

SYMPOSIUM PAPERS

Moths to the Light: The Dubious Attractions of American Law

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As a moth is drawn to the light, so is a litigant drawn to the United States.¹

Among the members of his generation, Robert Casad has been prominent among American law teachers taking a serious and sustained interest in international dispute resolution and foreign law. His marvelous book on jurisdiction² is, among other things, a response to the travails of international litigants who now frequent American courts. One need not be an expert on these matters, as Professor Casad is, to know that many international litigants would do almost anything to stay out of our courts and would prefer to litigate almost anywhere else. They are mostly defendants. Others go to great lengths to secure the jurisdiction of one of our courts. They are mostly plaintiffs.

On the other hand, there are courts in other countries that are regarded by foreigners as hospitable venues. Especially are some more hospitable to defendants. Almost certainly, the judicial system that is most nearly equal in its attraction to both plaintiffs and defendants are the courts of the United Kingdom. When two parties to an international transaction designate the courts of a third country as their forum of choice, the odds are strong that they will designate a court in London. Given the English ancestry of American law, how can we account for the extreme difference?

American law is less English than most international students and even some Americans are prone to suppose. In many universities outside the United States, instruction is often presented in "Anglo-American Law" as if they were intimately connected. And many American lawyers, especially those bound to the world view of that neighborhood identified (for good reason) as New *England*, seem inclined to think that the ancient

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1. *Smith Kline & French Lab. Ltd. v. Bloch*, 1 W.L.R. 730 (C.A. 1983) (Eng.) (Lord Denning, Master of the Rolls).

2. ROBERT C. CASAD, *JURISDICTION AND FORUM SELECTION* (1988).

English roots of American private law are a major source of their dignity as professional lawyers. But the alleged unity of English and American law conceals as much as it reveals.

In part, this is so because much of the American legal tradition and most American legal and political institutions were formed in the late eighteenth century as a reaction against British colonial rule. Although written in the English language, there is little that is English about American public law. The draftsmen of the federal and state constitutions were mostly Anglophobes and Francophiles. Thus, the many divisions of political power the draftsmen effected reflected ideas that were more French than English.³

The success of the war for independence created a brief moment, rare in human history, when it was possible to create law and legal institutions on a relatively clean slate, with minimal need to respect existing traditions and expectations. Yet, even then there were compromises to be made and much of the daunting complexity of American law is the result of those compromises. For example, the dual court system in which state and federal courts exercise a broad expanse of concurrent jurisdiction is an enduring product of eighteenth century politics. No sensible person would design such a system if the choice were open to have a simpler judicial structure. But without that clumsy compromise, it would have been impossible to effect a union of the states.

Thus, to understand American legal institutions, it is useful to the novice to keep in mind a few facts about America in 1783, the year in which the British acknowledged the independence of the thirteen former colonies. The population of the thirteen colonies was then about three million, most of whom lived within one hundred miles of the Atlantic Ocean but were spread along a thousand miles of shoreline. Most of the colonial judiciary and many of the lawyers who had been trained in England were loyal to the Crown and fled during the Revolution, most often to Canada. By 1783, some judges sitting on the courts newly created by the thirteen little states had no professional training at all, and any training they had received was secured in ill-supervised apprenticeships.⁴ It was in this era and the early nineteenth century, when technical competence was the exception, that American states

3. The political work most widely read by American revolutionaries was BARON CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., London, Nourse & Vaillant 1750). See PAUL MERRILL SPURLIN, *MONTESQUIEU IN AMERICA 1760-1801*, at 9-17 (1940). Montesquieu himself erroneously perceived that the doctrine of separation of powers was embodied in English government. See *id.* at 16.

4. For example, John David Dudley of the New Hampshire court boasted that he had never read a law book, and never would. See MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 57 (1976).

abandoned the English practice of requiring the losing party to pay the lawyers' fees of the prevailing party and of allowing unskilled lawyers to advocate claims for fees contingent upon success.⁵

Those semi-professional eighteenth century state courts were disinclined to enforce the rights of British creditors.⁶ Some who had fought in the Revolution had done so in part to rid themselves of debt to the loyal subjects of the Crown. This was a serious problem for all the little states, because the British had recognized independence on condition that those debts be paid.⁷ By 1787, there was a serious prospect that George III's Royal Navy might return in the role of debt collector. Those who met in Philadelphia that year to organize a stronger central government had this problem very much on their minds. Many of them therefore favored the creation of a national judiciary that would more reliably enforce British rights. But the mistrust directed at the central government was too great to permit such a step. Had a national judiciary been a feature of the Constitution, the Constitution would not have been ratified. A compromise, therefore, was to create a Supreme Court and to authorize Congress to create subordinate courts whose jurisdictions would be closely confined by the Constitution as well as by the legislation establishing them.⁸

Europeans are quick to notice the likeness to contemporary Europe. A European judiciary has been found to be necessary for limited purposes. But if it had been seriously proposed in 1948 to replace the national judiciaries, the European Community would have met overwhelming resistance. So it was in America in 1787 to 1789. Thus, as Europe gradually enlarges the role of the transnational judiciary, it is increasingly afflicted with the bedeviling consequences of dual judicial jurisdictions imparting pervasive complexity to the law of the European Community.

And even that compromise of dual jurisdiction was in America a near thing. In the ratification debates, particularly in New York and Pennsylvania, there was strenuous objection to the idea of any national judiciary, however limited its jurisdiction.⁹ Further compromise was

5. See *Arcambel v. Wiseman*, 3 U.S. 306 (1796). See generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 16-17 (1984).

6. See Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 *DUKE L.J.* 1421, 1435-53.

7. See *id.* at 1439-40.

8. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 132, 146, 172-73, 428-29 (Max Farrand ed., 1911); see also MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 154-57 (1913).

9. See CRAIG R. SMITH, *TO FORM A MORE PERFECT UNION: THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 1787-1795*, at 41, 113 (1993); see also *THE FRAMING AND*

necessary in the form of the Bill of Rights ratified as amendments to the Constitution. It now seems odd that the provision in the Bill of Rights most urgently demanded was the right to trial by jury in civil cases.¹⁰ The function of that institution as embedded in the Constitution was, and remains, to protect the people from the federal judiciary. It is a division of the judicial power between professionals and laymen, not unlike the many divisions of power that abound in other legal institutions created at that time.

The mistrust of the federal judiciary was not without warrant. It was true in the eighteenth century, and it remains true today, that those appointed to the federal judiciary can be seen by those of a Marxist persuasion to be members of a ruling class who bear a loose resemblance to the English wigged judiciary in its pretensions.¹¹ Federal judges were not and are not qualified as technicians in the sense that European and Japanese or Korean judges generally are. They are persons selected in their mature years partly because their politics are agreeable to the President who appoints them and not anathema to the Senate of the United States that must confirm their appointments. To be sure, Presidents have rarely sought to appoint a federal judge who was disesteemed as a technical lawyer by his or her fellow professionals, but technical competence is not the primary qualification for judicial office in the courts of the United States.

John Marshall, Chief Justice of the Supreme Court in the early decades of the nineteenth century, commanded the respect of lawyers and laymen alike. His Court initiated the practice of writing opinions of the Court as distinguished from the separate expressions customary in English law.¹² While confronting many issues of grave political concern, they were able to persuade their audience that their decisions were technically valid interpretations of the Constitution and of controlling legislation. By 1815, foreign observers were beginning to remark on the peculiar American obsession with law, and the inclination of Americans to litigate matters that in other countries would not be regarded as suitable for judicial attention.¹³ Tocqueville, the much-studied French tourist of the 1830s, perceived that the legal profession and the judiciary had become

RATIFICATION OF THE CONSTITUTION 287, 302 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

10. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295-99 (1966).

11. See Mark Tushnet, *A Marxist Analysis of American Law*, MARXIST PERSP., Spring 1978, at 96, 99.

12. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 292-95 (1996).

13. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 937 (1996).

a kind of aristocracy.¹⁴ He was not speaking so much of lawyers' and judges' social status or wealth as of their role in the political scheme of the United States. Where European societies were stabilized by the power and influence of a cohesive social class whose expectations descended from feudal times, few American states were in fact either afflicted or supported by any such cohesions.

Hence, the legal profession and the courts filled a political void. Timothy Walker, a law teacher in Cincinnati, explained to American lawyers in 1837 that their collective duty was to see that those with power and wealth were unable to use their power to secure more wealth at cost to those who had less, and that those who enjoyed some liberties were not permitted to employ liberty as socially destructive license.¹⁵ Walker's statement expressed the aim of those who were creating a legal profession to serve the republic.

The first university law professor in America was George Wythe, appointed at the College of William and Mary in Virginia in 1779 while the Revolutionary War was being waged not many miles away.¹⁶ Wythe was appointed through the initiative of the Governor of Virginia, his former student, Thomas Jefferson.¹⁷ Wythe's aim as a teacher, and the aim of other early law teachers, was moral education to prepare lawyers for the public role described by Tocqueville and Walker.¹⁸ It was not accidental that for ninety years of the Republic's first century, the President of the United States was a lawyer.

The most intellectually accomplished exponent of this academic purpose was Francis Lieber of the University of South Carolina,¹⁹ a native Prussian, on whom Tocqueville relied heavily for his insights. Among other early leaders of the profession were Peter du Ponceau of Philadelphia and Xavier Martin of New Orleans, both immigrants from France. A significant number of nineteenth century Americans studied law abroad, almost all of them in German universities, and a significant number of those returned to teach law in American colleges. Some of those who returned contributed to the nineteenth century effort to codify American law. While there was never an American code

14. See ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 273-80 (Francis Bowen trans., Phillips Bradley ed., 1945).

15. See TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 18 (Leonard W. Levy ed., Da Capo Press 1972) (1837).

16. See Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 532-33 (1990).

17. See Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339, 340 (1992) (citing WILLIAM CLARKIN, SERENE PATRIOT: A LIFE OF GEORGE WYTHE 142 (1970)).

18. See *id.* at 340-41. Among Wythe's students at William and Mary was John Marshall.

19. See *id.* at 356-58.

comparable to the Napoleonic Code or that produced in Germany in 1900, much American law was codified, partly in response to the continental influence and partly as a device to restrict the discretion of common law judges.²⁰

Indeed, the codification movement in nineteenth century America was a feature of a steady and stern political resistance to the elitist impulses of the legal profession and especially of the judiciary. In the first half of the nineteenth century, the state courts were the object of constant political attention by advocates of democratic reform. Especially to American citizens, state courts are the usual places for contesting disputes; indeed, about ninety-eight percent of American litigation is conducted in state, not federal, courts.²¹ No consideration was ever given in any American state to the creation of a technocratic, separately professionalized judiciary of the sort familiar to France, Germany, or Japan, because such an institution, despite its many merits, was inconsistent with the large political role conferred on the courts by the eighteenth century organizers of American governments. Accordingly, it became the practice in many states to elect judges, sometimes for short terms, to ensure they were beholden to the populace and were suitably deflated in their pretensions.²² That this did not happen to the federal judiciary was less a reflection of the public esteem for John Marshall, than a result of the difficulty of amending the Constitution of the United States.

One body of American law that was largely codified in the middle of the nineteenth century was the law of civil procedure.²³ This was state, not federal, law because federal courts then generally adhered to the procedure of the states in which they sat.²⁴ Those mid-nineteenth century state codes were designed to eliminate the vestiges of English procedure and provide simplicity that could be managed by the litigants themselves or, if need be, by counsel of limited technical competence.²⁵ The aim, seldom fully achieved, was to make it possible to enforce legal rights as inexpensively as possible.

Through the first seven decades of the nineteenth century, admission to the American legal profession became increasingly open. This was in

20. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 71-76 (1981).

21. See BRIAN J. OSTROM & NEAL B. KAUDER, *EXAMINING THE WORK OF STATE COURTS, 1994: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT* 20-21 (1996).

22. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-16 (1995).

23. See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 52-53 (1952).

24. See *id.* at 39.

25. See *id.*

part the influence of the frontier mentality, but it also reflected a reality that formal education was not indispensable, at least not in law. Abraham Lincoln was a very good lawyer before he was a political leader.²⁶ But he was almost completely self-educated.²⁷ While he was highly competent in numerous respects, he was superb as an advocate before a jury.²⁸ Thomas Cooley, the premier American legal scholar of the nineteenth century, had very little more formal training than Lincoln.²⁹ Lincoln and Cooley were exceptional men, but they were not exceptional among American lawyers with respect to their educational backgrounds. And their ability to speak to and for the farmers and workers, and their spouses, who did the nation's chores was an important aspect of their professional characters. Persons who were too professional, that is too thoroughly socialized to the legal profession and its elitist pretensions, were at a serious disadvantage when appearing in courts with elected judges and broadly empowered juries. In this important respect, the institution of the civil jury and the widespread hostility to pretensions of class shaped the American legal profession.

Beginning about 1870, the advent of industrialization led to the enormous growth of higher education in America. For the most part, German universities, not English, had been the prevailing model. But the professional law school was fashioned along distinctively American lines as a graduate program.³⁰ This was done less because of any perceived need for a more technocratically competent profession than because academic credentials were becoming an important feature of American life in a wide range of professional activities. If lawyers were to have higher standing in their communities than schoolteachers, nurses, and librarians, they would have to be certified by universities. The relative status of professions came to be measured by the number of years their members spent in the academy. For at least a half century, law teachers encountered a serious problem in finding enough of a curriculum to occupy the time of their students for the three full academic years deemed necessary to justify the standing of the profession and of the law.

The case method of instruction was the principal means by which the professionalism of American lawyers was validated by universities. It provided a form of intellectual rigor uniquely relevant to the form taken

26. See JOHN P. FRANK, *LINCOLN AS A LAWYER* 14 (1961); see also DAVID HERBERT DONALD, *LINCOLN* 98-100 (1995).

27. See FRANK, *supra* note 26, at 10-11.

28. See *id.* at 23.

29. See Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 *STAN. L. REV.* 495, 517 (1997).

30. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 36-37 (1983).

by American law.³¹ The efforts of codifiers notwithstanding, the judiciary had acquired a paramount role as interpreters of legal texts, including those enacted by democratic legislative bodies. The judiciary's role had been magnified by the invention of the opinion of the court, a device setting the stage for the case method of study. The case method subtly confirmed the observation of Tocqueville about the role of the profession. That observation was further reconfirmed by the commercial success of the West Publishing Company, the primary purveyor of judicial opinions, which provided the American legal profession with a literature all its own. In addition to these merits, the case method bore a faint resemblance to the educational method employed in the baths of Rome, where cases were discussed to develop the moral and political judgment that is the mark of the wise counselor and effective advocate.³² The case method had no English antecedent, in part, because eighteenth century English courts had not discovered the opinion of the court.

At the same time that the more technocratic, case method-trained legal profession was emerging, the federal courts were fulfilling some of the fears harbored by eighteenth century antifederalists who had opposed the creation of those courts. Most resented was the role of the federal judiciary in suppressing the American labor movement.³³ Lawyers appointed to the federal bench in the late nineteenth century were, almost without exception, men of long experience in serving industrial employers. Without sanction of democratic legislation, they found a series of methods by which their power could be employed to break strikes and demonstrations. They also interpreted the Constitution of the United States as an inhibition of legislation intended to relieve the distress of early industrial workers.³⁴ Some state courts followed in this pattern, but because the state courts were more sensitive to the political power of workers, they were much less prone to use their power against the interests of labor and of farmers.

A feature of American practice dramatized in that era was the use of the civil contempt sanction to enforce injunctions.³⁵ This sanction is an effective instrument of coercion seldom employed by judiciaries in other countries. The essence of civil contempt is the imposition of a continuing duty of obedience on the contemnor. A strike leader in violation of an injunction could be incarcerated until he ordered discontinuance of the strike. It is said that the person so confined has the keys to his jail cell in his own pocket—all he has to do is obey the court. But he has no

31. See Paul D. Carrington, *Hail! Langdell!*, 20 L. & SOC. INQUIRY 691, 711-12 (1995).

32. See JOHN P. DAWSON, *THE ORACLES OF THE LAW* 113 (1968).

33. See FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 206 (1930).

34. See *generally id.* at 146-47 (describing view taken by the Supreme Court).

35. See RONALD L. GOLDFARB, *THE CONTEMPT POWER* 7 (1963).

choice to be defiant. He cannot serve a limited term and gain his release, but must submit to the power of the court. Moreover, this power of coercion is not subject to the right to trial by jury. This is a relic of American Anglicism—the injunction was a device of the English Court of Chancery where no right to jury trial was ever acknowledged, but where the command of the Chancellor was often deployed to remedy diverse inadequacies in the legal remedies provided by the common law courts.³⁶

In appraising the civil contempt sanction, it is important to note that the power was often wielded by a single judge. And in the nineteenth century, appellate review was narrowly confined. Until 1891, the one regular appellate court in the federal system was the Supreme Court of the United States. The congressman responsible for the 1891 legislation creating the intermediate United States Courts of Appeals proclaimed it his purpose to “destroy the kingly power” of the federal judges.³⁷

However, even with the benefit of appellate review, one simply does not resist the power of the federal judiciary. President Lincoln did so once in the midst of a civil war and got away with it, but that is the single example of successful defiance.³⁸ On several occasions in the 1950s, state governors were tempted to defy the federal judicial power, but were quickly disabused of the purpose.³⁹ In 1974, America faced the prospect that the judiciary would enforce an order compelling the President of the United States to surrender information highly embarrassing to him and likely to result in his removal from office.⁴⁰ Only President Nixon’s resignation prevented a federal judge from ordering the United States Marshal to enter the White House, arrest President Nixon, and hold him in the city jail until he surrendered the required information. It is difficult to envision such an event in most other legal systems.

Although not used in the framing or enforcement of injunctions, the civil jury remained a major feature of American litigation in state and federal courts. It has largely disappeared in the United Kingdom and in other nations of the Commonwealth, but not in America.⁴¹ While large corporations fear an alleged reverse class bias of juries, the jury institution is deeply entrenched in American culture as an entitlement of

36. See Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 75.

37. 21 CONG. REC. 3404 (1890) (statement of Rep. Culberson).

38. See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 32 (1941).

39. See RICHARD KLUGER, *SIMPLE JUSTICE* 753-54 (1976).

40. See *United States v. Nixon*, 418 U.S. 683, 713-14 (1974).

41. The civil jury survives in modest form in Ontario. See *Courts of Justice Act*, R.S.O., ch. C-43, § 108 (1990) (Can.).

litigants and as a significant element of popular participation in government. Most Americans trust juries more than judges, in part because so many of them have themselves been jurors and in part because most who have served in that role found it a heartening experience. It is true that juries are almost impossible to bribe or intimidate because they are numerous and will adjourn at the end of the trial, never to meet again. As William Douglas stated, the jury is "the one governmental agency that has no ambition."⁴²

While much litigation, especially in commercial matters, is conducted by parties who do not desire a jury, the institution has continued to shape the character not only of the profession, but also of substantive and procedural law. Thus, the American law of torts is formed as a guide to trial judges giving instructions to juries in cases not arising out of contract. The law of negligence defines the role of the jury in imposing the moral standards of the community on the conduct of alleged malefactors. The law of punitive damages allows juries to express moral outrage at harmful conduct. The law of evidence is formed as a body of rules protecting the lay jury from improper influences to which lawyers are tempted to subject them.

American civil procedure is an outcome of the jury system in a different and important respect. Jury trials are by their nature dramatic events. Oral testimony is favored. Because the judges are more political and less technical, their role is diminished and the role of lawyers as advocates to the jury is enlarged. The right of parties to cross-examine adverse witnesses is sanctified. Moreover, in consideration of the jury, discontinuity in the presentation of evidence is disfavored. For that reason, parties must prepare their evidence before it is presented at trial in open court. Pretrial preparation is an indispensable phase of the process, not to be compared to pretrial proceedings in a system that countenances discontinuity in the presentation of evidence.

The need to prepare for trial led to the empowerment of lawyers to conduct investigations using diverse tools, some of which had origins in early practices of the English Court of Chancery.⁴³ This practice was not fully elaborated until the promulgation of the Federal Rules of Civil Procedure in 1938, but it is now customary in the courts of every American state.⁴⁴ Thus, any lawyer representing any client in federal court may issue a subpoena compelling (upon pain of the application of the civil contempt power) testimony and the production of documents by

42. WILLIAM O. DOUGLAS, *WE THE JUDGES* 389 (1956).

43. See Alan K. Goldstein, *A Short History of Discovery*, 10 *ANGLO-AM. L. REV.* 257, 257 (1981).

44. See *AM. JUR. 2D DESK BOOK*, Item No. 126 (1979) (listing 46 states in which state practice is the same or nearly the same as federal practice).

any person who can be found and served in the United States.⁴⁵ Such testimony can be taken in the form of a deposition administered by a subordinate officer of a court anywhere in the world.⁴⁶ Moreover, parties are required to cooperate in the production of materials useful as evidence at trial. They must produce their business records (wherever kept),⁴⁷ submit to examination while subject to punishment for perjury,⁴⁸ permit the inspection of their premises or property,⁴⁹ and may even be required to undergo physical and mental examinations by court-appointed examiners.⁵⁰ A party who appears to be less than forthcoming with information requested by an adversary is at serious risk of having the facts deemed to be as the adversary suspects and alleges.⁵¹ American corporations, like their international counterparts, revile this practice as a colossal invasion of privacy. But it is an important feature of a system erected on the base of a consciously politicized and non-technical judiciary sharing power with a civil jury informed of the facts in a dramatic encounter largely controlled by the advocates.

By the early years of this century, the predations associated with industrialization were well-recognized by the American electorate. A federal bureaucracy responsible for regulating the predatory impulses of capital first appeared in 1887 with the enactment of the Interstate Commerce Act, which created an agency to regulate railroads.⁵² Progressive legislation, such as the industrial accident compensation schemes enacted by state legislatures beginning about 1890, was frequently fashioned on German models. A state often leading the way was Wisconsin, a state largely settled by German immigrants.⁵³ The federal courts, however, continued to impede such legislation. A majority of the Justices on the Supreme Court appeared to find the principles of social Darwinism embedded in the Constitution.⁵⁴ Partly for that reason, Congress and the state legislatures were, for a half century, inclined to create administrative agencies having some independence from judicial and even executive oversight as responses for diverse social and

45. See FED. R. CIV. P. 45(a)(3), (e).

46. See FED. R. CIV. P. 28(a)-(b).

47. See FED. R. CIV. P. 34.

48. See FED. R. CIV. P. 30(a).

49. See FED. R. CIV. P. 34(a).

50. See FED. R. CIV. P. 35.

51. See FED. R. CIV. P. 37(b)(2)(A).

52. See Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (current version at 49 U.S.C.A. §§ 10101-11908 (West 1997)).

53. See A. J. ALTMAYER, *THE INDUSTRIAL COMMISSION OF WISCONSIN: A CASE STUDY IN LABOR LAW ADMINISTRATION* 16 (1932).

54. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 6-7 (1965).

economic problems.⁵⁵ Such agencies were not insulated from judicial review, but their claims to professional expertise tended to diminish the intensity of that review. And, in response to the longstanding inclination of federal courts to break strikes with injunctions, Congress withdrew the jurisdiction of those courts to hear the claims of employers seeking strike-breaking injunctions in 1932.⁵⁶

Despite the autonomy given to state and federal administrative agencies, they often proved to be vulnerable to influence and even control by those whom they were created to regulate. This was not necessarily a consequence of bribery or intimidation, but often was the product of sustained intimacy and of the special interest regulatees took in the selection of the chief regulators. By 1950, it was evident even to many of its former champions that the administrative process was not the panacea for America's social and economic problems that it had earlier been thought to be.⁵⁷

Meanwhile, however, the federal judicial process was gaining a stature not enjoyed since the time of John Marshall. In part, this reflected the impact of the 1891 legislation creating the intermediate appellate courts,⁵⁸ which served to inhibit idiosyncratic behavior and hubris by those judges appointed for their political qualifications, yet holding office for life. In part, renewed respect for the courts reflected general satisfaction with the greater modesty expressed in the conduct of the Supreme Court after 1937, when the President proposed to enlarge the Court for the purpose of modifying some of its positions on issues raised by Progressive legislation.⁵⁹ The increased stature of the federal judiciary may also have reflected the restraining influence of university legal education, employing the case method to enhance the moral and professional judgment of those who became judges, that became paramount after 1890. It was also a factor that lawyers, fully armed in 1938 with the tools of discovery, could effectively uncover falsehood and wrongdoing in civil cases. And it was a factor that juries, unlike bureaucracies, are virtually invulnerable not only to bribery and intimidation, but even to political influence. Furthermore, the availability of lawyers willing to work for contingent fees was unquestionably important.⁶⁰

55. *See id.* at 9-10.

56. *See* Norris-LaGuardia Act of 1932, Pub. L. No. 65, § 1, 47 Stat. 70 (codified as amended at 29 U.S.C. § 101 (1994)).

57. *See* Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1105-07 (1954).

58. *See* The Evarts Act of 1891, ch. 517, § 2, 26 Stat. 826 (codified as amended at 28 U.S.C. § 43 (1994)).

59. *See* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 142-54 (1995).

60. *See* F. B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 5, 87-109 (1964).

For these reasons, legislatures and Congress became, by mid-century, disenchanted with the administrative process and persuaded that a superior form of regulation was private law enforcement. Thus, whole bodies of American law were entrusted to that process. The nineteenth century antitrust laws⁶¹ had been the first to rely chiefly on the injured parties, prodded with the prospect of bounty in the form of trebled damages, to enforce an important national economic policy. By 1965, private enforcement was the norm in such diverse fields as civil rights, civil liberties, investment fraud, consumer protection, and environmental law.

A sort of paradigm of federal regulatory legislation was the Automobile Dealers' Day in Court Act of 1956.⁶² That statute was designed to protect local dealerships from predation by the manufacturers holding the economic power of life or death over them. The statute simply provided that in their relations with dealers, manufacturers are obliged to act "in good faith"—a term nowhere defined in the statute. The idea was to put the power to take an overbearing manufacturer to court in the hands of every dealer. There the manufacturer's behavior would be evaluated by a jury. In fact, few dealers filed claims under the Act, and fewer still were successful in persuading a jury that they were victims of bad faith dealing by the manufacturer. Nevertheless, the weapon is respected by manufacturers, who have been more restrained in their conduct toward the local dealers since its enactment.

Reliance upon private law enforcement in courts as a regulatory mechanism has had one major, unwelcome effect. For those states that still elect judges in partisan elections, some of those benefitting from, or threatened by, private enforcement have been induced to spend vast amounts of money to influence judicial elections. The state courts in Texas and Alabama, most notably, are now widely recognized as institutions submerged under an ocean of political campaign money. This development has strengthened the need for the civil jury in the courts of such states.

A second problem has been the alleged cost of discovery practice. Beginning about 1970, this problem began to attract notice.⁶³ Certainly there were and are abusers who use discovery practice to impose costs on adversaries and, thus, force them to accept otherwise unacceptable terms

61. See Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C.A. §§ 1-37a (West Supp. 1998)).

62. Automobile Dealers' Day in Court Act of 1956, Pub. L. No. 1026, 70 Stat. 1125 (codified as amended at 15 U.S.C. §§ 1221-1225 (1994)).

63. See, e.g., Ambrose Doskow, *Procedural Aspects of Discovery*, Address at the Ninth Annual Postgraduate Conference of the Columbia Law School Alumni Association on Changes Ahead in Federal Pretrial Discovery (Mar. 23, 1968), in 45 F.R.D. 498, 500, 504.

of settlement. Litigators billing their clients by the hour for the time required to scrutinize a warehouse full of documents produced some appalling costs. That this was or is a widespread problem is not demonstrable on the basis of empirical evidence, most of which suggests that discovery cost is infrequently a serious problem.⁶⁴ In recent years, diverse methods have been employed in an effort to limit the alleged adverse consequences of discovery. One response has been "managerial judging," a practice in which the judges manage the lawyers, performing a role more nearly resembling that of a judge working in the continental tradition.⁶⁵ A second response, also animated by other aims, has been the movement favoring the use of alternative methods of dispute resolution.⁶⁶

Those who fear the lash of the law seem to be especially attracted to arbitration because discovery is not generally available in arbitration. Moreover, in America arbitrators are not accountable for their fidelity to law and are generally reputed to favor "repeat players" who may hire them to arbitrate later disputes with other adversaries. Arbitrators are also said to share a tendency to make Solomonic awards, in other words, dividing disputed babies into halves.

Despite these developments, American courts seem likely to remain exceptionally open to plaintiffs claiming to have been victims of a wide range of predatory practices. It would require deep cultural change to persuade Americans that arbitral tribunals or administrative agencies are effective alternatives to the assertion of private rights in public courts, in which juries and discovery are available as a means of correcting imbalances in economic power that are productive of injustice. Accordingly, "as a moth is drawn to the light,"⁶⁷ aggrieved plaintiffs afforded a choice will often be wise to elect an American forum as the place in which their grievances should be heard.

64. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83-90 (1993).

65. Judith Resnik, *Managerial Judging*, 96 HARV. L. REV. 374, 378 (1982); see also Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770-73 (1981).

66. See Paul D. Carrington, *ADR and Future Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485, 485-93 (1996).

67. See *supra* note 1 and accompanying text.