.

[117]Trade mentioned in the Tribune, Feb. 18, 1900, p. 9; the Times characterized him as "a plucky as well as lucky speculator" [Feb. 18, 1900, p. 4].

[118]Riordan, Plunkitt of Tammany Hall, p. 5. He goes on to declare, "If I have a good thing to hand out in private life, I give it to a friend. Why shouldn't I do the same in public life?"

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His term and that of most other department heads ran until May of 1897, and he quite reasonably refused to give it up. The reformers countered with a "Power of Removal Act" in February 1895, however, and under authority of the new law Strong removed Clark and his fellow department heads to make room for his own choices. Clark left office on February with ill grace and, having acquired an appetite for speculation, bypassed a return to Cockran & Clark for a new career as a financier and budding "turfman."[119]

The new corporation counsel, Francis M. Scott, was in many ways Clark's direct opposite: patrician, abstemious, and severely moralistic. The son of a wealthy New York cotton trader, Scott was educated in the city's finest private schools and earned a law degree from Columbia University. On his admission to the bar in 1869, his father arranged an appointment as counsel to the Cotton Exchange and steered a wealthy clientele to his office.[120] Although Scott developed a thriving practice, commercial law soon

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[119]Clark's luck--if it had ever indeed been luck--deserted him four years later. His BRT stock went on a downhill slide, taking him with it, and a racetrack into which he poured $300,000 failed to catch on with the betting public. In the next few months he veered erratically between giddy optimism (losing $100,000 on the gaming tables at Saratoga Springs, for instance, in the conviction he was about to hit a lucky streak) and a depression so black at the end that his family put him on a suicide watch that was followed morbidly by most of the city's press [e.g., Herald, Feb. 16, 1900, p. 5, and Times, Feb. 17, 1900, p. 7]. He died on February 17, 1900, officially of "bronchitis" [Times, Feb. 18, 1900, p. 4].

[120]A. Oakey Hall, "Francis M. Scott," in The Green Bag, vol. X (Feb. 1898), pp. 45-49; quotation at p. 45.

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paled before the attraction of reform politics. He joined in founding the Young Men's Democratic Club, took part in the anti-Tweed crusade, and in 1881 attached himself to the County Democracy. There he came to the attention of Lacombe, who in 1886 appointed him as his personal deputy and legislative assistant, only slightly lower in rank than Dean. Scott remained there until 1888, making such a name for himself that when Hewitt was casting about for someone to clean up the scandal-ridden Aqueduct Commission, his name came instantly to mind. His record in that difficult post was so exemplary that in 1890 the short-lived "People's Municipal League"--a melding of anti-Tammany Democrats and Republicans--ran him for mayor.[121]

Scott was, in short, the darling of the reform crowd. "If his popularity goes on," exclaimed the Times in 1890, "it will become necessary to copyright him in order to prevent some other boss-ridden place from stealing him!"[122] Even though Scott lost the election, he remained active in anti-Tammany politics and in 1894 collaborated with former

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[121]See entries under his name in Who Was Who, vol. 2, p. 1094; National Cyclopaedia of American Biography, vol. 5, p. 233; McAdam, Bench and Bar, vol 2, p. 79, as well as an admiring article by A. Oakey Hall, "Francis M. Scott," Green Bag, vol. 10 (Feb. 1898), pp. 45-49.

[122]Times, Oct. 18, 1890, p. 5. In its coverage of his campaign the Times' employed headlines ("Plaudits for the Leader--Mr. Scott's Pilgrimage in the Cause of Reform--Everywhere Enthusiastically Greeted") hardly justified by the results; Tammany won by a far wider margin than in 1888. See Hammack, Power and Society, pp. 146-47.

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mayor Grace in founding the dissident "New York State Democracy." When a new nonpartisan Committee of Seventy[123] nominated Republican Theron Strong as mayor, Scott was the keynote speaker at the State Democracy's ratification meeting. "It is the duty of all good citizens when the occasion demands to sink their partisan feeling," Scott declared. "We stand today supporting with earnestness and honesty a Republican for the office of Mayor, and for my own part, I have no regrets, no excuses, and no apologies to offer."[124]

As a result Scott was on the short list of candidates for Strong's consideration as corporation counsel. There was, as usual, a great deal of interest in the appointment. Of all offices Strong had to fill, declared the Times, "the most important appointment is that of Corporation Counsel."[125] The Tribune plumped for a Republican, arguing that a Republican mayor was entitled to an Republican corporation counsel.[126] A number of prominent attorneys, both Democratic and Republican, were rumored to be under consideration: Scott, James C. Carter, John E. Parsons,

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[123]Not the same as the old Tweed-era committee of the same name, it was a mixture of anti-Tammany Democrats, Chamber of Commerce members, Protestant moral crusaders, and anti-Platt Republicans. See Hammack, Power and Society, p. 148.

[124]Times, Oct. 17, 1894, p. 1.

[125]Times, Feb. 9, 1895, p. 9.

[126]Tribune, Feb. 6, 1895, p. 3.

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Wheeler H. Peckham, William R. Hornblower, and Bar Association president Joseph Laroque.[127] It was no surprise, however, when Strong announced he had selected Scott, for he had probably the best qualifications of any for the job. Not only was he an excellent lawyer, but he had had years of practical experience with the city's legal affairs--making him, in the opinion of the Times, "one of the three or four lawyers in New York who have that special knowledge of the laws of the Corporation that constitutes a full equipment for the office of its counsel."[128]

Although much was made of its being a "merit" appointment,[129] Scott's selection was, quite literally, an act of political calculation. As Strong blithely told a reporter from the World, he had simply "calculated the vote" and, figuring that he had got 100,000 votes from the Republican Party and 50,000 from anti-Tammany Democrats, had handed out offices in direct proportion. In his opinion, the two most important offices were the commissioner of public works and the corporation counsel. Because the post of public works commissioner was the more valuable of the two,

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[127]Ibid., Feb. 6, 1895, p. 3, and Times, Feb. 9, 1895, p. 9.

[128]Ibid., Feb. 14, 1895, p. 4.

[129]The Times called him "one of the three of four lawyers in New York who have that special knowledge of the laws of the Corporation that constitutes a full equipment for the office of its counsel" [Feb. 14, 1895, p. 4]. See also ibid., Feb. 9, 1895, p. 9, and Tribune, Feb. 14, 1895, p. 4.

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he had given it to a Republican and reserved the corporation counsel's slot for a Democrat. He had arrived at Scott's name by a process of elimination, offering the post first to two more prominent State Democrats--Peckham and Laroque--and settling on Scott only when both had turned him down. Once he had appointed the public works commissioner and corporation counsel, Strong went down the list of other offices and filled them in similar proportion, using the same electoral formula.[130]

Unfortunately, Scott felt compelled to do much the same within the Law Department. "Off Go Tammany Heads!" exulted a Tribune headline as Scott swept out second assistant chief Blandy, all the bureau chiefs, and senior assistants William A. Sweetser and Charles N. Ridgway.[131] Matthew Breen, in charge of the bureau for street improvements in the Annexed District, obstinately refused to resign and was summarily fired. Scott named a mixture of State Democrats and Republicans to replace the Tammany men. For second assistant chief he chose State Democrat William L. Turner, a close personal friend who had been Grace's mayoral secretary and an assistant under Lacombe, O'Brien, and Beekman. He named two Republican assistants, John Proctor Clark and

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[130]With such exactness, it should be noted, that he even allotted one small office each to the "Steckler" and "O'Brien" factions of the anti-Tammany Democracy [World, June 19, 1895, pp. 1-2].

[131]Tribune, March 1, 1895, p. 5.

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David Milliken, Jr., and two State Democrats, John J. Brady (in Breen's old place) and Robert Barlow, Jr. It was, in the words of the World, "Tammany's Black Friday."[132] It was the greatest turnover the department had seen for some time. Altogether, in his first year in office Scott replaced half the legal staff of the general office--five senior assistants, three juniors, and five law clerks.[133] Even so, he took care to retain a number of key assistants without whom it would have been difficult to make the transition, among them Tammany men Conolly, Sterling, Olendorf, and Farley.

And, it went almost without saying, Dean. "David J. Dean, the First Assistant Corporation Counsel, is, of course, retained without the necessity of reappointment," the Times noted.[134] Dean had, to all intents and purposes, become de facto chief of practical operations. In 1896 an English visitor, chief solicitor Frank Lockwood, toured the office and instantly recognized him for what he was--in British legal slang, a "coaching devil." That is, like his counterpart in chambers, Dean was the office veteran on whom newer chief counsel depended for "coaching" in the

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[132]World, March 1, 1895, p. 12; Times, same date, p. 3.

[133]"Law Department Officers," City Record (1895), p. 390, and (1896), p. 286. It must be noted however, that some may well have left voluntarily.

[134]Times, March 1, 1895, p. 3.

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discharge of their duties.[135] It was more or less taken for granted now that Dean would always be first assistant and a more political appointee would be corporation counsel. And in 1895, although it was not mentioned publicly, Strong knew that Dean had been fighting tuberculosis since 1892 and was not up to the rigors of the top post.

The remarkable thing about Scott's office was not the discharge of so many Tammany men but the continued presence of so many old hands like Dean, who had entered the department in 1866. In addition to Scott and Turner, who had been assistants a decade or so earlier, three other lawyers--Edwin J. Freedman, John L. O'Brien, and Charles H. O'Neill--had from six to ten years experience in the office. The clerical staff boasted some extremely grizzled veterans: chief clerk Andrew T. Campbell, date of hire 1857; messenger William F. Hodge, 1866; register clerk Henry F. Rosselot and copyist John Foy, both 1875; clerk William H. Brady, 1876, and librarian James M. Valles, 1880. Even the young "typewriters" tended to stay with the

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[135]Hall, "Francis M. Scott," p. 47. In British legal slang, a "devil" carries roughly the same meaning as an "associate" in a modern American law office. The junior counsel to the Treasury, for instance, was commonly called the "attorney-General's devil," and Lord Chief Justice Mansfield was notorious for forgetting opinions that had been written for him by his "devils." Oxford English Dictionary, 2nd ed., vol. 4, p. 569.

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department; of nine women in the general office, six had been there five years or more.[136]

Although few New Yorkers paid much attention to their city's Law Department, its fame had spread far afield in legal circles. When Lockwood visited the United States as a guest of the American Bar Association in 1896, one of the stops he specifically requested on his itinerary was the New York City corporation counsel's office. Ushered through its rooms by Scott, he ran a finger over its register of 4,000 active cases and proceedings, thumbed through one year's volume of 735 formal written opinions, and pronounced it "undoubtedly the most extensive law office in the world."[137]

Certainly it was one of the busiest. The volume of its work, already stupendous by the time of Clark's administration, grew only larger under Scott. In the year of Lockwood's visit, the department's Annual Report describes more street openings than ever before, the acquisition of hundreds more acres for the aqueduct project, the annexation of five towns in Westchester County (making up most of the present-day Bronx), and the acquisition of twenty-six school sites, eight parks, two bridge approaches, and

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[136]From Deming Report, pp. 1-2, and comparison of Law Department rosters in the City Record, 1885-1896. I have not attempted to make similar comparisons in the various attached bureaus.

[137]Hall, "Francis M. Scott," p. 47.

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extensive river frontage for new docks.[138] In addition, the office had 307 cases on the calendars of various courts, including 84 appellate cases decided in favor of the city and 41 against it. In Sage v. Mayor, for instance, the Appellate Division sustained the city's absolute ownership of the land between high and low tides around Manhattan Island, a stretch of real estate estimated at the time to be worth, conservatively, $45 million.[139] On a slightly lesser scale, the Appellate Division also sustained a hotly contested will in which an elderly widow had left her entire estate of $50,000 to the city for drinking fountains in the parks. In addition, the department made huge inroads into its backlog of pending cases. A group of forty-four old contract cases was ended on terms favorable to the city, either in trial or by outside settlement, as was a large class of insurance company cases that had been in litigation for thirteen years.[140]

"His duties as corporation counsel have been colossal," remarked an article in a popular legal journal.[141] The article might have added that they had also been largely unfettered by any direction from the Strong administration.

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[138]Law Department, Annual Report (1896), pp. x-xvi.

[139]Estimation from ibid. (1897), p. xxi.

[140]Ibid. (1896), pp. xvi-xvii.

[141]Hall, "Francis M. Scott," p. 47.

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Scott enjoyed a great deal more autonomy than his predecessor Clark, a state of affairs reflecting the different style of government under Strong's "fusion" administration. By definition, an administration that strived for a balance of Republicans and reform Democrats was not going to have the tight discipline of one under the control of a machine boss. The closest thing this administration had to an authority figure was Strong himself, chosen more for his inoffensiveness than for any innate generalship. Strong's leadership style was one of collegiality, bringing his department heads together for monthly dinners so "they could get to know one another better."[142] In effect, the old dry-goods merchant gave each department head his own store and let him run it his own way.

In Scott's case, this amounted to permission to run the city's legal affairs as he saw fit. That he took this as permission to issue broader statements of policy seemed not to bother the mayor at all, nor did it strike the press as anything unusual. When Scott sent the legislature a strongly worded letter opposing consolidation, for instance, the Times remarked casually, "It is understood that Mayor Strong is aware of all the views that Mr. Scott expresses in his letter."[143] The mayor in fact was some-

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[142]Times, May 27, 1896, p. 4.

[143]Times, Jan. 23, 1896, p. 9.

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what in awe of Scott's expertise in legislative matters and deferred to him in making decisions on bills of interest to the city. The new state constitution of 1894 had given the mayor a "suspensory veto" over New York City bills, and he relied on Scott to supply him with briefs, sit in on any mayoral hearings, and assist in the writing of vetoes.[144] Scott, for his part, relished legislative work and delegated far less responsibility to his man in Albany, John Proctor Clarke, than his predecessor Clark had given Blandy. In general, he relied on Clarke to winnow out the bills of interest to New York City and to monitor their progress carefully, but then to summon him for the more important committee hearings. In most such hearings, according to one observer, "Scott's imprimatur to a city bill was always accepted by the statute makers, and the negative shake of his head, accompanying good reasons for the shake, usually killed the opposed measure."[145]

Scott asserted his independence in matters both of style and of substance. He took it upon himself, for

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[144]Art. XII, Sec. 2, Constitution of 1894. The veto was more symbolic than real; it signalled the city's strong disapproval, but the bill could be repassed by a simple majority of the legislature. See W. Bernard Richland, "Constitutional Home Rule in New York," Columbia Law Review vol. 54 (March 1954), pp. 320-22.

[145]Hall, "Francis M. Scott," p. 47. Scott himself said more modestly, "By reason of the facts and arguments presented by this Department to the committees . . . many bills failed of passage or were materially amended, in accordance with the views of the City authorities." [Law Department, Annual Report (1895), p. xv.

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instance, to argue the more important appellate cases himself, an indulgence his predecessors had long ago abandoned.[146] He also insisted on reevaluating, and at times reversing, decisions taken by Clark--setting off, in at least one case, repercussions of monumental consequence. In this instance Scott reevaluated the $8 to $10 million in fraud cases still pending against the aqueduct contractors, decided quite by himself that the test case won during Clark's term had not set a decisive precedent, won the mayor and Board of Estimate over to his view, and settled with the contractors for $200,000. The subsequent uproar tarnished both his reputation and that of the office; one of the first items on the agenda the new "consolidated" government of Greater New York was to reexamine the powers of the corporation counsel and impose strict limits on them.[147]

Scott's administration of the Law Department marked, in two ways in particular, the end of an era. In November of 1894 the voters approved consolidation into a five-borough "Greater New York," and in May of 1896, after a great deal of wrangling, the legislature appointed a committee to draft the charter for the new metropolis. Strong

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[146]Ibid. Although Hall fails to mention it, he was arguing from briefs written in collaboration with Dean and Conolly.

[147]For details, see O'Brien v. Mayor, 160 New York 691 (1899) and later in this work.

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and Scott both opposed consolidation, giving them (momentarily at least) something in common with Tammany, whose leaders saw in it a threat to their power. Scott raised a great many practical objections to consolidation and lobbied the legislature vociferously against appointing a commission. He aided Strong in writing veto messages against both the act of 1896 setting up the commission and the act of 1897 approving the charter.[148] His opposition was to no avail, however; the legislature easily overrose both vetoes and authorized the commission to write a new charter uniting every county touching on New York harbor into one city. An unlikely alliance of old-line reformers, Platt Republicans, elite merchants, Brooklyn and Queens real estate developers, and municipal efficiency experts had triumphed over the opposition of the city's own government.[149]

The involvement of the corporation counsel's office in drafting the charter was not solicited until very late in the day, and then only when the commission's own experts (which included no less an authority on municipal law than the famed treatise writer John F. Dillon) were themselves stumped by the enormity of the task before them. Scott,

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[148]Times, Feb. 6, 1896, p. 3, and Feb. 7, 1896, p. 4 [Scott's opposition in the legislature]; Apr. 14, 1896, p. 1, and Apr. 10, 1897 [Strong's vetoes].

[149]Hammack, Power and Society, pp. 185-229.

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resigning himself to the coming consolidation, released Dean for full-time service to the commission in the summer of 1896. In the words of the New York City Bar Association,

> With Hon. William C. De Witt [long-time Brooklyn corporation counsel and a member of the commission], he devoted the entire summer of 1896 to the work, giving up the vacation he needed and had earned, to the most severe application. He was warned that he was overtaxing his strength, but with characteristic self-forgetfulness refused to cease so long as he was able to continue.[150]

By the end of the summer, the charter--for better or worse--was finished.[151] So too, for all practical purposes, was Dean. He went to the Adirondacks to recuperate, but his health worsened there. At Christmas time he went to San Antonio in search of warmth and dry air, and died there on January 10, 1897. For such an obscure public servant, there was an unprecedented outpouring of grief at his passing. The charter commission issued a statement declaring that "his distinguished career . . . culminating in this work entitles him to the lasting gratitude and esteem

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[150]Bar Association, Year Book (1897), pp. 96-97.

[151]In its haste the commission produced a charter that, in the words of David Hammack, "was thrown together so rapidly, out of so many disparate laws relating to so many distinct jurisdictions, that many of its provisions contradicted one another, or simply made no sense." [Hammack, Power and Society, p. 226; for the power struggle behind the formation of Greater New York, see ibid., pp. 185-229.]

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of the cities of this State."[152] The Bar Association paid long and emotional tribute not just to his phenomenal career as an appellate lawyer but to his generosity and long years of mentorship to younger lawyers.[153] The Times and the Tribune both ran obituaries of a length usually reserved for major political figures, with the Tribune even illustrating its piece with a portrait.[154]

Dean's body was returned to New York City, and on January 16 a funeral was conducted before a large congregation of mourners at St. James Methodist Church. When it was over, Scott and five former New York City corporation counsels--Andrews, Lacombe, Beekman, O'Brien, and Clark--stepped forward and carried Dean's casket to a waiting hearse and from there to his grave. It was, as nearly as can be determined, the only time that all six appeared together in public; Whitney, travelling abroad, cabled his condolences.[155] With Dean gone and the new charter ready to go into effect, it was the end of one era for the Law Department and the beginning of another. "Vast as the interests represented by the Law Department have already

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[152]Quoted in the Times, Jan. 12, 1897, p. 12.

[153]Ibid. The tribute notes that he argued more appeals before the New York Court of Appeals than any other lawyer, his name appearing as counsel in almost every volume of its case reports between vols. 30 and 150.

[154]Ibid., and Tribune, Jan. 12, 1897, p. 7.

[155]Times, Jan. 17, 1897, p. 20.

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become from comparatively small beginnings," declared Scott, in his valedictory Annual Report, "they are destined to increase greatly in the future under the new regime about to be inaugurated."[156]

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[156]Law Department, Annual Report (1897), p. xxii.

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BIBLIOGRAPHY

NEW YORK CITY GOVERNMENT DOCUMENTS

Board of Aldermen. Documents, 1831-1877.

_____. Proceedings, 1831-1898.

Board of Assistant Aldermen. Proceedings and Documents, 1831-1853.

Board of Councilmen. Proceedings, 1853-1870.

Board of Estimate and Apportionment. Proceedings. 1870-1898.

Board of Supervisors. Proceedings and Documents, 1831-70.

Common Council. Minutes of the Common Council of the City of New York, 1675-1776. 8 vols. New York, 1905.

_____. Minutes of the Common Council of the City of New York, 1784-1831, 21 vols. New York, 1917-30.

Law Department. Annual Report of the Corporation Counsel. 1875-1898.

Manual of the Corporation of the City of New York. 1841-1873.

NEW YORK STATE GOVERNMENT DOCUMENTS

New York State Assembly. Documents, 1857.

_____. Journal, 1857.

New York State. Laws of the State of New York, 1784-1898.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

New York State Senate. Documents, 1857.

_____. Journal, 1857.

MANUSCRIPT COLLECTIONS

Mayors' Papers Prior to 1898. New York City Municipal Archives.

Filed and Approved Papers of the Common Council of New York City. New York City Municipal Archives.

Opinions of the Corporation Counsel of the City of New York. Library of The Association of the Bar of the City of New York.

Tammany Scrapbooks. New York Public Library.

PRIVATE PAPERS

Richard Harison Papers. New-York Historical Society.

Charles S. Fairchild Papers. New-York Historical Society.

Samuel J. Tilden Papers. New York Public Library.

William C. Whitney Papers. Library of Congress.

NEW YORK CITY NEWSPAPERS

Courier and Enquirer

Commercial Advertiser

Herald

Irish-American

Journal of Commerce

Mail and Express

Post

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Star

Times

Tribune

World

LAW BOOKS AND ARTICLES

[Anstey, John]. The Pleader's Guide. A Didactic Poem in Two Books, Containing the Conduct of a Suit at Law, With the Arguments of Counsellor Bother'um and Counsellor Bore'um, in an Action Betwixt John-a-Gull and John-a-Gudgeon, for Assault and Battery at a Late Contested Election. Philadelphia: Samuel Akerman, 1803.

Black, Henry Campbell. Black's Law Dictionary, 4th ed. St. Paul, Minn.: West Publishing Co, 1951.

Borchard, Edwin M. "Government Liability in Tort." Yale Law Journal 34 (1924-25): 1-43, 129-57, 229-40; (36 (1925-26): 1-41, 757-807, 1039-1100.

Briefs and Arguments for Criminal Cases in Which Abraham Oakey Hall Was Interested. 14 vols. New York Public Library

Cataldo, Bernard F., and others. Introduction to Law and the Legal Process. 3rd ed. New York: John Wiley & Sons, 1980.

Dillon, John F. The Law of Municipal Corporations. 2nd ed. 4 vols. New York: James Cockcroft & Co., 1873.

Engdahl, David E. Constitutional Federalism in a Nutshell. 2nd ed. St. Paul, Minns.: West Publishing Co., 1987.

Forrow, Brian D. "The Corporate Law Department Lawyer: Counsel to the Entity." The Business Lawyer 34 (1979): 1797-1815.

Freedman, Edwin J. Index to the Opinions of the Counsel to the Corporation on Questions Relating to the Administration of the Various Departments of the City of New York from 1874 to 1888. New York, 1888.

Frug, Gerald. "The City as a Legal Concept." Harvard Law Review 93 (1980): 1059-154.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Gaines, George. Practical Forms of the Supreme Court. Taken from Tidd's Appendix of the Forms of the Court of King's Bench, in Personal Actions, and Adapted to the Supreme Court of the State of New York. New York: Alsop, Brannon & Alsop, 1808.

Henn, Harry. Handbook of the Law of Corporations and Other Business Enterprises. 2nd ed. St. Paul, Minn.: West Publishing Co., 1970.

Hoffman, Murray. Treatise on the Estate and Rights of the Corporation of the City of New York, as Proprietors. 2 vols. New York: McSpedon and Baker, 1853; rev. ed., 1862.

Johnson, Herbert A. "Civil Procedure in John Jay's New York." American Journal of Legal History 11 (1967): 69-80.

Kent, James. Commentaries on American Law. 4 vols. New York: O. Halstead, 1826-30.

_____. Dissertations: Being the Preliminary Part of a Course of Law Lectures. New York: George Forman, 1795.

_____. The Charter of the City of New York, with Notes Thereon. New York: Childs and Devoe, 1836.

Kutak, Robert J. "Whom Does the Corporate Counsel Represent?" The Corporate Director, Mar.-Apr. 1981: 1-6.

Kyd, Stuart. A Treatise on the Law of Corporations, 2 vols. London: Butterworth, 1793-94.

Langbein Brothers [George F. and J. G]. The District Courts in the City of New York: Their Origin, Jurisdiction and Practice. New York: Diossy & Company, 1872.

Lawry, Robert P. "Who is the Client of the Federal Govern ment Lawyer?" Federal Bar Journal 37 (1978): 61-71.

McQuillan, Eugene. Municipal Corporations. 3rd ed. St. Paul, Minn.: West Publishing Co., 1979.

Mellinkoff, David. The Language of the Law. Boston: Little, Brown and Company, 1963.

Moore, J. B. A Treatise on Extradition. Washington: Government Printing Office, 1890.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Mott, Rodney L. Due Process of Law. Indianapolis: Bobbs-Merrill, 1926.

New York City Law Department. Index of Cases, Points and Opinions [James M. Valles, comp.]. New York; 1887, 1891, 1898.

_____. Table of Cases, Involving Questions of Law Peculiar to the City and County of New York. New York, 1882, 1888, 1895, 1916.

Reynolds, Osborne M., Jr. Handbook of Local Government Law. St. Paul., Minn.: West Publishing Co., 1982.

Reznick, Scott M. "Land Use Regulation and the Concept of Takings in Nineteenth Century America." Chicago Law Review 40 (1973): 854-93.

Rhyne, Charles S. The Law of Local Government Operations. Washington, D.C.: The Law of Local Government Operations Project, 1980.

Schnapper, Eric. "Legal Ethics and the Government Lawyer." The Association of the Bar of the City of the City of New York, Record 32 (1977): 649-57.

Tribe, Laurence H. American Constitutional Law. 2nd ed. Mineola, N. Y.: The Foundation Press, 1988.

Williams, Joan C. "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law." Wisconsin Law Review (1986): 83-153.

Wolfram, Charles W. Modern Legal Ethics. St. Paul: West Publishing Company, 1986.

Zimmerman, Joseph F. State-Local Relations: A Partnership Approach. New York: Praeger Publishers, 1983.

BOOKS AND DISSERTATIONS

Alexander, De Alva S. A Political History of the State of New York. New York: Holt, 1906.

Alexander, Holmes. Aaron Burr: The Proud Pretender. New York: Harper and Brothers, 1937.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Auerbach, Jerold S. Unequal Justice: Lawyers and Social Change in Modern America. New York: Oxford University Press, 1976.

Barker, Charles Albro. Henry George. New York: Oxford University Press, 1935.

Baxter, Katherine Schuyler. A Godchild of Washington: A Picture of the Past. London: F. Tennyson Neely, 1897.

Bergan, Francis. The History of the New York Court of Appeals, 1847-1932. New York: Columbia University Press, 1985.

Bigelow, John. Letters and Memorials of Samuel J. Tilden. 2 vols. New York: Harper Brothers, 1908.

_____. The Writings and Speeches of Samuel J. Tilden. 2 vols. New York: Harper Brothers, 1885.

Blackstone, Sir William. Commentaries on the Laws of England, 7th ed. Oxford: Clarendon Press, 1775.

Blau, Peter M., and Marshall W. Meyer. Bureaucracy in Modern Society, 2nd ed. New York: Random House, 1971; orig. 1956.

Brandt, Nat. The Congressman Who Got Away with Murder. Syracuse, N.Y.: Syracuse University Press, 1991.

Bridges, Amy. A City in the Republic: Antebellum New York and the Origins of Machine Politics. Cambridge: Cambridge University Press, 1984.

Bowen, Croswell. The Elegant Oakey. New York: Oxford University Press, 1956.

Breen, Matthew P. Thirty Years of New York Politics, Up-to-Date. New York: Arno Press, 1974; orig., 1899.

Bridges, Amy. A City in the Republic: Antebellum New York and the Origins of Machine Politics. New York: Cambridge University Press, 1984.

Brugger, Robert. J., ed. The Papers of James Madison: Secretary of State Series. Charlottesville: University Press of Virginia, 1986.

Bryce, James. The American Commonwealth, 3 vols. London: Macmillan and Company, 1888.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Callow, Alexander T., Jr. The Tweed Ring. New York: Oxford University Press, 1966.

Carman, Harry J. The Street Surface Railway Franchises of New York City. New York: Columbia University Press, 1919 [Columbia University Studies in History, Economics and Public Law, vol. 88, no. 1].

A Century of Growth: The Emigrant Industrial Savings Bank. New York: Privately printed, 1950.

[Cheetham, James]. The Trial of Maturin Livingston Against James Cheetham for a Libel. New York: S. Gould, 1807.

Chester, Alden, ed. Legal and Judicial History of New York. 3 vols. New York: National Americana Society, 1911.

Cook, Adrian. Armies of the Streets: The New York City Draft Riots of 1863. Lexington, Ky.: University Press of Kentucky, 1974.

Cortissoz, Royal. The Life of Whitelaw Reid, 2 vols. New York: Harper & Brothers, Publishers, 1921.

Dangerfield, George. Chancellor Robert R. Livingston of New York, 1746-1813. New York: Harcourt, Brace and Company, 1960.

Davies, Margery W. Woman's Place is at the Typewriter: Office Work and Office Workers, 1870-1930. Philadelphia: Temple University Press, 1982.

Davis, Elmer. History of the New York Times, 1851 to 1921. New York: The New York Times, 1921.

Dean. Arthur H. William Nelson Cromwell, 1854-1948: An American Pioneer in Corporation, Comparative and International Law. New York: Privately printed, 1957.

Deming, Horace E. The Government of American Cities: A Program of Democracy. New York: G. P. Putnam's Sons, 1909.

DuBose, John W. Alabama's Tragic Decade, 1865-1874. Birmingham: Southern Publishing Company, 1940.

Duffy, John. A History of Public Health in New York City, 1625-1866. New York: Russell Sage Foundation, 1968.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Duffy, Sir Charles Gavan. Young Ireland: A Fragment of Irish History, 1840-1850. New York: D. Appleton and Company, 1881.

Durand, Edward Dana. The Finances of New York City. New York: The Macmillan Company, 1898.

Edwards, Charles. Pleasantries about Courts and Lawyers. New York: Privately printed, 1867.

Edwards, George W. New York as an Eighteenth Century Municipality, 1731-1776. New York: Columbia University Press, 1917.

Eisenschiml, Otto. The Celebrated Case of Fitz John Porter: An American Dreyfus Affair. Indianapolis: Bobbs-Merrill, 1950.

Emmet, Thomas Addis, M.D. The Emmet Family, With Some Incidents Relating to Irish History. New York: Privately printed, 1898.

Fernow, Berthold, ed. Records of New Amsterdam, 7 vols. New York: The Knickerbocker Press, 1897.

Flick, Alexander, C. Samuel Jones Tilden: A Study in Political Sagacity. Port Washington, N. Y.: Ira J. Friedman, 1939.

Fox, Dixon Ryan. The Decline of Aristocracy in the Politics of New York, 1801-1840. New York: Harper and Brothers, 1917.

Frankfurter, Felix M., and James M. Landis. The Business of the Supreme Court: A Study in the Federal Judicial System. New York: The Macmillan Company, 1928.

Friedman, Lawrence M. The Legal System: A Social Science Perspective. New York: Russell Sage Foundation, 1975.

_____. A History of American Law. New York: Simon and Schuster, 1973.

Gawalt, Gerard W. ed. The New High Priests: Lawyers in Post-Civil War America. Westport: Greenwood Press, 1984.

Gibson, Florence E. The Attitudes of the New York Irish toward State and National Affairs, 1848-1892. New York: Columbia University Press, 1951.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Goebel, Jr., Julius, ed. The Law Practice of Alexander Hamilton: Documents and Commentary. 5 vols. New York: Columbia University Press, 1964-81.

Gover, William C. The Tammany Hall Democracy of the City of New York. New York: Martin Brown, 1875.

Greener, John H. A History of the Office of the Corporation Counsel and the Law Department of the City of New York. New York: New York City Law Department, 1907.

Griffith, Ernest S. A History of American City Government: The Formation of Traditions, 1775-1870. New York: Praeger Publishers, 1976.

_____. A History of American City Government: The Conspicuous Failure, 1870-1900. New York: Praeger Publishers, 1974.

Hall, Kermit L. The Magic Mirror: Law in American History. New York: Oxford University Press, 1989.

Hammack, David C. Power and Society: Greater New York at the Turn of the Century. New York: Russell Sage Foundation, 1982.

Hanyan, Craig. De Witt Clinton: Years of Molding, 1769-1807. Ph.D. Dissertation, Harvard University, 1964.

Hartog, Hendrik. Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870. Chapel Hill: The University of North Carolina Press, 1983.

Hendrick, Burton J. The Age of Big Business: A Chronicle of the Captains of Industry. New Haven: Yale University Press, 1919.

Hershkowitz, Leo. Tweed's New York: Another Look. Garden City. N.Y.: Anchor Press/Doubleday, 1977.

Hirsch, Mark D. William C. Whitney: Modern Warwick. New York: Archon Books, 1969; orig. 1948.

Hobson, Wayne K. The American Legal Profession and the Organizational Society, 1890-1930. New York: Garland Publishing, Inc., 1986.

Hoogenboom, Ari. Outlawing the Spoils: A History of the Civil Service Reform Movement, 1875-1883. Urbana, Ill.: University of Illinois Press, 1968.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Horton, John T. James Kent: A Study in Conservatism, 1783-1847. New York: D. Appleton-Century Company, 1939.

Horwitz, Morton. The Transformation of American Law, 1790-1860. Cambridge: Harvard University Press, 1977.

Hoyt, Jeffrey Wood. Abuse of Power: New York City and the Formation of Municipal Law, 1846-1866. University of Virginia, 1983.

Hurst, James Willard. Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915. Cambridge: Harvard University Press, 1964.

_____. Law and Social Order in the United States. Ithaca, N.Y.: Cornell University Press, 1977.

Hutchinson, E. A. A Model Mayor: Early Life, Congressional Career, & Triumphant Municipal Administration of Hon. Fernando Wood. New York: American Family Publications, 1855.

Ivins, William Mills. Machine Politics and Money in Elections in New York City. New York: Arno Press, 1970; orig. 1887.

Jessup, Philip. Elihu Root. 2 vols. New York: Dodd, Mead & Company, 1938

Johnson, Willis Fletcher, and Ray B. Smith, Political and Governmental History of the State of New York. 2 vols. Syracuse: The Syracuse Press, Inc., 1922.

Jones, John H. The Jones Family of Long Island. New York: Tobias A. Wright, 1907.

Kee, Robert. The Green Flag: The Turbulent History of the Irish National Movement. New York: Delacorte Press, 1972.

Kent, William. Memoirs and Letters of James Kent, LL.D. Boston: Little, Brown and Company, 1898.

Kilroe, Edmund P. The Story of Tammany. New York: Privately printed, 1924.

Kline, Mary-Jo, ed. Political Correspondence and Public Papers of Aaron Burr. 2 vols. Princeton: Princeton University Press, 1983.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Kolko, Gabriel. Railroads and Regulation, 1887-1916 (New York: W. W. Norton, 1965.

Loomis, Arphaxed. Historic Sketch of the New York System of Law Reform in Practice and Pleadings. Little Falls, N.Y.: J. B. & G. G. Stebbins, 1879.

Lorenzo B. Shepard against Fernando Wood and Others, Supervisors of the City and County of New York. New York: Bowner & Hasbrouck, 1856.

Lynch, Denis Tilden. "Boss" Tweed, The Story of a Grim Generation. New York: Boni & Liveright, 1927.

McAdam, David, and others. History of the Bench and Bar of New York. 2 vols. New York: New York History Company, 1897-99.

McBain, Howard Lee. De Witt Clinton and the Origin of the Spoils System in New York. New York: Columbia University Press, 1907.

McCusker, John J. How Much is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States. Worcester, Mass.: American Antiquarian Society, 1992.

McGurrin, James. Bourke Cockran: A Free Lance in American Politics. New York: Charles Scribner's Sons, 1948.

Mackaye, Milton. The Tin Box Parade: A Handbook for Larceny. New York: Robert M. McBride & Company, 1934.

MacMahon, Arthur W. The Statutory Sources of New York City Government. New York: Columbia University Press, 1923.

Malone, Paul E. The Fiscal Aspects of State and Local Relationships in New York. Albany: J. B. Lyon Company, 1937.

Mandelbaum, Seymour. Boss Tweed's New York. New York: Wiley, 1965.

Memorial of the Late Honorable David S. Jones. New York: Stanford & Swords, 1849.

Mumford, Lewis. The Culture of Cities. New York: Harcourt, Brace and Company, 1938.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Murray, George Wellwood. Murray, Aldrich & Webb: Random Jottings from a Long Memory. Part 1 in Histories of the Predecessor Firms of Milbank, Tweed Hope & Webb. New York: Privately printed, 1937.

Mushkat, Jerome. Fernando Wood: A Political Biography. Kent, Ohio: The Kent State University Press, 1990.

_____. Tammany: The Evolution of a Political Machine, 1789-1865. Syracuse: Syracuse University Press, 1971.

Myers, Gustavus. The History of Tammany Hall, 2nd ed. New York: Burt Franklin, 1968.

Nelson, William E. Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830. Cambridge: Harvard University Press, 1975.

Nevins, Allan. Abram S. Hewitt, With Some Account of Peter Cooper. New York: Harper & Brothers, Publishers, 1935.

_____, ed. The Diary of Philip Hone. New York: Arno Press, 1970; orig. 1927.

_____. Grover Cleveland: A Study in Courage. New York: Harper & Brothers, Publishers, 1935.

_____ and Milton H. Thomas, eds. The Diary of George Templeton Strong. 4 vols. New York: Macmillan and Company, 1952.

Nichols, Roy Franklin. Franklin Pierce: Young Hickory of the Granite Hills. Philadelphia: University of Pennsylvania Press, 1931.

Pessen, Edward I. Jacksonian America: Society, Personality, and Politics. Urbana: University of Illinois Press, 1969.

Peterson, Arthur Everett. New York as an Eighteenth Century Municipality, Prior to 1731. New York: Columbia University Press, 1917.

Pierce, Harry H. Railroads of New York: A Study of Government Aid, 1826-1875. Cambridge: Harvard University Press, 1953.

Pleasants, Samuel A. Fernando Wood of New York. New York: Columbia University Press, 1948.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Pomerantz, Sidney I. New York, An American City, 1783-1803. Port Washington, N.Y.: Ira J. Friedman,

Rembar, Charles. The Law of the Land: The Evolution of Our Legal System. New York: Harper & Row, Publishers, 1989.

Riley, Henry Thomas, trans. Liber Albus: The White Book of the City of London. Compiled A. D. 1419 by John Carpenter, Common Clerk, and Richard Whitington, Mayor. London: Richard Griffin and Company, 1861.

Riordan, William L. Plunkitt of Tammany Hall. New York: E. P. Dutton & Co., Inc., 1963; orig. 1905.

Rosenberg, Charles E. The Cholera Years: The United States in 1832, 1849, and 1866. Chicago: The University of Chicago Press, 1962.

Rosenzweig, Roy and Elizabeth Blackmar. The Park and the People: A History of Central Park. Ithaca, N.Y.: Cornell University Press, 1992.

Sante, Luc. Low Life: Lures and Snares of Old New York. New York: Farrar, Strauss, Giroux, 1991.

Sayre, Wallace S., and Herbert Kaufman. Governing New York City: Politics in the Metropolis. New York: Russell Sage Foundation, 1959.

Spann, Edward. The New Metropolis: New York City, 1840-1857. New York: Columbia University Press, 1981.

Swain, Robert T. The Cravath Firm and Its Predecessors, 1819-1947, 3 vols. New York: privately printed, 1946.

Strong, Theron G. Landmarks of a Lawyer's Lifetime. New York: Dodd, Mead and Company, 1914.

Swanberg, W. A. Sickles the Incredible. New York: Charles Scribner's Sons, 1856.

Teaford, Jon. The Unheralded Triumph: City Government in America, 1870-1900. Baltimore: Johns Hopkins University Press, 1984.

Townsend, John. New York in Bondage. New York: Privately printed, 1901.

von Spuyten, Henry [William A. Brewer]. A Few Thoughts for Taxpayers and Voters. New York: Charles B. Norton, 1853.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Webb, Sidney James, and Webb, Beatrice. The Manor and the Borough. London: Longmans, Green & Co., 1906.

Weber, Max. The Theory of Social and Economic Organization. [A. M. Henderson and Talcott Parsons, trans.] New York: Oxford Press, 1947.

Wegemann, Edward. The Water-Supply of the City of New York, 1658-1895. New York: John Wiley & Sons, 1896.

Weidner, Charles A. Water for a City. New York: , 1974.

Wellman, Francis I. Success in Court. New York: The Macmillan Company, 1941.

Werner, M. R. Tammany Hall. Garden City, N.Y.: Doubleday, Doran & Company, Inc., 1928.

White, Philip L. The Beekmans of New York in Politics and Commerce, 1647-1877. New York: New-York Historical Society, 1956.

Wiebe, Robert H. The Search for Order, 1877-1920. New York: Hill & Wang, 1967.

Wilentz, Sean. Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850. New York: Oxford University Press, 1984.

Wilgus, Horace L. A Study of the United States Steel Corporation in its Industrial and Legal Aspects. New York: Arno Press, 1973; orig. 1901.

Wilson, James Grant, and John Fiske. Appleton's Cyclopaedia of American Biography. New York: D. Appleton and Company, 1894.

_____. Dictionary of American Biography. New York: D. Appleton and Company, 1894.

PAMPHLETS

[Cheetham, James]. The Trial of Maturin Livingston Against James Cheetham for a Libel. New York: S. Gould, 1807.

Citizens' Association of New York. Analysis of the Comptroller's City Budget for 1869. New York, 1869.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

_____. How the Money Goes: A Letter from the Citizens' Association to Richard O'Gorman Relative to His Office. Misc. Publ. No. 12. New York, 1867.

_____. The Legal Bureau of the City of New York. Misc. Publ. No. 10. New York, 1867.

_____. Philanthropic and Charitable Relief in New York. New York, 1868.

_____. Report of the Executive Council. New York, 1866.

_____. Report on Public Instruction. New York, 1868.

Communication from the Comptroller in Relation to the Claim of Robert W. Lowber (1857).

A Condensed Biography of a Candidate for Speaker: Fernando Wood, His Forgeries and Other Crimes. New York, 1867.

How New York Is Governed: Frauds of the Tammany Democrats. New York, 1871.

O'Conor, Charles. Peculation Triumphant, Being the Record of a Four Years' Campaign against Official Malversation in the City of New York. New York, 1875.

The Record of John K. Hackett, as Recorder, Founded on Official Documents. New York, 1875.

Lorenzo B. Shepard against Fernando Wood and Others, Supervisors of the City and County of New York. New York: Bowner & Hasbrouck, 1856.

Report of Horace E. Deming, Special Counsel to the Commissioners of Accounts, on the Office of the Counsel to the Corporation of the City of New York. New York, 1885.

ARTICLES

Chalmers, Leonard. "Fernando Wood and Tammany Hall, The First Phase." The New-York Historical Society Quarterly 52 (1968): 379-97.

_____. "Tammany Hall, Fernando Wood, and the Struggle to Control New York City, 1857-1859." The New-York Historical Society Quarterly 53 (1969): 7-33.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Daly, Charles P. "A History of the Court of Common Pleas." 1 E. D. Smith (N.Y. Common Pleas) Reports, i-lxi.

Flick, Hugh M. "The Council of Appointment." New York History 15 (1934): 262-98.

Hirsch, Mark D. "More Light on Boss Tweed." Political Science Quarterly (June, 1945): 267-78.

_____. "Samuel J. Tilden: The Story of a Lost Opportunity." American Historical Review (56): 788-802.

Leonard, Ira M. "The Politics of Charter Revision in New York City, 1845-49." New-York Historical Quarterly 62 (1978): 43-70, and 63 (1979): 7-23.

Parton, James. "Government of the City of New York. North American Review. Oct. 1866: 415-16.

"Political History of New York." Manual of the Corporation of the City of New York. 1854: 487-514.

Pratt, John. "Boss Tweed's Public Welfare Program." New-York Historical Society Quarterly. Oct. 1961: 397-411.

Reuben, Beatrice. "Burr, Hamilton, and the Manhattan Company." Political Science Quarterly 72 (1957): 187-92.

Richardson, James F. "Mayor Fernando Wood and the New York Police Force, 1855-1857." The New-York Historical Society Quarterly 50 (Jan. 1966): 5-40.

Schwab, John C. "History of the New York Property Tax." American Economic Association, Publications 5 (1890), no. 5: 73-88.

Wingate, Charles. "An Episode in Municipal Government." North American Review, Oct. 1874; Jan., July 1875; Oct. 1876.

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