

“Too Many Courts and Too Much Law”: The Politics of Judicial Reform in Nova Scotia, 1830–1841

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The 1830s was Nova Scotia’s “Age of Reform.” Although historians have documented the growing tensions between elected Assembly and appointed lieutenant governor and Council, the concomitant attacks on the established economic elite, and the rise of a distinct party in colonial politics, little attention has been paid to the role played by the colony’s courts and judges in this crucial decade. This lacuna is surprising, because reformers were convinced that the judges of the Nova Scotia Supreme Court (NSSC) were bulwarks of the old order and barriers to progress, and as their movement gained influence in the 1830s it brought the judges and the court system to the fore. This period saw numerous proposals for reform to the colony’s laws and legal system, some effected and others not. Here we examine those aspects of the reform platform that were most hotly contested precisely because they exemplified the ways in which controversies about the legal system both reflected and exacerbated broader

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political and social change. The most important issues were judicial fees and the role of the chief justice as head of the Tory-dominated lieutenant governor's Council. We also examine two other matters in which the judicial system was directly linked to reformers' general demands for a system of government more responsive to the needs of ordinary Nova Scotians: judicial salaries and the role of the lower civil courts.

We argue that far from being niche issues of legal administration, the often heated debates that accompanied judicial and court reform provide an important insight into the broader clash of ideas and interests occurring in the colony. Beginning almost two decades before the achievement of responsible government in 1848, they shaped and were shaped by conflicting visions of state formation and constitutional governance, the surging power of reform ideology and public opinion, and the uncertainty of a colony desperate to develop its economy. We also argue that this was not one-way traffic; in turn these legal system issues, especially judicial fees, propelled the reform movement forward, giving it a number of causes célèbres that served to illustrate the evils of the ancien régime. Neither Nova Scotia nor any other British North American colony exhibited Jacksonian demands for judicial reform; there were no impeachments, burnings in effigy, or suggestions that judges should be popularly elected.¹ But there was plenty of invective, and reformers in this outpost of British North America did, similarly to their United States counterparts, see the NSSC judges as an unwelcome vestige of aristocracy, their attitudes a relic of colonialism, and their interests at times diametrically opposed to those of the majority of the population. That Nova Scotia did not go as far as many American states can probably be attributed to the absence of a revolutionary legal and constitutional culture. The revolution in authority to the south, whose reverberations swept through judicial systems in many states, had no such counterpart in a colony that had opted to retain its links

1. On Jacksonian democracy and the courts see: Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," *University of Chicago Law Review* 62 (1995): 689–794; Caleb Nelson, "A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America," *American Journal of Legal History* 37 (1993): 190–224; Walter F. Pratt, "The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges," *Law and History Review* 4 (1986): 129–59; Kermit Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary," *Historian* 45 (1983): 337–54; R. Lawrence Hachey, "Jacksonian Democracy and the Wisconsin Constitution," *Marquette Law Review* 62 (1978): 485–529; Richard P. Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly*, 71 (1956): 341–64; Clark F. Norton, "Judicial Reform in Michigan Between Two Constitutions, 1835–1850," *Michigan Law Review*, 51 (1952): 203–60; and Evan Haynes, *The Selection and Tenure of Judges* (Newark: National Conference of Judicial Councils, 1944).

to the empire in the 1770s. However, we would argue, legal reform evinced a more radical outlook than historians have so far appreciated.

Legal reform therefore cannot be understood without some appreciation of the political and economic situation in the colony in the 1830s, the decade in which reformers took aim at what the radical editor of Pictou’s *Colonial Patriot*, Jotham Blanchard, denounced as the “system of grandeeism and grasping,” which he said typified the colony’s government.² In the early 1830s reformers in the Assembly attacked the governing elite, principally the lieutenant governor’s Council and its Assembly supporters,³ over a variety of issues, including banking reform, taxation, educational policy, and the collection of quit rents to pay the costs of government, with the result that relations between the elected and appointed branches of the local government, and between the Assembly and the imperial government, grew increasingly confrontational. In 1835, newspaper editor and future reform leader Joseph Howe publicly accused Halifax’s governing grand jurors of corruption, and the resulting libel trial, in which he defended himself and was acquitted, mobilized support for reform across the colony. Something of a watershed was reached with the 1836 Assembly election, the first to be fought on clear party lines, and in which voters returned a reform majority.

It was in this atmosphere of growing discord that various aspects of court reform were debated. An examination of them highlights the extent to which broader ideas of democratic development infused the politics of legal reform. On the subject of judicial fees, for example, reform advocates argued that the judges’ custom violated the principle of taxation without representation. On the question of salaries, the Assembly rejected as early as 1830 the idea of judges as a class apart from ordinary Nova Scotians, a notion forwarded by those still promoting the concept of a mixed monarchy constitution.⁴ And on reform of the inferior courts,

2. Quoted in J. Murray Beck, *The Politics of Nova Scotia: Volume One: 1710–1896* (Tantallon, Nova Scotia: Four East, 1985), 104. What follows is derived from this and from J. Murray Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957), 128–33; J. Murray Beck, *Joseph Howe: Volume One: Conservative Reformer, 1804–1848* (Montreal and Kingston: McGill-Queen’s University Press, 1982); and Brian Cuthbertson, *Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles, 1758–1848* (Halifax: Formac, 1994). For the Nova Scotia events in comparative perspective, see Philip A. Buckner, *The Transition to Responsible Government: British Policy in British North America, 1815–1850* (Westport: Greenwood, 1985).

3. Prior to 1838, Nova Scotia had a Council of Twelve, which functioned in both executive and legislative capacities, not two separate councils.

4. On mixed monarchy in British North America, see Jeffrey L. McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791–1854* (Toronto: University of Toronto Press, 2000).

abolitionists and defenders alike grounded their arguments in popular opinion, suggesting an awareness that institutional legitimacy now resided with the colonial public. It would go too far to say that court reform debates simply reflected Jacksonian democratic ideas about the place of the judiciary. On some issues, especially that of the continuing role of the chief justice on the governor's Council, Nova Scotian developments were influenced by broader imperial currents of reform. But on other questions, particularly that of judicial fees, the courts' critics in the province did display something of the Jacksonian ethos for change. They clearly wanted to democratize the system to some extent, to make justice more accessible, and to see judges as citizens elevated to the bench, not a caste apart from the ordinary person. They argued, for example, that the legislature alone, and not custom inherited from Britain, should control the way judges were paid.

Party politics and the rise of "democracy" do not solely explain the direction of legal reform, especially in this period before the full development of party discipline. Lawyers in the Assembly found their views often discounted because of anti-legal sentiment and allegations that self-interest shaped their decisions. The perception of lawyers as an insular, self-aggrandizing elite was widespread in the maritime colonies of British North America, as it was in the United States throughout the Jacksonian period.⁵ On some issues, especially debates over the abolition of the inferior courts, local considerations were prevalent, with members routinely crossing party lines to retain court services for their counties. And the debates over judicial and court reform also reveal that political ideology, independent of party affiliations, could be influential. Others have argued that historians of nineteenth-century Maritime politics traditionally underestimated the role of political ideology and were too ready to rely on expediency, patronage, and self-interest as explanations of political developments;⁶ we also demonstrate here that ideas mattered. On the question of

5. See Gregory Marquis, "Anti-Lawyer Sentiment in Mid-Victorian New Brunswick," *University of New Brunswick Law Journal* 36 (1987): 163–74. For the United States see Gerard N. Gawalt, "Sources of Anti-Lawyer Sentiment in Massachusetts, 1740–1840," *American Journal of Legal History* 14 (1970): 283–307.

6. See, especially, Philip Girard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax*. (Toronto: University of Toronto Press and the Osgoode Society, 2011); Girard, "'I will not pin my faith to his sleeve': Beamish Murdoch, Joseph Howe, and Responsible Government Revisited," *Journal of the Royal Nova Scotia Historical Society* 4 (2001): 48–69. See also Gregory Marquis, "In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture," *University of New Brunswick Law Journal* 42 (1993): 69–94, and the recent literature on the Joseph Howe trial for libel, especially Lyndsay Campbell, "Licence to Publish: Joseph Howe's Contribution to Libel Law in Nova Scotia," *Dalhousie Law Journal* 29 (2006): 79–116.

judges involving themselves in politics, for example, the Tory Beamish Murdoch, the colony’s leading legal author and an opponent of responsible government, made sophisticated arguments for the separation of powers, rooted in the “Country” school of political thought. Broader intellectual currents, which coalesced into what has been called the “intellectual awakening” of the colony, also affected court reform debates just as they influenced religious controversies, the historical writing of Thomas Chandler Haliburton, and the legal scholarship of Murdoch.⁷

Also key to the direction of legal reform was the economic climate, because the cost of the judicial system was a constant concern of its critics. The colonial economy endured severe fluctuations throughout the decade, and some regions even faced famine when harvests failed in the early 1830s.⁸ In this tumultuous economic context, rhetoric about the extravagance of judicial remuneration and the wastefulness of superfluous courts was especially resonant. For its critics the court system was not simply unnecessarily expensive, it drew limited resources away from infrastructure projects crucial to colonial development. Petitions poured into the legislature asking for money for roads and bridges, and despite a debt of over £62,000 in the 1830s, the Assembly still allocated large sums of money: £14,000 in the 1839 session alone to road building. Even with the money allocated, travel throughout the province remained fairly difficult in many areas through the first half of the nineteenth century, especially in the fall and spring.⁹ As a result, complaints about the cost of the judicial establishment should be seen both as protests against the high costs of an

7. See, generally, D.C. Harvey, “The Intellectual Awakening of Nova Scotia,” *Dalhousie Review* 13 (1933): 1–22. See also Daniel C. Goodwin, “‘The Very Vitals of Christianity’: The Baptismal Controversy and the Intellectual Awakening in Nova Scotia, 1811–1848,” *Nova Scotia Historical Review* 15 (1995): 72–87; M. Brook Taylor, “Thomas Chandler Haliburton as a Historian,” *Acadiensis* 13 (1984): 50–68; and Philip Girard, “Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova Scotia*,” *Law and History Review* 11 (1993): 101–44.

8. Julian Gwyn, *Excessive Expectations: Maritime Commerce and the Economic Development of Nova Scotia, 1740–1870* (Montreal and Kingston: McGill-Queen’s University Press, 1998), 43–89; Rosemary E. Ommer, “The 1830s: Adapting Their Institutions to Their Desires,” in *The Atlantic Region to Confederation: A History*, eds. Phillip A. Buckner and John G. Reid (Toronto: University of Toronto Press, 1994), 284–306.

9. The debt figures are from 1839 and 1840. See *Journals of the House of Assembly of Nova Scotia* [hereafter *Assembly Journals*], 1839, Appendix 28, and 1840, Appendix 35. The roads figure is at *ibid.*, March 30, 1839, 619. For roads generally, see Robert Mackinnon, “Roads, Cart Tracks, and Bridle Paths: Land Transportation and the Domestic Economy of Mid-Nineteenth Century Eastern British North America,” *Canadian Historical Review* 84 (2003): 184–6.

official class widely disliked on a political basis, and as arguments about where the colony should invest its limited revenues.

This article proceeds by examining the various issues involving the provincial court system and its judges in a broadly, although not entirely, chronological order. We begin with the period from c. 1830 to 1834, in which the principal topic of discussion was judicial salaries. The next two sections examine the closely related issues of judicial fees and the chief justice's place on the Council, in the years between 1834 and 1838. The final section is centered on the later 1830s and early 1840s, in which the principal question was whether the lower civil courts should be retained. Before we begin discussion of these issues, however, we need to establish the principal features of the legal system that attracted so much controversy.

In 1830 the principal court in the colony, the NSSC, had five judges: the chief justice, three assistant (puisne) judges, and, from 1816, an associate circuit judge whose jurisdiction was limited to the circuit.¹⁰ The judges were members of the colonial elite even apart from their positions on the bench. Chief Justice Sampson Salter Blowers, for example, was a Harvard-educated and very successful Massachusetts lawyer and former solicitor-general of New York who had joined the loyalist migration in 1783. He was made attorney general the following year and a member of the Council in 1788. He had been chief justice since 1797 and served until he retired in 1833 at the age of 90. The senior assistant judge, Brenton Halliburton, who succeeded Blowers in 1833, was a high Tory, a councillor, the son-in-law of Anglican bishop Charles Inglis and the nephew of former NSSC Judge James Brenton. The court sat at Halifax for four terms a year, and in the late spring, summer, and early fall it went out on circuit; by 1830 it was holding seventeen weekly sessions a year at twelve different circuit locations.¹¹

The NSSC judges drew their remuneration from two different sources. The chief justice received £850 sterling, paid by the London government, which had initially created the position. The others were paid by the

10. When not otherwise referenced, the summary that follows is drawn from J. Barry Cahill and Jim Phillips, "Origins to Confederation: The Supreme Court, 1754–1867," in *The Supreme Court of Nova Scotia 1754–2004: From Imperial Bastion to Provincial Oracle*, eds. Philip Girard, Jim Phillips, and J. Barry Cahill (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2004), 53–139.

11. For the growth and operation of the circuit see Jim Phillips and Philip Girard, "Courts, Communities, and Communication: The Nova Scotia Supreme Court on Circuit, 1816–1850," in *The Grand Experiment: Law and Legal Culture in British Settler Societies*, eds. Hamar Foster, A. R. Buck, and Benjamin Berger (Vancouver: University of British Columbia Press and Osgoode Society for Canadian Legal History, 2008), 117–34.

Assembly: £600 local currency for the assistants, which was worth only 90% of sterling, reduced to 80% in the early 1830s, and £400 local currency for the associate circuit judge. The judges also received fees directly from litigants including: 10 s. on the entry of every action above £10, 5 s. for those under £10, 6 s. 8 d. for every trial. A contemporary estimate put the total fee received on suits above £10 at between 17 s. 6 p. and £1 17 s. 6 p.¹² Formally, only the chief justice was entitled to these fees, but there was a long-standing practice of his relinquishing the circuit fees to the judges who actually heard the cases. The amount of fees collected fluctuated with litigation levels, but they were a substantial salary supplement. The chief justice got approximately £500 local currency annually in the 1820s and 1830s, the assistants probably averaged c. £75 each before 1834 and over £100 thereafter, the difference the result of moving from two-judge to one-judge circuits.

The NSSC was but one part of the colonial judicial establishment. It was joined by various specialized courts such as Vice-Admiralty and Chancery. But the principal other courts were the county-based lower courts, the Inferior Courts of Common Pleas (ICCP, civil) and the Sessions of the Peace (criminal). The former had a jurisdiction more or less concurrent with the NSSC, whereas the latter was very much an inferior court, dealing only with less serious offences. For the most part these courts were staffed by unpaid justices of the peace, but from the early 1820s they were presided over by four professionally trained and salaried judges, styled "Divisional Chief Justices" of the ICCP and "Presidents" of the Sessions. The inferior courts had been organized into four divisions, with the chief justices travelling to the various counties in their divisions. The first such chief justice was established for Cape Breton Island in 1823, shortly after it had been annexed to Nova Scotia, and the measure was largely uncontroversial. A year later, however, a proposal spearheaded by leading members of the bar to divide the mainland into three divisions and establish £400 a year chief justiceships for each sparked a rancorous debate in the Assembly, passing on an 18 to 17 vote following assertions that it was little more than a ploy to provide well-paying jobs for senior members of the legal profession.¹³ In fact, the three posts were then awarded to lawyer-assemblymen, after much lobbying and scrambling among the

12. See Council Minutes, September 1, 1785, in *Assembly Journals*, 1836, Appendix 76; and *Novascotian*, March 10, 1836.

13. See *Administration of Justice in Cape Breton Act*, *Statutes of Nova Scotia* [hereafter S.N.S.] 1823, c. 36, and *Equal Administration of Justice Act*, S.N.S. 1824, c. 38. For the vote and debates see *Assembly Journals*, March 4, 1824, and *Novascotian*, February and March 1824, passim.

contenders,¹⁴ and for many the whole arrangement came thereafter to stand as an exemplar of how local tax revenues were used for the aggrandizement of an elite profession. From 1826, the Assembly also had to foot the bill for a master of the rolls, who presided in Chancery; the post went to Speaker of the Assembly Simon Bradstreet Robie.¹⁵ By 1830, the total amount paid by the House for judicial salaries and travelling expenses was over £5,000, out of a total provincial revenue of only £60,000.¹⁶

Judicial Salaries, 1830–1834

The issue of judicial salaries generated an intense debate because it exposed fundamental disagreements about the role and status of the judiciary between the majority of assemblymen and the judges' supporters in the Assembly and in the executive. In turn, those disagreements were symptomatic of the emerging critique of the ancien régime, a critique that focused on the argument that colonial government was operated for the benefit of a small entrenched elite and paid insufficient attention to the needs and aspirations of the majority of colonists. Half a decade before Howe's libel trial galvanized opposition to the old order, the issue of the salaries of the legal elite revealed in some, and created in others, an incipient spirit of democratic political and legal reform.

There were two formal attempts to increase NSSC puisne judges' salaries in this period. In 1830, Michael Wallace, provincial treasurer and administrator of the government during Lieutenant Governor Maitland's absence, presented the Assembly with a petition from the judges for an increase of £200 a year.¹⁷ The request was resoundingly rejected, and a further attempt in 1833, this time initiated from London, to get the Assembly to agree to a salary increase was rebuffed without even a vote. The 1830 petition, with which this section of the article will principally deal, was the culmination of some years' private discussion among the judges and their supporters in Council about salaries, discussions that revealed that the judges had little faith that the Assembly would grant

14. See James Stewart to Peleg Wiswall, March 8 and 22, 1824, Nova Scotia Archives and Records Management [hereafter NSARM], Wiswall Papers, Manuscript Group [hereafter MG], vol. 980, Nos. 92 and 96.

15. *Master of the Rolls Act*, S.N.S. 1826, c. 11.

16. See 'Report of Assembly Proceedings,' *Novascotian*, March 18, 1830.

17. *Assembly Journals*, February 18, 1830. We have not been able to locate the judges' memorial, but its content is clear from the debate over it.

the request.¹⁸ They were right regarding that point, but probably did not anticipate the adamant and heated negative reaction, which resulted from a rejection of the idea that judges needed more money to maintain their independence and their status as part of the colonial governing elite.

The few voices raised in favor of the petition made two principal arguments.¹⁹ First, supporters of the judges compared Nova Scotian judicial salaries unfavorably with those of other colonies. "[T]here was no other Colony where public officers were so badly paid as they were in Nova Scotia," asserted Cape Breton County representative Richard Uniacke Junior, who very shortly afterwards became an NSSC judge.²⁰ In this he was generally correct, but, as we shall see, the comparison was considered irrelevant by many.²¹ The second, and most vigorously asserted, argument for an increase was that the judges required salaries that would provide them with an exalted place in colonial society. Both Murdoch and Uniacke explicitly linked salary levels to what they termed the "independence" of the judges, by which they meant not just the need to ensure that judges were free from the temptation to abuse their office, but, more importantly, a requirement that they live in a style that set them apart from their fellow citizens. As Murdoch stated, the judges' salaries were not only "inadequate to the duties they have to perform" but also for the "establishment which, for the due performance of that duty and the maintenance of their ranks in society, it was necessary to keep up." He could, he continued, "state from his own personal knowledge of the style of living in

18. The judges were also divided over whether they should link a salary increase to giving up their fees. Lewis Wilkins wanted to do so, but the other puisnes (Halliburton and James Stewart) disagreed with the tactic, in part because they knew that Blowers, who drew the lion's share of the fees, would never support such a proposal. Stewart and Halliburton also disliked the proposal because it would freeze remuneration; if circuit litigation increased they would be better off with the existing £600 plus fees. See James Stewart to Peleg Wiswall, February 16 and March 12, 1827, and February 23, 1829, NSARM, Wiswall Papers, MG 1, vol. 980, Nos 114, 116, and 140.

19. The debates over salaries were reported in 'Report of Assembly Proceedings,' *Novascotian*, March 18 and 24, 1830.

20. See also the comment of Alexander Stewart, lawyer and future master of the rolls, that the NSSC judges were much less well paid than those in New Brunswick ('Report of Assembly Proceedings,' *Novascotian*, March 24, 1830), and "Selden" 'The Judges' Memorial,' *Novascotian*, March 18, 1830, which offered unflattering comparisons with a variety of other colonies.

21. The chief justices of Upper and Lower Canada both received £1,500 sterling, almost twice as much as Nova Scotia's, and that of New Brunswick received £900 sterling. But those of Newfoundland and Prince Edward Island received only £700 sterling. Puisne judges in the first three named colonies were all paid rather better than their Nova Scotia counterparts—the puisne judges of the Upper Canada Court of King's bench, for example, received £900 sterling.

the circle which the Judges moved, that the present salaries were inadequate.” To similar effect Uniacke contrasted local judges with their British counterparts: “It was well known that when a British Judge went on the circuit, he travelled in a style which at once stamped his character; and we ought to enable our Judges to support their dignity in a similar manner.” Uniacke insisted that a judge on circuit “ought to be able . . . to travel in his own carriage. Surely gentlemen would not like to see a Judge crammed into a common stage coach.”²²

Uniacke’s argument was an assertion of the desirability of a form of gentry class in the colony. He clearly believed that the judges should reflect the “majesty” of the law, that judicial authority was more effective when accompanied with the trappings not only of office but also of wealth.²³ He and others argued that judges needed to be a breed apart, to play the role of a local aristocracy, albeit one of professional attainment rather than birth. The idea that judges should be far removed from ordinary citizens, a notion underpinned by the conviction that the law applied by the judges rested not on popular sovereignty but in royal authority, was supported by a letter writer to the *Novascotian*, Selden, after the debate. Arguing first that, “the British Courts of Justice had a more direct and beneficial influence on the morality of the people than the whole Bench of British Bishops,” he went on to assert that such influence could only be sustained by a judge who was “one of the first and most dignified in the land.” He “should be able to mingle in the best society, and to move in the highest sphere of action, for his influence and elevation is not personal only; it sheds around upon the community a healthy and vivifying influence.” Much more followed in the same vein; the judges needed to be able to live at a much higher standard if they were to be truly independent.

The debate inevitably involved comparisons with the United States as well as with Britain and its other colonies. Some members compared Nova Scotia with the United States, where judicial salaries, it was correctly alleged, were considerably lower.²⁴ However, Murdoch and others

22. ‘Report of Assembly Proceedings,’ *Novascotian*, March 24, 1830. In fact that is exactly how they often travelled on circuit—when there was a stage coach. For some circuits horseback and open boats were the order of the day. See Phillips and Girard, “Courts, Communities, and Communication.”

23. Obviously we are drawing here on Douglas Hay’s famous argument that in eighteenth-century England judges on circuit accentuated and exploited the “majesty” of the law as part of the ideology that ensured obedience to authority: see “Property, Authority, and the Criminal Law,” in Douglas Hay, Peter Linebaugh, and E.P. Thompson, eds., *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allen, 1975), 17–63.

24. This argument was not reported in the *Novascotian*, but Murdoch and others responded to it; therefore, it must have been made: see ‘Report of Assembly

vehemently rejected the comparison. He derisively asserted that "£20,000 was the cost of the Judiciary Establishment of the whole republic," and insisted that the "parsimonious system adopted in the United States" was "radically bad." Members should not have their opinions "warped towards the practice of our republican neighbours." By implication, judges in a monarchical system of government needed to be a distinct class from ordinary citizens.²⁵ Alexander Stewart argued similarly and more explicitly that "it ought never to be lost sight of that we form part of a monarchy, and that the salaries of our public officials ought to be greater than in a republic."²⁶

These ideas reflected a still significant strain in early nineteenth-century British constitutional thought. However, only a small minority of assemblymen believed in them enough to support the judges' petition. A motion to refer the salary memorial to the committee of supply was defeated 31 to 5, and one to refer it to a select committee was defeated 28 to 8.²⁷ In the debate, most speakers had no patience with aristocratic pretensions. The comparison to other colonies was irrelevant; what mattered was comparison with others in Nova Scotia, not salary parity among colonial elites. William Lawson, a Halifax merchant and a stalwart of the reform cause, noted that there were "very few men in Nova Scotia who enjoyed an income of £600." The rejection of a claim based on colonial aristocracy, and the willingness to employ American comparisons demonstrates, we would suggest, that Nova Scotians were beginning to fashion their own ideas about the nature of politics and were developing a distinct legal culture. British models were inapplicable to some extent, while at the same

Proceedings,' *Novascotian*, March 18 and 24, 1830. United States salaries were lower than those in British North America, although there were considerable differences among the states. The chief justice of New Hampshire received \$1,500 and that of Massachusetts received \$3,500. See John Philip Reid, *Controlling the Law: Legal Politics in Early National New Hampshire* (DeKalb, IL: Northern Illinois University Press, 2004), and William T. Davis, *History of the Judiciary of Massachusetts* (Boston: Boston Book Company, 1900). The United States dollar exchanged at five to the pound sterling at this time (see James Pennington, *The Currency of the British Colonies* [London: Clowes, 1848]), meaning that even Massachusetts paid its chief justice less than Nova Scotia did, and New Hampshire paid its considerably less.

25. 'Report of Assembly Proceedings,' *Novascotian*, March 24, 1830. This was a view consistent with Murdoch's general political philosophy. He was one of the more articulate defenders of the ancien régime's mixed constitution, in which the elected representatives of the people should share power with an appointed elite. See Girard, "Beamish Murdoch, Joseph Howe, and Responsible Government."

26. 'Report of Assembly Proceedings,' *Novascotian*, March 24, 1830.

27. *Assembly Journals*, March 15, 1830.

time there was no suggestion that salaries actually be lowered to bring them in line with American levels.

Local ideas were based on local conditions. For many assemblymen the really important comparison was with other inhabitants of Nova Scotia and other demands on the public purse, and there was considerable resentment of the salary request not only as an excessive claim in itself but also as an especially unreasonable one in the colony's straitened circumstances. Members, especially those from the out-settlements, insisted that the colony could not afford higher pay for judges when there was not enough for other expenditures. Typical was John Barry, a Shelburne merchant, who "would never consent to burthen the Revenue with additions to the Salaries of the Judges" when money was needed for roads and other internal improvements.²⁸ Although none of the judges were criticized individually, and although laudatory things were said about their judicial performance,²⁹ they were clearly seen as making selfish and unreasonable demands on the limited resources of an economically struggling colony. The principal speaker against the salary increase in 1830, John Young, the member for Sydney County and as "Agricola" best known for his promotion of agricultural development and innovation, made the point at great length. He noted that England had a population of 13 million compared to Nova Scotia's 123,000, and was served by twelve judges, only three more than the colony's nine. He also asserted that the judges' salaries accounted for one-twelfth of the revenues raised by the Assembly, and insisted that it was simply not right to have the judiciary consume such a large proportion of government spending. The judges should abide by local standards. In comparative terms, spending one-twelfth of Assembly-generated tax revenues was excessive, because no other British North American colony's judicial establishment was funded by the Assembly to this extent in the nineteenth century. In Nova Scotia, only the chief justice was paid for by the Crown, all the other judgeships had been created, and were paid for, by the Assembly. Elsewhere almost all superior court judges were creations of the imperial government and their salaries borne by it, for many years on the parliamentary grant and by the 1830s out of locally raised crown revenues.³⁰ Judicial salaries elsewhere were to some extent therefore

28. See the comments of Lawson and Barry, 'Report of Assembly Proceedings,' *Novascotian*, March 24, 1830.

29. John Young accepted that there had never been "a charge . . . made against their integrity and purity" and the characters of the men on the bench were "unreproached and irreproachable." It was therefore "an implied libel to insinuate that the refusal of this petition would endanger their independence": *Ibid.*

30. See the various reports on public accounts, contained in the Appendixes to the *Journals* of the Legislative Assemblies for New Brunswick, Upper Canada and Lower

a "hidden" expense; in Nova Scotia they were a visible manifestation of money not available for spending on other priorities.

As for claims of the need for an aristocracy, assemblymen would have none of it. Speaker after speaker insisted that the judges were well enough paid already, both in absolute terms and in comparison to the vast majority of the colony's inhabitants. Joseph Oxley, a Cumberland County farmer, was another member who like Barry and Lawson thought the judges "very handsomely paid."³¹ Young, who cleverly resisted the argument that the judges needed more money to ensure full independence by praising their probity, also linked true independence to modest, prudent lifestyles, in tones reminiscent of the movement for republican virtue in the early American republic. Independence, he argued, "may be attained, not so much by multiplying the means of indulgence as by restraining the desires." That is, "the wants of nature are easily supplied, but the cravings of rank and luxury are insatiable and know of no bounds. A man governed by reason and the rules of prudent economy is as effectually above all pecuniary difficulties, when in possession of £400 per year as of £800, and when in possession of £600 as of £1600."³² Rather than seeing a need for judges to be elevated into a form of colonial aristocracy, he urged them to set a "decorous example of the ancient simplicity of manners." Therefore, whereas a small group wanted judges set high above the populace, most assemblymen preferred them closer to the people they judged.

This attitude to judicial salaries was widely shared, cutting across nascent "party" lines with the opposition to increases including many members otherwise generally inclined to support the executive's measures. The judges' supporters in the Assembly were almost all lawyers. Of the mere five members who voted to refer the petition to the committee of supply, four were lawyers: Murdoch, Stewart, Uniacke, and Thomas Dickson, a member for Sydney County who had studied under Attorney General Samuel George William Archibald. Voting against the judges on this occasion were four other lawyers: John Johnston from Annapolis, James Shannon Morse from Amherst, Charles Dickson Archibald, member for Truro Township and the son of S.G.W. Archibald, and John Forman of

Canada, and Prince Edward Island in the 1830s, available at Early Canadiana OnLine (www.canadiana.org). John Young noted this difference: "if we turn to Canada, he admitted that the Judges there received £1,000 a year but from what fund? Not from the Revenue at the disposal of the legislature, but from the duties . . . dispensed by the Lords of the Treasury": 'Report of Assembly Proceedings,' *Novascotian*, March 24, 1830. See below for a further discussion of the civil list and responsibility for the costs of local government.

31. 'Report of Assembly Proceedings,' *Novascotian*, March 18, 1830.

32. *Ibid.*

Shelburne County.³³ On the second motion, to refer the petition to a select committee, a less strong endorsement than the first, three of the latter group also supported the judges, leaving Forman as the only lawyer to oppose the motion.³⁴ Overall, therefore, only one non-lawyer voted in favor of even considering the idea of an increase.

Given that almost all the support for the judges came from members of the legal profession, and that almost all the lawyers supported the judges on the second vote, it is reasonable to think that the profession acted from self-interest and perhaps that opponents of the increase were motivated by a general anti-lawyer sentiment. There is evidence for both conclusions. Uniacke provides the most obvious example of individual self-interest; he was the son of his famous namesake who had served as attorney general from 1797 until his death in 1830, and he was appointed to the NSSC only weeks after the salary debate. Perhaps Barry had Uniacke in mind when he observed that “when the gentlemen of the Bar advocat[e] an increase of salary to the Judges,” he could not “bring himself to believe that their own prospects or expectations had not a certain influence.”³⁵ But the charge against the legal profession was not as much individual self-interest as what Young rather vaguely called a collective wish for “the aggrandizement of their profession.” He meant that lawyers supported every measure that was likely to bring professional advancement to some and/or greater remuneration for all. He attributed the agitation for an increase to the “influence which is exercised by the Gentlemen of the Bar in the House of Assembly.” They were, he said, “a close and determined phalanx,” one “governed by an esprit de corps” and “always act [ing] in concert.” Barry used the occasion to bring up the old complaint about lawyers having used their “united influence” to force through the Assembly the 1824 act that created divisional chief justices, with three of those who had voted for the measure attaining the posts.³⁶ This was not the only occasion when lawyers converted their status as assemblymen and their willingness to support government into lucrative appointments.³⁷

33. *Assembly Journals*, March 15, 1830.

34. There were two other lawyers in the Assembly. S.G.W. Archibald was speaker, and Charles Rufus Fairbanks would appear to have been absent.

35. ‘Report of Assembly Proceedings,’ *Novascotian*, March 24, 1830. See also Lawson’s comment reported in the issue that it was “natural enough for some honourable gentlemen to advocate an increase in salary, because they would in the natural course of things soon become Judges themselves.”

36. *Ibid.* See also Alexander Stewart’s lament in the same issue that “it had been the fashion of late to encourage the idea, that gentlemen of the learned profession were dangerous as legislators,” and he called such attitudes “vulgar prejudice.”

37. Of the fifteen lawyers who served in the tenth through the thirteenth Assemblies, thirteen received official appointments: see Beck, *Government of Nova Scotia*, 33.

To some extent, therefore, the judges suffered the backlash from attitudes to lawyers generally. The debates bore out Blowers' belief in a widespread perception that "[t]he profession of the law was the best paid in the community, and the least entitled to an augmentation of profit," and that in particular "[t]he judges were wallowing in wealth." Although Young's complaint that lawyers alone among all professions had an "asylum . . . well endowed by this legislature" to which they could "fly in the decline of life,"³⁸ suggests that many assemblymen personally resented the profession, this is too simple an explanation of the voting. The debate was not simply about lawyers' and judges' remuneration, but also took in the fact that the judges were seen as making too heavy a demand on the public purse, and as taking scarce tax revenues that could be spread more evenly in society. The group of members willing to consistently oppose the government in the Assembly was still small in March 1830 when the salary increase was debated, but it was growing. The strength of the opposition to that increase, and the arguments deployed against it, suggests that it was both a reflection of wider concerns about colonial government and an issue that to some degree gave impetus to the reform critique.

Crucially, the salary debate took place at the same time that the Assembly was in conflict with the local executive over the collection of quit rents, ordered by London as part of its "search for economy" in colonial administration, which had begun in the late 1820s and which saw the home government seek to reduce and ultimately eliminate the parliamentary subsidy for the British North American colonies.³⁹ Henceforth the costs of colonial government, including the substantial salaries of office holders, were to be borne by money raised locally. Quit rents were very unpopular with the Assembly, especially with the rural members, and in the spring 1830 session the Assembly passed a unanimous address to the crown rejecting them.⁴⁰ Although the quit rents issue was not discussed in the Assembly until after the judges' salary request, it clearly influenced the majority of members. Young and Barry referred specifically to it, and other members who complained of taxation burdens on the ordinary citizen must have had it in mind as well. It also seems reasonable to conclude that in turn the salary request affected the quit rents debate. That some of the highest paid local officials could demand more money at a time when

38. *Novascotian*, March 18, 1830; and Sampson S. Blowers to Peleg Wiswall, March 18, 1830, NSARM, Wiswall Papers, MG 1, vol. 979, Folder 3, No 16.

39. The general issues discussed here are dealt with in D.C. Harvey, "The Civil List and Responsible Government in Nova Scotia," *Canadian Historical Review* 28 (1947): 365–82, and P. Burroughs, "The Search for Economy: Imperial Administration of Nova Scotia in the 1830s," *Canadian Historical Review* 49 (1968): 24–43.

40. The debates and address are in *Assembly Journals*, March 18, 19, 26, and 29, 1830.

every small landowner in the colony was threatened with having to pay the rents, exposed and deepened the cleavage between those in power and the ordinary citizen, and was further evidence that the system was run for the benefit of those in power.

Judicial salaries were debated again in 1833, when the Colonial Office proposed increases. It most likely did so as a result of personal lobbying by the judges and others, and the only justification offered was that the current salaries were inadequate to attract the very best of the bar to the bench.⁴¹ Although there were a few lawyers who earned more than the judges, most did not, and there was even less support for increases than in 1830; the proposal was not even put to a vote in the Assembly because nobody found the rationale in the least persuasive.⁴² Even Alexander Stewart, who had supported the judges' petition in 1830, rejected the notion, asserting that "some of the ablest men at the Bar were ready and willing to accept the Puisne Judgeships whenever they were vacant." A seat on the bench brought a good salary irrespective of what a lawyer had earned in practice and, of course, security. The issue of judicial salaries did not go away when the Assembly rejected London's proposal. But from 1834, it was always tied to more general discussions about the creation of a local civil list and, especially, to the related question of judicial fees.

41. For this paragraph see Lord Goderich to officer administering the government, December 4, 1832, in *Assembly Journals*, 1833, Appendix 2. Colonial Secretary Goderich must have been influenced to suggest an increase by either Halliburton or S.G.W. Archibald, attorney-general and speaker of the Assembly, or both. The two men were rivals for the succession to Blowers and both visited London in the early 1830s and lobbied for the chief justiceship. Goderich proposed a range of £800 to £1,000 for the puisnes, considerably more than they were paid.

42. All discussion of the debates in 1833 is from 'Report of Assembly Proceedings,' *Novascotian*, March 14, 1833. Our limited knowledge of lawyers' salaries suggests that they varied considerably. William Young, a hard-working young man determined to make his way in the world, earned £1,300 in 1830 and £3,600 by 1842: William Laurence, "A Literary Man and a Merchant: The Legal Career of Sir William Young," PhD diss., Dalhousie University, 2009, 178. However, William Blowers Bliss, who became an NSSC judge in 1834, frequently complained about the difficulties of making a good living as a lawyer. In 1831 he noted: "if I have great good luck and do not die before my seniors I may be shelved as a Judge some ten years hence with 600 pounds currency per annum": William B. Bliss to Henry Bliss, September 6, 1831, NSARM, Bliss Papers, MG 1, vol. 1598, No 291. Two years later, with a vacancy on the bench and lobbying going on on behalf of Bliss and William Hill to fill it, Bliss, while he would have preferred an appointment as one of the law officers of the crown, knew that he "cannot afford to let the Judgeship" pass: Same to same, February 15, 1833, NSARM, Bliss Papers, MG 1, vol. 1599, no. 4.

Judicial Fees, 1834–1838

Judicial fees were central to the democratic reform campaign of the 1830s. For reformers, they symbolized what was most wrong with the ancien régime: the colonial elite enriched itself at the expense of the mass of the people while the chief justice used his entrenched political position on the Council to prevent change. Reformers argued that fees were unconstitutional and illegal because they had never received Assembly sanction; they were a form of taxation without representation. In response, the judges and their supporters defended the fees as a vested right derived from the chief justice’s commission from the Crown and English legal custom.

The debate over fees was marked by considerable heat and rancor, in stark contrast to the way the issue played out in Britain, the United States, and elsewhere in British North America. Almost everywhere, fee reform was treated largely as a minor administrative change, exciting little controversy. In England the fees of the judges of Westminster Hall were abolished in two stages, in 1799 and 1825, when abolition was included in a package of reforms that eliminated saleable offices at the disposal of the chief justices, established judicial retiring allowances, and raised judicial salaries.⁴³ The fees decision was largely uncontroversial, Home Secretary Sir Robert Peel articulating the consensus view in arguing that he “thought it better that the judges should have a fixed salary out of a fixed fund, than an uncertain salary out of uncertain and fluctuating fees.”⁴⁴ In the United States fees were never part of the federal court system, and were banned by two state constitutions, but they played a role in most state superior courts and were criticized at various times and places.⁴⁵

43. *House of Commons Debates*, May 16, 1825, vol. 13, 612–43; May 20, 1825, 801–12; and May 27, 1825, 927–34. For judicial salaries and fees see Daniel Duman, *The Judicial Bench in England, 1727–1875: The Reshaping of a Professional Elite* (London: Royal Historical Society, 1982), and David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (New York: Oxford University Press, 2000). For a detailed analysis of the English fee system, and an argument that fees caused judges to favor plaintiffs to attract business into their courts, see Daniel Klerman, “Jurisdictional Competition and the Evolution of the Common Law,” *University of Chicago Law Review* 74 (2007): 1179–1226.

44. *House of Commons Debates*, May 27, 1825, vol. 13, 931.

45. This brief discussion on the United States is based on James E. Pfander, “Judicial Compensation and the Definition of Judicial Power in the Early Republic,” *Michigan Law Review* 107 (2008): 8–14, and on an excellent unpublished survey of fees for many officers, Nicholas Parrillo, “The Rise of Non-Profit Government in America: A Preliminary Overview,” (unpublished paper, on file with the authors). As Parrillo notes, at 37, there is very little secondary literature on fees for judges of courts of general jurisdiction. The account of New York that follows is drawn from his very detailed survey at 38–55.

In New York, the one jurisdiction studied with any degree of thoroughness, Supreme Court judges lost their fees in return for higher salaries in the late eighteenth century, although when the judicial system was reformed in the 1820s, the newly created circuit judges were paid by a mixture of fees and salary. This system lasted until 1846, and although criticized by some, it was never the focus of the kind of angry denunciations which, as we will describe, characterized the Nova Scotian debates. The same can be said of other British North American colonies, where fees had either long been abolished (Upper and Lower Canada) or stayed in place until mid-century (New Brunswick).⁴⁶

In Nova Scotia, debate over fees quickly became a contest between the new movement for democratic reform and the establishment. The first public mention of fees appeared in a September 1832 editorial in the *Pictou Colonial Patriot*, penned by Blanchard, who sat as a representative for the Pictou district of Halifax County.⁴⁷ He complained that Chief Justice Blowers received £400 annually in fees “to which, upon no principle of either law or equity, has he the faintest claim.”⁴⁸ Blanchard’s attack on the fees did not provoke any action initially, but by 1834 fees were debated in the Assembly, and they were discussed every year thereafter, sparking an increasingly heated debate in which reformers accused the judges of fleecing ordinary people while the latter defended fees as an exercise of customary and property rights.

Through the 1830s, the fees issue was tied to the question of responsibility for the costs of local government. In February 1834, the Assembly was faced, not for the first time, with a demand from London that it take responsibility for the salaries of local officials—a civil list—in return for

46. There is no study devoted to the judicial fee system in British North America. This summary is from Jim Phillips, “Judges and Coal Miners: The Civil List Dispute and the Nova Scotia Supreme Court, 1830–1850” (unpublished paper), 2009.

47. The only discussion of fees in the Assembly prior to this period can be construed as an acceptance of their validity; in 1787 acting Chief Justice Isaac Deschamps negotiated a deal whereby he received a grant of £200 as a commutation of his 1788 fees. See *Assembly Journals*, December 4 and 6, 1787. The arrangement is noted in Chief Justice Brenton Halliburton to Thomas James, Deputy Provincial Secretary, March 23, 1836, in *Assembly Journals*, 1836, Appendix 76. Halliburton stated that the arrangement was with Chief Justice Sir Jeremy Pemberton, and for 1787 as well as 1788. However there is no reference to this in the *Assembly Journals*, and no such deal could have been struck with Pemberton for 1787, because he was not appointed until August 1788. The puisne judges also seem to have agreed not to take fees for both 1787 and 1788; *Assembly Journals*, July 6, 1786 and December 3, 1787. No such deal was made with any other Chief Justice, although according to Halliburton’s 1836 letter cited above, at one point the Assembly appointed Simon Bradstreet Robie to try to negotiate a commutation with Blowers, but he refused.

48. Editorial, *Colonial Patriot*, September 8, 1832.

receiving control of what were called the "casual and territorial revenues" of the Crown: revenues other than those raised by the Assembly.⁴⁹ Otherwise, London threatened, it would pay the costs of local government by collecting quit rents, the threat it had made but not followed through with in 1830. Most assemblymen wanted the deal in principle, but executive and Assembly could not agree on the details. Much of the difference between them was about remuneration for judges, which in turn raised the fees issues, with two main proposals being brought forward. The first, which declared that the fees should be abolished outright and no compensation provided, failed 19 to 17. The second proposal was for a fund into which litigants would pay their fees, and out of which the chief justice would draw £400 and the puisnes £100 annually, ensuring that increased litigation levels did not benefit the judges personally. This compromise position attracted much wider support, passing 24 to 9.⁵⁰ However, as the Assembly's civil list proposals faltered, the fee fund idea came to nothing. At this stage, those arguing for reform focused on the ideas that judges were paid enough in salaries, and that fees, as Blanchard insisted, hurt the poor and therefore made justice less accessible.⁵¹ Little was said about the idea that fees might be illegal.⁵²

The debates became more heated when the Assembly revisited the issue in the 1834–1835 session. By this time, the matter was generating attention among a wider public, as evidenced by a number of petitions to the Assembly.⁵³ In late 1834, the House appointed a committee to investigate abolishing fees and began collecting information and drafting a bill to abolish them without compensation, which passed easily.⁵⁴ Therefore, in less

49. In Nova Scotia, the principal sources of such revenue were rent and royalties from the Sydney and Pictou coal mines, fees charged for the issuing of warrants or commissions, and money paid for sales of land: see Phillips, "Judges and Coal Miners."

50. See *Assembly Journals*, March 20 and 21, 1834.

51. See 'Report of Assembly Proceedings,' *Novascotian*, April 9 and March 26.

52. See the comments of Lawrence O'Connor Doyle, lawyer and member for the Arichat district on Cape Breton Island, in *Novascotian*, April 9, 1834.

53. Petitions were presented by George Smith, member for Halifax County, from a public meeting in his Pictou district, "praying that Judges Fees may be abolished": *Assembly Journals*, December 15, 1834. For later petitions see below.

54. *Assembly Journals*, December 4 and 6, 1834. For the bill, see *Assembly Journals*, December 24, 1834 and January 6, 8, and 9, 1835. The information on fees is in Brenton Halliburton to Sir Rupert George, December 10, 1834, *Assembly Journals* 1834–1835, Appendix 9. The bill is at NSARM, Record Group [hereafter RG] 5, Series U, [Unpassed Bills], vol. 12, No. 57. In its entirety it read: "Be it Enacted by the Lieutenant Governor Council and Assembly . . . that from and after the passing of this Act it shall not be lawful for the Chief Justice or for any Judge of His Majesty's Supreme Court within this Province to ask demand or receive any fee or prerequisite whatever for signing any Judgment or Judgments or for any process mesne or final by him or them to be signed, passed, or received

than a year, the Assembly that had voted for continuing fees but restricting them, now preferred abolition without compensation. Despite the Assembly's new determination, the bill was summarily rejected by the Council, presided over by Chief Justice Halliburton himself.⁵⁵

By 1835, many, although not all assemblymen had come around to the position that the fees were illegal. When the Council blocked abolition, Cornwallis merchant and conservative, John Morton, member for King's County, moved a resolution contending provocatively that as the fees were not authorized by any colonial statute, they were unconstitutional and should not be taken by the judges. A less controversial, but still pointed, resolution was then offered instead: "That the receipt of Fees by the Chief Justice, rests upon no better constitutional principles, than the payment of the Quit Rents of Private Individuals," a reference to the opinion of most members that the government had no right to collect the quit rents. This passed 20 to 14; when the original resolution by Morton was also put, it failed 19 to 16.⁵⁶ Therefore, by 1835, a substantial majority of members thought that fees should be abolished without compensation, most of those believed that there was no legal basis for their collection, and a good many people, although not a majority, were prepared to say so very explicitly. The principal reason given for illegality was that fees had not been sanctioned by the Assembly. This argument rested on the fact that the House had legislated with respect to fees generally in the 1787 Fees Act,⁵⁷ and that legislation said nothing about the chief justice's fees. The argument conveniently ignored the fact that when the 1787 bill was passed, the acting chief justice had agreed to a commutation; it seems more than plausible that the chief justice's fees had been omitted from the Act for that reason. But the significance of the argument lies in the assertion that the legislature, and only the legislature, could decide what fees were to be collected.

The Council's blocking of the 1835 bill inflamed the controversy. One of the petitions tabled in the Assembly in response, for example, described fees as "Exactions made upon the most distressed part of His Majesty's subjects," whereas another urged the Assembly to pass an abolition bill "Session after Session until the point is established that no money in any

or for any paper or document to be filed or entered in the said Court but such Fees and pre-requisites of what nature or kind soever heretofore received be and the same are hereby declared to be hereforth and forever abolished."

55. *Journals of the Governor's Council* [hereafter *Council Journals*], January 12, 1835. The Council's action was discovered only after an assembly committee had been appointed to examine the *Council Journals* re the bill: *Assembly Journals*, January 30, 1835.

56. *Assembly Journals*, February 5, 1838.

57. S.N.S. 1787, c. 15.

shape can be levied on the people but by the sanction of their Representatives."⁵⁸ When the House reconvened in 1836, it passed an identical abolition bill, and when this too was rejected by the Council the Assembly appealed to London.⁵⁹ The legality issue drove the opponents of fees and produced much invective. Morton insisted that "there was no law for the exaction," and numerous other speakers used the word "exaction" and similarly insisted that the fees had not been sanctioned by the Assembly.⁶⁰ One member even suggested impeaching the judges for their allegedly illegal actions.⁶¹ The committee drafting the address to London called the fees "unconstitutional and repugnant to all just notions of liberty, because the Commons have always claimed the inherent and exclusive right of originating all Taxes upon the People." In the same resolutions, assemblymen also attacked the ethics of the judges, arguing that fees "have a tendency to create disrespect for, and to weaken the confidence which ought ever to be placed in, the Tribunals of the country."⁶²

The last comment about disrespect may have been an oblique reference to a criticism of the fee system which received some play in the press: that the NSSC and ICCP judges essentially competed for litigants because they were competing for fees. They did so, asserted "Scrutator" in a special edition of the *Novascotian* published solely to accommodate the large number of letters received about the fees, by favoring "the leading and influential members of the Bar."⁶³ In the Assembly, Hugh Bell, reform member for Halifax, complained similarly that fees were "a bounty on the encouragement of litigation;"⁶⁴ the more cases brought, the more the judges were paid. This was an argument redolent of what Daniel Klerman has suggested happened in England: judges favored plaintiffs (who chose the

58. Petition re the fees paid to judges, February 1, 1836, NSARM, RG 5, Series P, [Petitions], vol. 6, no. 38. We have not been able to locate the other two petitions that came in at the beginning of February, but they are mentioned and briefly summarized in 'Report of Assembly Proceedings,' *Novascotian*, February 4, 1836. See also, Petition re the fees paid to judges, February 15, 1836, NSARM, RG 5, Series P, vol. 6, No 48.

59. For the bill, see *Assembly Journals*, February 1, 2, and 3, 1836. No votes are recorded. The bill is "An Act to abolish the fees at present taken by the Chief Justice and Judges of the Supreme Court throughout this Province": NSARM, RG 5, Series U, vol. 13, no. 12, February 3, 1836. It is an exact copy of the 1835 bill, laid out in full above. For details of its rejection, see *Council Journals*, February 3 and 6, 1836, and *Assembly Journals*, February 19, 1836.

60. 'Report of Assembly Proceedings,' *Novascotian*, March 10, 1836.

61. This was Charles Roach, the member for Shelburne Township; see *Ibid*.

62. *Assembly Journals*, March 26, 1836. The address to the crown passed 24–9.

63. "Scrutator," letter to the editor, *Novascotian*, March 17, 1836.

64. 'Report of Assembly Proceedings,' *Novascotian*, March 10, 1836.

forum) with the result that they attracted more plaintiffs' counsel to sue in their court.⁶⁵ But whether or not such accusations were generally believed outside, they formed little or no part of the Assembly resolutions; as we have seen, the emphasis was on the constitutional arguments.

Those who argued for preserving fees relied on property rights and legal custom, as evidenced by Halliburton's 1836 public defense of the fees.⁶⁶ Although the chief justice conceded that their specific origin in Nova Scotia was unclear, he declared that established practice in the colony and its English origins in the superior courts at Westminster were sufficient legal justification. He went on to insist that fees had received legislative recognition, first from the Council, when it laid down a table of fees in 1785, and then by the commutation of the late 1780s, which he said was an implicit recognition of their validity by the Assembly. He further contended that his royal commission as chief justice, which bestowed "all the rights, profits, privileges and emoluments, thereunto belonging, in as full and ample a manner as any of my predecessors," had granted him a right to take the fees; they were, as he stated later, "part of my real estate."⁶⁷ Because the office of chief justice was a creation of the home government, it followed that whereas the Crown could abolish that right as they had with English judges, the colonial government lacked the constitutional authority to do so. Halliburton's defense of fees was therefore also a defence of the mixed and balanced constitution, in which the Assembly shared power with the Crown and the Council.

For the Tory chief justice, the Assembly's excess of democratic zeal posed a serious threat to the state. It was, he said, "a Subject for regret, that one of the highest Officers in the Government, in whose integrity it is not desirable to shake the confidence of the People . . . should be accused of making illegal exactions, merely on account of his continuing a practice which he firmly believes was established before he was born."⁶⁸ The other NSSC judges were equally adamant in asserting the right to fees. William Blowers Bliss was in equal measure angry and indignant at the suggestion of illegality. He complained about being "slandered and abused in every shape by a set of low designing, artful scoundrels" who published

65. See Klerman, "Jurisdictional Competition."

66. Brenton Halliburton to T.W. James, March 23, 1836, in *Assembly Journals*, 1836, Appendix 76. This paragraph is from this source and from "Observations of His Majesty's Council . . . on the Address of the House of Assembly," *Council Journals*, April 20, 1837.

67. Brenton Halliburton to Sir Rupert George, January 18, 1838, in *Assembly Journals*, 1838, Appendix 2.

68. Brenton Halliburton to T.W. James, March 23, 1836, in *Assembly Journals*, 1836, Appendix 76.

"misstatements and false reasoning."⁶⁹ But whereas they were insistent about their rights, the judges were also realistic about the politics of the fee question, and appreciated that taking the issue out of the public debates was the best course of action. After the passage of the 1835 abolition statute, Halliburton tried to effect a compromise in the form of another commutation scheme, instituted not by the Assembly but by the executive, and Bliss wanted the fees question to be "so settled that we may not be henceforth vilified and abused and insulted on account of them."⁷⁰

The Colonial Office sided with the judges and rejected the call for abolition without compensation. At the behest of the Halifax government, and under some pressure from the judges' lobbyists,⁷¹ Colonial Secretary Lord Glenelg concluded that the fees were legal, with the commutation of the 1780s confirming that, and as a vested right they could not be abolished without the compensation of a salary supplement from the Assembly.⁷² This provoked considerable anger, in and out of the legislature; the most visible manifestation was a series of letters in the *Acadian Recorder* by "Joe Warner" (John Young), excoriating what he called the "aristocratic party" (the Council) for its many sins, including its handling of the fees question.⁷³ The 1836 election was the first to be fought in the colony along clear party lines and with party "platforms." Significantly, when Halifax reformers decided to run a slate of candidates based on those candidates' commitments on a series of issues, one of the issues chosen was fee abolition.⁷⁴ The reformers won a substantial majority, and in late February and early March 1837 Joseph Howe, one of the principal reformers, introduced his "Twelve Resolutions," a series of critiques of many aspects of colonial government, including the composition of the Council. One of the resolutions asserted that "among the many proofs that might be adduced of the evils arising from this imperfect structure

69. William B. Bliss to Henry Bliss, November 14, 1836, NSARM, Bliss Papers, MG 1, vol. 1599, no. 33.

70. Same to same, May 16, 1836, NSARM, Bliss Papers, MG 1, vol. 1599, no. 29. We do not know exactly when Halliburton proposed his commutation scheme, but Bliss referred to it in this letter as having happened "some time ago."

71. For the judges' own "observations" on the issue, sent to supplement Halliburton's letter, and for the use of lawyer James Stewart (William Hill's agent) and Henry Bliss (engaged by his brother) to lobby the Colonial Office, see Bliss to Henry Bliss, March 7, May 16, August 19, September 8, and November 14, 1836, NSARM, Bliss Papers, MG 1, vol. 1599, nos. 27, 29, and 31–33.

72. Lord Glenelg to Lieutenant-Governor Campbell, July 16, 1836, *Assembly Journals*, 1837, Appendix 2. Glenelg's decision was not conveyed to the Assembly until early 1837: *Assembly Journals*, February 4, 1837.

73. *Acadian Recorder*, July 23 and 30; August 6, 13, and 27; and September 17, 1836.

74. 'Election Statement,' *Novascotian*, November 17, 1836.

of the upper branch” was the “recent abortive attempts to abolish the illegal and unnecessary Fees taken by the Judges of the Supreme Court.” This passed 19 to 16, and was followed a few weeks later by the ubiquitous Morton introducing yet another abolition bill. It went through all stages without amendment, accompanied by more petitions on the subject.⁷⁵

By this time, the fees issue had become subsumed in the broader negotiations among London, the Halifax government, and the Assembly over the civil list. Key to the failure of these negotiations was the inability of the parties to agree on salary levels, including those of the NSSC judges, and in turn a large part of that failure was the continuing disagreement over the fees. The Council and the London government accepted that fees were no longer politically palatable to majority opinion in the colony, but both were insistent that they could not be abolished without compensation (higher salaries), which the Assembly was not willing to grant. Glenelg’s solution was to raise salaries and pay the difference out of local Crown revenues.⁷⁶ The salary of the chief justice would be £1,000 sterling and those of the puisnes £650 sterling. Because this represented an overall reduction in current income for the chief justice and potentially a limitation on future remuneration for the puisnes who would not benefit from increases in litigation on circuit, Glenelg also insisted this his scheme required the judges’ approval. Like them, he saw fees as an entitlement of office, a form of property, and whereas he was prepared to impose his arrangement on any new appointees, he would not do so with incumbents.⁷⁷

The judges desperately wanted the fee controversy to go away. Bliss was dismayed at the Assembly’s “continued declamations and declarations of our illegal exactions” and worried about the “injurious effect throughout the Province” they would have “both upon the character of the Judges and the administration of the laws by them.”⁷⁸ He and the other puisnes quickly if grudgingly agreed to the proposal, as did Halliburton, who knew that the fees were now indefensible to most Nova Scotians.

75. *Assembly Journals*, February 27; March 31; and April 1, 15, and 15, 1837. The bill is at NSARM, RG 5, Series U, vol. 14, no. 133, April 15, 1837. As in 1835 and 1836, it was a very short bill.

76. A much fuller account of the relationship between judicial salaries and fees and the civil list question is contained in Phillips, “Judges and Coal Miners.”

77. Lord Glenelg to Lieutenant-Governor Campbell, October 31, 1837, in *Assembly Journals*, 1838, Appendix 2. These were smaller increases than the Council had wanted—£1,200 and £700 sterling respectively: Campbell to Glenelg, August 26, 1837, in *Assembly Journals*, 1838, Appendix 2.

78. William B. Bliss to Henry Bliss, March 8, 1837, NSARM, Bliss Papers, MG 1, vol. 1599, no. 35.

He agreed, he later said, "to allay any discontent which might be excited against those who were appointed to preside in the Supreme Court."⁷⁹ The new scheme went into effect from January 1, 1839,⁸⁰ although it was not the final resolution of the issue. Judicial fees continued to cause controversy and delayed settlement of the civil list question for more than another decade.⁸¹

By the time it was finally settled, the fees issue had dragged on for at least 15 years. At the height of the controversy in the 1830s, opponents of fees made it one of the leading issues of the day. They were able to do so not so much because the sums collected were so extravagant, but because they could lean heavily on the need for democratic control of public revenues, often equating it with the taxation and representation debates of seventeenth-century England.⁸² Although the Assembly never effectively countered Halliburton's arguments on legality, whether reformers were "right" does not matter. What matters is that they were able to use the emerging power of the press and the nascent moves toward party politics in the 1836 election to great effect. Public opinion emerged as a powerful force, transforming conventional wisdom in the colony, and doing so with indifference toward the fact that critics enraged the judges and demeaned the judicial branch in the process. Therefore, the Nova Scotia fees controversy, like the debate over salaries, saw the colony charting its own course and developing its own distinct legal culture and legal reform tradition. The rhetoric about fees, and, indeed, the reality of the Assembly's commitment to abolition without compensation, were redolent

79. Lewis Wilkins Senior, William Hill, and William B. Bliss to Sir Rupert George, January 8, 1838, in *Assembly Journals*, 1838, Appendix 2; and draft of Brenton Halliburton's Memorial to the Queen, n.d. [c. mid to late 1840s], NSARM, Brenton Halliburton Papers, MG 1, vol. 334, no. 99.

80. See *Assembly Journals*, January 18, 1839. Note that fees were not "abolished" at this time, they were simply commuted. Abolition came only with the final settlement of the civil list question in 1849: see *Civil List Act*, S.N.S. 1849, c. 1, s. 2—salaries of all judges to be "without any fees of office whatsoever."

81. There is not space to detail the aftermath of the fees issue here; it is discussed in detail in Phillips, "Judges and Coal Miners." Efforts to settle the civil list question continued through the 1840s. Although both sides wanted a settlement, time and again judicial salaries prevented one. With one exception, a series of *Civil List Acts* passed by the Assembly but rejected by London provided for judges' salaries which were less than those that Glenelg had imposed in 1838, on the grounds that the 1838 salaries included compensation for forgoing illegal fees. The London government always refused to agree to a civil list that included salary reductions for incumbent judges, because incumbents' salaries were a vested right. The Assembly gave in only in 1849, and fees were then finally abolished; see *Civil List Act*, S.N.S. 1849, c. 1, s. 2.

82. On the use of this analogy in Maritime politics, see Marquis, "In Defence of Liberty," 87–88.

far more of the populist court reform plans of Jacksonian America than it was of the much more tepid approach to this or many other judicial issues in Britain or elsewhere in British North America.

The Chief Justice and the Council, 1834–1838

One of the most egregious aspects of the fees controversy for reformers was the role played by Halliburton, as both the principal recipient of fees and a leading member of the Council that had so summarily rejected abolition. More broadly, Halliburton's continued presence on the Council in the 1830s came increasingly to be seen as an anachronism in a colony that had, through the first three decades of the nineteenth century, worked incrementally to achieve a separation between the judicial and other branches of government. The presence of the chief justice on the Council also gave impetus to the demands for a more representative Council generally; Halliburton, an Anglican high Tory, was something of a lightning rod for concerns about the ways in which councillors used their influence to defend their own interests and to block measures that had broad support from the elected elements in the provincial constitution.

Nova Scotia was hardly unique among British colonies in the eighteenth and early nineteenth centuries in the extent to which judges were involved in politics. In New Brunswick, for example, all the Supreme Court judges were members of the single (as in Nova Scotia) council prior to 1833, when separate executive and legislative councils were created.⁸³ Similarly, in Upper Canada, the chief justice was always a member of the Executive Council until London ordained a change in policy in 1831, which will be discussed below, and other judges served on both councils.⁸⁴ In Nova Scotia the chief justice had always been president of the Council, and in the eighteenth century all but one of the puisne judges were also councillors, some appointed before their elevation to the bench

83. W.S. MacNutt, *New Brunswick: A History, 1784–1867* (Toronto: Macmillan, 1963), 186–7. For the New Brunswick judges see the *Dictionary of Canadian Biography* [hereafter *DCB*] online (www.biographi.ca) entries for Jonathan Bliss, John Murray Bliss, William Botsford, Ward Chipman Junr, and Ward Chipman Snr, Edward Jarvis, George Ludlow, John Saunders, Joshua Upham, and Edward Winslow. See also Joseph Wilson Lawrence, *The Judges of New Brunswick and Their Times* (Fredericton: Acadiensis Press, revised 1983 edition).

84. See William R. Riddell, "Judges in the Executive Council of Upper Canada," *Michigan Law Review* 20 (1922): 716–36, and "Judges in the Parliament of Upper Canada," *Minnesota Law Review* 3 (1918): 163–80. The practice of having judges in councils was prevalent throughout the empire: see M. Wight, *The Development of the Legislative Council, 1606–1945* (London: Faber, 1946).

and some after. Many also sat in the Assembly. It was less common for nineteenth-century judges to be councillors, but half of those appointed before 1830 were.⁸⁵ The NSSC judges were always important voices, and they enjoyed extensive tenures on council, especially compared to the many lieutenant governors who stayed for only a few years.

A series of statutes from 1809 on progressively barred the puisne judges and the divisional chief justices of the ICCPs from membership in the Assembly or from holding other official posts, although only the latter were precluded from Council seats, and, reflecting the period's concern with vested rights, there were exemptions for incumbents.⁸⁶ The fact that the NSSC judges were allowed to continue on the Council reflected adherence to a principle of the mixed constitution in which the Council was to be appointed from society's elite. However, over time, it was increasingly seen as desirable that judges not be involved in politics. In the early 1830s, Beamish Murdoch, commenting on office-holding restrictions on the divisional chief justices, argued that whereas they might seem at first sight "hard and severe," they were not. They were "intended to place the office beyond the suspicion of improper influence." Indeed, he went on, implicating the NSSC judges, "[i]t seems desirable that all judges should be removed (as far as possible) from the hopes and fears of political life, and the strife of business" so that "their minds may be undisturbed by any passions that would bias their judgment." It was also "a fair principle of constitutional governments, to require a thorough separation of the judicial, the legislative, and the executive powers." Murdoch, despite flirting with reform politics in the 1820s, was a firm believer in the eighteenth-century constitution and opposed to giving too much power to the elected branch.⁸⁷

The Assembly could bar judges from being elected to it, and could impose restrictions on judgeships it created, but it had no control over the chief justice, a matter for the home government. By 1830, London, at least, was persuaded that it was inappropriate for colonial judges to be councillors. Agitation about this issue had come particularly from reformers in Upper and Lower Canada, and had resulted in a Parliamentary Select Committee on the Civil Government of Canada. The Committee recommended that all judges be excluded from executive

85. Halliburton was appointed to the Court in 1807 and to the Council in 1816. See also James Stewart (1815 and 1816) and Foster Hutchinson (1810 and 1812).

86. See *Supreme Court Act*, S.N.S. 1809, c. 15; *Equal Administration of Justice Act*, S.N.S. 1824, c. 38, s. 6; and *Master of the Rolls Act*, S.N.S. 1826, c. 11.

87. Murdoch's views are from his *Epitome of the Laws of Nova Scotia* (4 vols., Halifax: Howe, 1833–34), vol. 3, 61. See, generally, Girard, *Lawyers and Legal Culture in British North America*.

councils, and that only the chief justice, “whose presence on particular occasions might be necessary,” should participate in legislative councils.⁸⁸ The report clearly had implications for all British North American colonies,⁸⁹ and although it was not implemented immediately, it did guide the Whig government that came to power at Westminster in 1830. At the end of 1830, London issued instructions that “in future . . . the Puisne Judges . . . should not be admitted to Seats in the Council.”⁹⁰ Judges who were already on councils were to remain, and in practical terms this meant that of the NSSC judges only Chief Justice Blowers and Halliburton were councillors after 1830, and only the latter after Blowers’ resignation as chief justice and Halliburton’s elevation to the post in 1833.

The home government was not prepared to displace incumbents, but by 1834 some reformers in the Assembly were demanding both the separation of the unitary Council into two bodies – Legislative Council and Executive Council – and changes in the composition of the former, making Legislative Councillors more broadly representative of the colonial population. And when the issue of Council membership was raised, the role of the chief justice came under attack; a February 1834 motion asserted both that the Council should be split and that “no person holding a judicial appointment should be an Executive Councillor.”⁹¹ Its mover, Solicitor General Charles Fairbanks, insisted that “the exercise either of legislative or executive powers, was incompatible with the due administration of

88. *Report from the Select Committee on the Civil Government of Canada* (Parliamentary Papers, 1828, Cd 569), 8.

89. See James Stewart’s 1829 comment that “puisne judges are, of late, considered as improperly seated in the Council”: Stewart to Peleg Wiswall, April 6, 1829, NSARM, Wiswall Papers, MG 1, vol. 980, no. 144. Stewart also claimed not to be concerned about this for himself; he would be happy, he said, to “quit the board of Wisdom.” In other correspondence at the time Stewart repeated these sentiments. He claimed that he detested “the politics of a little province” and could not understand why his colleague Lewis Wilkins Senior had spent years avidly seeking a seat on Council. He intimated that Halliburton also wanted to be removed from Council; Stewart to Wiswall, February 23 and December 18, 1829, NSARM, Wiswall Papers, MG 1, vol. 980, nos. 140 and 154. See also William B. Bliss to Henry Bliss, April 8, 1829, NSARM, Bliss Papers, MG 1, vol. 1598, no. 272.

90. Lord Goderich to Lieutenant-Governor Sir Peregrine Maitland, December 7, 1830, NSARM, RG 1, vol. 67, no. 88. The same instruction was issued for other colonies; see *Copies or Extracts of Correspondence relative to the Constitution of Legislative and Executive Councils* (Parliamentary Papers, 1839, Cd 579) [hereafter *Copies or Extracts of Correspondence*]; Peter Burroughs, *The Canadian Crisis and British Colonial Policy, 1828-1841* (Toronto: Macmillan, 1972), 44.

91. *Assembly Journals*, February 20, 1834.

justice."⁹² Others made the same argument, but the motion was defeated, 24 to 12.⁹³

Local opinion was thus divided on the question. The other side to the argument is exemplified by William Blowers Bliss, who resigned his seat in the Assembly without complaint when he was made an NSSC judge in 1834. He agreed that judges should not sit in the Assembly, but defended a role for the chief justice on Council as not merely justified but necessary. London's 1830 prohibition was a "very good rule in the abstract," but "in point of practice a bad one." Good Tory that he was, Bliss believed in the need for checks on democracy and its excesses. Judges were the "best members" of Council, because "the laws that sometimes pass the lower house show how necessary it is to have lawyers in the upper to read, to watch, and to amend or reject them." Bliss also linked judicial exclusion to the demand that some assemblymen were making by the mid-1830s: that the Council itself be split into legislative and executive branches and that the former be elected. Such a change, he asserted, would "loose in some degree the connection between the Mother Country and this, it was one of the first things that tended to the disturbance in America." It would also remove a "Constitutional check on the folly the extravagance and the ignorance of the Assembly."⁹⁴

When the Assembly next turned its serious attention to the chief justice and the Council it took little time to achieve the desired change. The reform majority returned in the election of late 1836 immediately targeted the Council, demanding its abolition and replacement with separate legislative and executive councils, that assemblymen be included in the executive, and that both councils not be packed, as the Council of Twelve was, with adherents of the Church of England and members of the Halifax commercial elite. The campaign to change the Council structure was part of the process by which the old colonial system, government by a small and narrowly constituted appointed elite, evolved gradually into what became, in 1848, responsible government. The removal of the chief justice from the

92. 'Report of Assembly Proceedings,' *Novascotian*, March 5, 1834. There was a rich irony in Fairbanks' taking this position, because when he was appointed master of the rolls in August 1834 he tried to keep his seat in the Assembly, the various local statutes prohibiting judges from doing so not specifically excluding the master of the rolls. A consequent bill to exclude vice-admiralty and chancery judges from membership met considerable opposition from the legal profession and Fairbanks' friends, who successfully sought to exempt him as an incumbent: see *Assembly Journals*, December 1834–January 1835, passim; David A. Sutherland, "Charles Fairbanks," *DCB*, online edition; and *Master of the Rolls and Judge of Vice-Admiralty Act*, S.N.S. 1834–1835, c. 26.

93. *Assembly Journals*, February 20, 1834.

94. William Bliss to Henry Bliss, April 8, 1829 and February 5, 1831, NSARM, Bliss Papers, MG 1, vol. 1598, nos. 272 and 286.

executive branch was an important aspect of this broader process of constitutional reform.

The role of the chief justice, and the related issue of judicial fees, featured prominently in both the debates over Council reform and in Howe's "Twelve Resolutions" of 1837. Reformers made three, at times overlapping, arguments about the chief justice. First, there was an appeal to the broad constitutional principle of the separation of powers, assertions that mixing judging and politics lessened the legitimacy of the court. Howe demanded what he called "a broad line of demarcation, separating the Judiciary from politics." This argument was bolstered by assertions that it was against British constitutional practice for judges to be involved in executive government. Combining the powers to make laws, administer them, and advise the executive as to their execution, was "at variance with the principles of the British Constitution."⁹⁵ Howe sought to assure members that he was not attacking Halliburton personally: but, he insisted, "I would not permit the head of the judiciary to sit in the Legislative Council."⁹⁶ He seems to have forgotten that the lord chancellor was in the House of Lords, as were a good number of the chief justices of the courts of Westminster Hall in the eighteenth and early nineteenth centuries.

The second argument was personal. Not only was it not good practice for the chief justice to be on the Executive Council, Halliburton in particular, a judge with high Tory views, had always used his influence to resist reform. As Howe put it, Halliburton was wont to "mingle in the strife of politics—and, by his influence over the Courts and the Bar, to foster and maintain a narrow and illiberal party in the Country."⁹⁷ Halliburton was thus accused of being able to control the legal profession as a whole, through his personal status and his control of patronage, such that lawyers would not disagree with him on questions of politics.⁹⁸ This was obviously an appeal to, and a reflection of, the general anti-lawyer sentiment that we have discussed, and its potency can be seen in the fact that many of the

95. 'Report of Assembly Proceedings,' *Novascotian*, February 9 and 16, 1837.

96. 'Report of Assembly Proceedings,' *Novascotian*, February 16, 1837. About Halliburton personally Howe said: "I wish to make no improper charges against the Chief-Justice; I respect his talents and his integrity; . . . if I were selecting a person to do impartial justice between one man and another—a judge into whose court I would go satisfied that the law would be impartially administered, the Chief-Justice would perhaps be the man." Halliburton had been the presiding judge in Howe's libel trial in 1835.

97. 'Report of Assembly Proceedings,' *Novascotian*, February 9, 1837.

98. See Howe's assertion of "the influence which the Chief-Justice wields over the hopes, and fears, and prospects of some seventy or eighty lawyers and several hundred students, spread over the country, who naturally imbibe his political opinions, and are apt to support him against the views and interests of the people": 'Report of Assembly Proceedings,' *Novascotian*, February 16, 1837.

pro-Halliburton speakers in the debates were more concerned to counter the argument that he had such an influence than to defend his position on the Council.⁹⁹

Influence over the profession aside, the real problem was Halliburton's politics and the alacrity with which he defended the old order. Halliburton was not only unelected and a member of the judicial branch, he was well known as a Tory, and as the address to the Crown put it, he had always shown a "warm interest" in politics, and "particularly" in issues "in which the Representative Branch and His Majesty's Council have been diametrically opposed." As a result "he has frequently been brought into violent conflict with a People imbued with the truly British idea that Judges ought not to mingle in the heats and contentions of Politics." This language was too strong for some; James Boyle Uniacke, lawyer, member for Cape Breton County, and the brother of a former NSSC judge, successfully albeit narrowly (23 to 21) had it amended to a milder statement that Halliburton's role as councillor "has a tendency to lessen the respect which the people ought to feel for the Courts over which he presides." It was this form of words that went into an address sent to the Crown in April 1837.¹⁰⁰ But although the words were less strident, the meaning was the same: it was time for Halliburton go. Many instances were adduced of his having opposed the wishes of the Assembly.¹⁰¹ Perhaps testament to the fact that the legal profession was indeed less than willing to criticize the chief justice, fourteen of the sixteen lawyers who voted supported Uniacke's amendment, including two reformers.

The third argument used against Halliburton was the specific issue of judicial fees. No better example could be found, reformers argued, of the baneful influence of his presence on council. Howe asserted that "among the many proofs that might be adduced of the evils arising from this imperfect structure of the upper branch" was the "recent abortive attempts to abolish the illegal and unnecessary Fees taken by the Judges of the Supreme Court."¹⁰² In another resolution Howe referred to "the disposition evinced by some [councillors] to protect their interests and emoluments at the expense of the public," a comment that clearly included Halliburton,

99. Lewis Morris Wilkins Junior, son of a Supreme Court judge, James Boyle Uniacke, William Frederick Desbarres and Alexander Stewart—all lawyers—denounced the idea. See 'Report of Assembly Proceedings,' *Novascotian*, February 9 and 16, 1837.

100. *Assembly Journals*, March 1 and April 13, 1837. The address stated: "this Assembly is convinced that the presence of the Chief Justice at the Council Board has a tendency to lessen the respect which the People ought to feel for the Courts over which he presides."

101. See especially Lawrence Doyle's comments in 'Report of Assembly Proceedings,' *Novascotian*, February 23, 1837.

102. *Assembly Journals*, February 27, 1837.

although in context it was not limited to him. Although Howe's original resolution was amended, this phrase remained, and the resolution passed 25 to 18.¹⁰³ Howe did not mince his words on this issue: "when Bills abolishing the illegal exaction of One Thousand Pounds per annum taken by the Judges in the shape of fees, are year after year burked in the other end of the Building, by a Body over which presides a gentleman largely interested in that exaction, is it unfair to attribute to him some agency in their destruction, or to wish that he had not been placed in a situation where his public duty interferes so much with his private interests?"¹⁰⁴ Speaker after speaker came back to this issue.¹⁰⁵ His handling of the fees issue was also something for which Halliburton had been strongly criticized in the Assembly before 1837. As John Young stated in one of the fee debates in 1836: "We have sent two Bills to the Council . . . regarding the fees; these bills have met their fate, as the Chief Justice sits in the upper House ready to guard and protect his own interests." The rejection of those bills, asserted Young, "must be and almost is universally attributed to the preponderance of his influence in the Council."¹⁰⁶

Although there were defenses of Halliburton's role in the Assembly, they tended to defend his personal and judicial integrity rather than justify his position on the Council. Alexander Stewart agreed that "the Ermine of Justice should be kept unsullied, and the Judges should not take part in politics," but he was mainly concerned to deny the accusation that Halliburton was either the leader of the Bar and/or the leader of the Conservative Party as a whole.¹⁰⁷ Uniacke argued that "[i]t was necessary that the upper branch should be presided over by a man of reading and research, acquainted with the principles of the British Constitution, and qualified to guide and superintend the deliberations of a Legislative Assembly," but also conceded that the political connections of judges had the tendency to "excite suspicions," and in that light he had no problem with removing the chief justice from Council to satisfy public opinion.¹⁰⁸ Similarly to Stewart, Uniacke insisted that Halliburton's

103. *Ibid.*, March 3, 1837.

104. 'Report of Assembly Proceedings,' *Novascotian*, February 16, 1837.

105. 'Report of Assembly Proceedings,' *Novascotian*, February 23 and March 9, 1837.

106. 'Report of Assembly Proceedings,' March 10, 1836. When in March 1836 the Assembly addressed the crown on the topic, it had been equally blunt: "Your Majesty's loyal Subjects are thus injured, and have been twice refused the means of redress from that Branch over whom the Chief Justice presides": 'Report of Assembly Proceedings,' *Novascotian*, April 6, 1836.

107. 'Report of Assembly Proceedings,' *Novascotian*, February 9 and 16 and March 2, 1837.

108. 'Report of Assembly Proceedings,' *Novascotian*, February 23, 1837.

judicial integrity was intact, although in the process he conceded that Halliburton did indeed "mingle in politics."¹⁰⁹

There was much more substantial opposition to the removal of Halliburton from his colleagues on the Council.¹¹⁰ Councillors principally insisted that his membership was useful as the colony's leading legal authority, because there was no better person to preside than one who "is every day in the habit of investigating and expounding the existing Laws." The Council also relied on British precedent; some chief justices of the superior courts sat in the House of Lords. And claims of partiality were vehemently denied: Halliburton had been both councillor and judge for over 20 years "and no instance has been adduced even in the Debates upon this Address, of his ever having allowed political feeling to bias his judicial decisions." This argument ignored the principal aspect of the Assembly's complaints, which were about Halliburton's politics rather than his judicial work.

For all the heated words emanating from Halifax, it proved easy to remove Halliburton. The new colonial secretary, Lord Glenelg, was broadly sympathetic to many of the reformers' demands, including separation of the Council into two bodies, a more diverse membership for both, and the removal of the chief justice. Glenelg insisted that "[t]he principle to be steadily borne in mind . . . is that all the judges . . . should be entirely withdrawn from all political discussions and from all participation in the measures of the local government." He believed that there was some advantage in having the chief justice's advice in statutory drafting, but this advantage could not be obtained without running the risk of "the judges being drawn into the political discussions of the country."¹¹¹ The change was a signal victory for Howe and the reformers, one which delighted the former: "The removal of the Chief Justice from the Council, and the reconstruction of that Board, leads me to hope that measures of retrenchment will not be resisted, and that questions will be quieted which, for the good of the country, for the respectability of the

109. "Has the breath of slander ever dared to insinuate that there has been partiality in the exercise of his judicial functions, or that his mingling in politics has, in fact, tainted the Ermine of Justice? No! not a man will prefer such a charge": 'Report of Assembly Proceedings,' *Novascotian*, February 16, 1837.

110. This paragraph is from "Observations of His Majesty's Council . . . on the Address of the House of Assembly," *Council Journals*, April 20, 1837.

111. Lord Glenelg to Lieutenant-Governor Campbell, April 30, 1837, in *Copies or Extracts of Correspondence*, 12. For the receipt of these instructions see *Assembly Journals*, January 29, 1838. See, generally, on Councils, W.S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland and Stewart, 1965), chap. 8. London also ordered that four assemblymen be appointed to the executive council and that favoritism in council appointments toward adherents of the Church of England and the Halifax commercial elite be ended.

Bench, ought to be forever set at rest.”¹¹² To an extent, the campaign against Halliburton’s role was part and parcel of a more general assault on the system of colonial governance, but it was the fees issue that made the separation of powers a crucial plank in reformers’ demands for change, and contributed to the vehemence with which Halliburton was attacked personally, not simply as an institutional symbol of the old order. Not only was Halliburton generally seen as providing a brake on reform; by 1837, the fees issue had become a particularly egregious example of his influence.

Abolishing the Inferior Courts, 1836–1841

Concerns about the cost of the legal system not only engaged judicial salaries and fees, they also implicated the structure of the system as a whole, especially the civil courts. As noted earlier, the addition of four salaried judges to the ICCPs in 1823–1824 was frequently adverted to by critics as a prime example of the use of local tax revenues to enrich an elite profession.¹¹³ By the mid-1830s, the reform movement had convinced most assemblymen that, as John Holmes, a Pictou County member and a conservative, asserted at the end of the decade, Nova Scotia simply had “too many courts and too much law for the good of the country.”¹¹⁴ Something had to go, but it turned out not to be easy to agree as to what. Between 1836 and 1841, the Assembly debated two versions of court reform. One version would see the ICCP largely abolished (in most proposals Cape Breton Island was exempted, for reasons discussed below), the other would see reductions in the ranks of both NSSC and ICCP judges, leaving both courts intact. Between 1836, when the House rejected an ICCP abolition bill, and 1840, when a large majority supported a similar measure, a consensus emerged in favor of ICCP abolition, albeit one that did not receive the approval of the Legislative Council until 1841 after an even more overwhelming vote in the Assembly.¹¹⁵ The Courts Act

112. ‘Report of Assembly Proceedings,’ *Novascotian*, February 15, 1838.

113. See, for example, the comment of William Roach of Annapolis in a debate on a proposal to abolish the ICCPs in 1829 that “the three men who got the situations [of Divisional Chief Justice] had promises of them before the Bill was passed. The bill could not be an act of the country, but was carried by individual interests.” ‘Report of Assembly Proceedings,’ *Novascotian*, February 26, 1829.

114. ‘Report of Assembly Proceedings,’ *Novascotian*, March 1, 1838.

115. For the 1840 and 1841 votes see *Assembly Journals*, January 15, 1840 and February 23, 1841. For the Legislative Council’s rejection in 1840 see *Journals of the Legislative Council*, March 14, 1840.

of 1841 abolished the ICCPs throughout the colony and transferred all cases to the NSSC. The divisional chief justices were pensioned off, and a fifth judge was added to the NSSC to handle the increased circuit workload.¹¹⁶ In the interim, the Assembly rejected ICCP abolition on a number of occasions, and in both 1838 and 1839 it voted instead in favor of reducing the number of both NSSC and ICCP judges.

The road to court reform involved a complex set of arguments and also engaged regional interests and party loyalties. The need for economy was a consistent feature of Assembly debates. It was achieved to a small degree by a decision not to appoint a new associate circuit judge after incumbent Peleg Wiswall died in 1836.¹¹⁷ But more substantial reform engaged questions about the quality of the lower courts and a concomitant concern for legal uniformity, as well as claims for democratic legitimacy and appeals to public opinion. The debates and votes reveal that party affiliation was clearly important, but by no means determinative; reformers invariably wanted some form of retrenchment, but so did most conservatives. Where party differences were revealed was in the choice of reform model. However, in that choice, regional loyalties appear to have mattered more than party, reflecting local preferences over which court people preferred to litigate in. Court reform was much less a party issue than were judicial salaries and fees or the separation of powers.

When assemblymen debated court reform, cost was a pervasive concern. In the often difficult economic times of the 1830s, rhetoric about the wastefulness of judicial salaries and superfluous courts was especially resonant. As Cumberland farmer Joseph Oxley put it, the abolition of the ICCPs would release Nova Scotians "from a heavy tax, for the support of courts that were totally unnecessary."¹¹⁸ Howe similarly bemoaned the "wasteful extravagance" and "useless expenditure" on courts, although he did not immediately support abolishing the ICCP.¹¹⁹ We could fill many pages with similar comments. It was not simply that courts and judges cost too much money. It was also widely believed that court sessions interfered with the colonial economy by consuming too much of Nova Scotians' time as suitors, jurors, and witnesses. Attitudes to jury service in the colony reflected less the ideals of English jury ideology, which highlighted resistance to state oppression, and were more often rooted in simple annoyance

116. *Courts Act*, S.N.S. 1841, c. 3. An additional saving resulted from appointing one of the divisional chief justices, Thomas Chandler Haliburton, to the NSSC. The pension of £300 a year given the Divisional Chief Justices was to cease if they took other official employment "of equal or greater value" than the pension: *Courts Act*, ss. 7 and 8.

117. See *Supreme Court Circuit Act*, S.N.S. 1837, c. 54, s. 5.

118. 'Report of Assembly Proceedings,' *Novascotian*, March 16, 1836.

119. 'Report of Assembly Proceedings,' *Novascotian*, February 15, 1838.

at being taken from farming, fishing, and business pursuits. Court sittings often conflicted directly with planting and harvesting periods, prompting jurors to petition the legislature to have the court terms altered or abolished entirely.¹²⁰ William Young, a lawyer, the son of John Young, and the leading reform/liberal politician of the 1840s and 1850s, stated succinctly: “whenever the inhabitants of a district are summoned from their homes as jurors, witnesses, or parties, the steady industry of the country is interrupted, and the wealth of the community diminished.”¹²¹ This concern was acknowledged by Legislative Councillor L.M. Wilkins Junior, whose father sat on the NSSC; perhaps self-interestedly he argued that the peoples’ real grievance with the judiciary was not about salaries but about the waste of their own time as jurors and participants.¹²²

Wilkins, however, was wrong to try to downplay the importance of salaries, for two reasons. First, although many did complain about the disruption, others benefitted from the economic activity generated by the Supreme Court circuit, and communities frequently lobbied to be added to it and resisted being removed from it.¹²³ Second, the expense of the courts, the major part of which was judicial salaries, was consistently seen as a hurdle to economic and social development. Although tumultuous economically, the 1830s also saw Nova Scotia allocate considerable resources to building infrastructure such as roads and bridges in the hope of fostering the colony’s growth;¹²⁴ however, more was always needed, and many saw high judicial salaries as a pernicious waste of scarce revenues. “I cannot tamely see the resources of this young country,” Howe told the Assembly, “so much required for purposes of internal improvement, squandered, upon any privileged portion of the people upon any particular profession.”¹²⁵ He argued that the “useless” expenditure on the inferior courts since the 1824 act amounted to over £26,000, a sum that he claimed would have bought a road to the Gut of Canso and drawn Cape Breton much closer to the rest of the colony.

Advocates of ICCP abolition linked the need for economy with complaints about the court’s allegedly low quality. Local lay judges

120. R. Blake Brown, “Storms, Roads and Harvest Time: Criticisms of Jury Service in Pre-Confederation Nova Scotia,” *Acadiensis* 36 (2006): 93–111. For examples, see *Assembly Journals*, February 13, March 7, and March 20, 1837; April 1, 1838; and February 25, 1839.

121. ‘Report of Assembly Proceedings,’ *Novascotian*, February 15, 1838.

122. ‘Report of Assembly Proceedings,’ *Novascotian*, March 22, 1838.

123. See Phillips and Girard, “Courts, Communities, and Communication.”

124. Mackinnon, “Roads, Cart Tracks, and Bridle Paths,” esp. 184–8.

125. ‘Report of Assembly Proceedings,’ *Novascotian*, February 15, 1838.

were portrayed as unqualified and ignorant of the law,¹²⁶ and one of the professional first justices, William Sawers, was not spared: he would never have qualified for a seat on any provincial bench "but for the passing of the unholy act" of 1824.¹²⁷ Systemic flaws were found in the ICCPs' organization. Abolitionists argued that the inferior court system hampered legal uniformity. Oxley contended that as NSSC judges saw their circuit cases appealed to the full court in Halifax, they learned quickly when their judgments were overturned and did not make the same mistake again. The inferior court judges, by contrast, remained ignorant of legal developments and prone to repeat their errors year after year.¹²⁸ In the Legislative Council, Wilkins argued that low-quality barristers frequented the court, and lawyer and leading conservative James W. Johnston alleged that the circuit system, under which the first justices moved through the same circuits year after year, kept the bench and bar from improving.¹²⁹ Lunenburg lawyer John Creighton similarly contended that on his circuit each first justice was "omnipotent and could do as he pleased," and that there was little chance for country suitors to overturn even radically bad rulings. William Young struck a similar chord, presenting one of his abolition bills as a way to regularize provincial law. The inferior judges, he noted, went on their own circuits with no uniform standards of practice, and as a result, "what is law at Annapolis may not be the law at Kentville or Pictou." Young argued that "the property, reputation, and liberty of the subject, are less secure beyond Sackville Bridge than in the Metropolis," where the NSSC sat four terms a year.¹³⁰ For several leading abolitionists these problems were a far more pressing reason to do away with the courts than the monetary savings that might be achieved.¹³¹ Without more accountability, Young argued, ICCP judges had authority far more absolute than those on the NSSC and "mischief and injustice must flow from so anomalous and defective a system."¹³² In stressing this concern, Young was

126. See letter to the editor and 'Report of Assembly Proceedings,' *Novascotian*, March 23, 1837, and comments of Hugh Bell, member for Halifax Township, reported in 'Report of Assembly Proceedings,' *Novascotian*, March 1, 1838.

127. 'Report of Assembly Proceedings,' *Novascotian*, February 15, 1838.

128. 'Report of Assembly Proceedings,' *Novascotian*, March 22, 1838.

129. 'Report of Assembly Proceedings,' *Novascotian*, March 22 and 29, 1838.

130. Quotations from 'Report of Assembly Proceedings,' *Novascotian*, February 17, 1836 and February 15, 1838.

131. 'Report of Assembly Proceedings,' *Novascotian*, March 22, 1838.

132. 'Report of Assembly Proceedings,' *Novascotian*, February 15, 1838.

advocating one aspect of the broad mid-nineteenth-century trend toward state formation; although court reform did not bring about the expansion of state bureaucracy, it certainly represented a demand for consistency and rationalization.¹³³

Such complaints gave a considerable impetus to the abolition option. “If the people must go to law,” Conservative member for Amherst Robert Dickey contended, “let them go to the highest and best.” By now in the new Legislative Council, Oxley, the author of the 1836 abolition measure in the Assembly, urged councillors to compare the two courts. “The inferior will sink beyond comparison before the claims of the Supreme Court,” he said. “I am astonished that there can be two opinions on the subject—that anyone can entertain the idea of sacrificing the NSSC for the ICCP.” Johnston agreed, saying the high court would bring “even-handed justice to every man’s door.”¹³⁴

In the debates over court reform, both sides sought to draw legitimacy from public opinion. As Jeffrey McNairn has shown for Upper Canada in the same period, public opinion was becoming “the ultimate form of enlightenment, an elixir for all the ills of government.”¹³⁵ And as historians have long noted for Nova Scotia, reformers such as Howe appealed to and manipulated popular sentiment to win some of the key constitutional battles of the time. The court reform discussions illustrate how the rhetoric of public opinion and the idea of democratic legitimacy came to matter in detailed questions of policy and legal administration in the colony. For advocates of both abolition and reduction, appeals were made on behalf of “the people” against an exploitative and appointed elite. Alexander Stewart, later a staunch Tory but in the mid-1830s a supporter of many aspects of reform, noted a “just clamour, which prevails throughout the country, against the influence of the profession and the cost of the Judiciary.” In endorsing an 1836 bill to reduce ICCP sittings in Cumberland, he insisted that the people of the county supported it: petitions ran 5 to 1 in its favor, he said.¹³⁶ Assemblymen consistently used the example of the 1824 Act as exemplary of the way public opinion had been ignored in the past; Hants County shipbuilder and reformer Henry Goudge

133. For an excellent Canadian discussion of state formation see Allan Greer and Ian Radforth, eds. *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*, (Toronto: University of Toronto Press, 1992).

134. *Novascotian*, March 22 and 29, 1838.

135. McNairn, *The Capacity to Judge*, 424.

136. ‘Report of Assembly Proceedings,’ *Novascotian*, March 16, 1836. See also, among many others, the comments of Henry Goudge, William Holland, and George Smith on the alleged unpopularity of the inferior courts, reported in *ibid.*, February 15, 1838.

described the measure as having been "born in sin and shapen in iniquity."¹³⁷

Another argument often used by reformers was the alleged greed of the legal profession. As with court reform debates in the United States, much was made of the avarice of lawyers, their love of superfluous courts, and their protection of opportunities for future elevation to the bench. The profession plundered the colony's meager resources for its own benefit. Howe talked of "the aggrandizement of a particular profession," whereas Hugh Bell, claiming that he liked many lawyers personally, insisted that there were too many of them, and that they were an "unproductive class." When Young's abolition resolution failed in 1838, Dickey noted his lack of surprise that lawyers voted to retain the ICCP: "the more courts and terms and appeals, the better for Lawyers."¹³⁸ In fact, lawyers were a considerable block in the Assembly, and did tend to vote to preserve the ICCP.¹³⁹ However, if lawyers were truly concerned only with self-interest, they would presumably have opposed all reform schemes, and that was not the case; in the 1838 and 1839 votes on reduction bills they came out largely in favor.¹⁴⁰ It might be argued that lawyers would have preferred reduction to abolition because the majority of them benefitted from more litigation, whereas only a very few could hope to achieve judgeships.

The Assembly debates demonstrate a consensus in favor of a reduction in the cost of the legal system, and also that most of the arguments deployed supported the abolition, in whole or in part, of the ICCP. Opponents of the ICCP made powerful arguments, about wasted resources, exploitation of the many by the few, underdevelopment, and lack of professionalism and legal uniformity, all couched in appeals to public opinion. Defenders of the ICCP did not dispute the need for economy, but wanted that achieved by reductions in the number of judges on both courts. They could, however, offer few defenses of the ICCP, and relied principally on the argument that the court was popular.¹⁴¹ They argued that the 1823–1824 reforms had been beneficial, citing the experience of their

137. 'Report of Assembly Proceedings,' *Novascotian*, February 15, 1838. See also in the same issue the comments of Gloud McLellan and of William Young, the latter referring to the "secret history of that memorable transaction."

138. 'Report of Assembly Proceedings,' *Novascotian*, March 1 and 22, 1838. See also the comments of William Holland in the issue of February 15, 1838.

139. Across three votes on abolition of the ICCP in 1836, 1838, and 1839, discussed subsequently, lawyers voted seven times for abolition and nineteen times against it.

140. In 1838, six lawyers voted for reduction and two voted against, and in 1839 they voted five to three for reduction. See below for the source for this calculation.

141. In addition to the popularity argument, on a number of occasions it was suggested that abolition would create a problem for it would remove from the sessions the position of president; presumably as a result some of the reform bills retained the divisional chief

constituents. Gloud McLellan of Londonderry noted that in his district the number of suits filed in each court were nearly equal, and therefore “it may . . . be reasonably presumed that it is not the wish of all the people of Londonderry that these courts should be swept away from the face of the earth.”¹⁴² Even in 1841, with abolition having been twice approved in the house by massive majorities, Attorney General Archibald insisted that the ICCP remained popular among Nova Scotians.¹⁴³

Although the weight of the arguments seems to have favored ICCP abolition, and although the NSSC judges consistently indicated that they could handle the extra caseload that would come with it, it took some years for abolition to happen, and this fact suggests that the ICCP, for all its apparent flaws, was indeed popular in some quarters. Additional evidence for this comes in analyses of voting patterns on the three proposals to abolish the ICCP debated in 1836, 1838, and 1839, which reveal distinct regional preferences.¹⁴⁴ In the 1830s, there were clear distinctions among the various counties and districts in use of the ICCP for litigation rather than the NSSC on circuit; the ICCP was the court of choice in places that were either far away from Halifax or closer but relatively inaccessible for the NSSC circuit, entailing arduous and lengthy travelling for the NSSC judges. Conversely, litigants in counties or districts close to the capital or to which the roads were relatively good preferred the NSSC. We have termed these either “ICCP counties” or “NSSC counties” respectively.¹⁴⁵ Not all of the colony’s counties fall into one group or the other;

justices in that role, on reduced salaries. See, for example, the bill introduced in 1839: NSARM, RG 5, Series U, vol. 14, no. 147.

142. ‘Report of Assembly Proceedings,’ *Novascotian*, March 1, 1838. See also the similar comments of Alexander McKim of Cumberland in the issue of March 22, 1838.

143. ‘Report of Assembly Proceedings,’ *Novascotian*, February 11, 1841.

144. In 1836, a total abolition bill was presented but lost 18 to 15 on a motion to defer it by 3 months. In 1838, with the Assembly debating a bill that would reduce the number of judges in both courts, a motion was made to refer that bill back to committee and instead to debate an abolition proposal (albeit with Cape Breton exempted); this motion was defeated 25 to 17. In 1839 the House voted 26 to 21 for a reduction bill over an abolition (again exempting Cape Breton) bill. For these votes see *Assembly Journals*, February 25, 1836; March 3 and 5, 1838; and February 28, 1839. For the bills see NSARM, RG 5, Series U, vol. 14, nos. 17 and 147. The judiciary was discussed briefly in 1837, but extensive consideration of the issue was constantly deferred because the Assembly was absorbed with Howe’s Twelve Resolutions and the general reform of colonial governance. We have not analyzed the votes of 1840 and 1841 because on each occasion a very large majority voted in favor, evidence of the consensus that had by then emerged. See *Assembly Journals*, January 15, 1840, and February 23, 1841.

145. We use the word “counties” even though some areas were only judicial and electoral districts of counties; the districts all became counties, sometimes in this period, sometimes later. The figures on court use employed here to group the colony’s counties and districts are

we have put these into a "miscellaneous group."¹⁴⁶ Across the three votes the abolition movement drew much more support from NSSC county members: 54 percent of the votes for abolition came from them, whereas only 18 percent came from ICCP counties (28 percent were from the miscellaneous group.) Making the same point another way, 53 percent of members from NSSC counties voted in favor of abolition, whereas only 24 percent of those from ICCP counties did so. The representatives from the other group split 51 to 49 percent in favor of abolition. Therefore, however much they might have wished for economy, many members from largely outlying regions, aware that their constituents liked the local court, were unwilling to achieve it by getting rid of the ICCP.

As one might expect, the converse was true when the Assembly voted not on abolition but on reduction of the number of judges in both courts. In both 1838 and 1839, Morton introduced more or less identical bills providing that neither the first vacancy in the NSSC nor the first among the divisional chief justices on the mainland would be filled, meaning that in time the number of judges on both courts would be reduced from four to three.¹⁴⁷ Morton's bill passed in the Assembly both years, only to be rejected by the Legislative Council.¹⁴⁸ In the 1839 vote on reduction, 71 percent of the ICCP county members voted for it (eleven of fifteen), whereas only 45 percent (ten of twenty-two)

from Assembly investigations in the 1830s, reported in *Assembly Journals*, 1838, Appendix 12, and 1841, Appendix 22. The NSSC counties or districts were Annapolis, Hants, King's, Colchester, Pictou, and Yarmouth. ICCP counties/districts were those on Cape Breton Island, Guysborough, Sydney, Queens, Lunenburg, and Digby. Although it is not germane to our analysis here, note that there was a close correlation between distance and court use, and a very close one when to distance is added the difficulties of travel for the NSSC circuit. Lunenburg, for example, reasonably close to Halifax, was an ICCP county because the roads were unfit for any conveyance other than horseback. For a more detailed discussion of the links between distance, accessibility, and court use see Phillips and Girard, "Courts, Communities, and Communication."

146. The part of Halifax County that included the city and its environs did not have an ICCP, no figures were returned for Shelburne, and Cumberland County fluctuated in its preferences, perhaps because of a local dispute about which community the NSSC should hold its circuit sessions in. For this dispute see Phillips and Girard, "Courts, Communities and Communication."

147. NSARM, RG 5, Series U, vol. 14, no. 13, and vol. 15, no. 1. Similarly to the abolition bills of 1838 and 1839 Cape Breton got an exemption. Morton's bill provided that if the Cape Breton chief justice was the first vacancy, one of the other three from the mainland would be moved to the Cape Breton post, and the mainland would henceforth be divided into two, not three, divisions.

148. For the progress of his bills see *Assembly Journals*, January 31, February 10, March 5, and March 6, 1838; and January 15 and February 6, 13, and 28, 1839.

of NSSC county members did so.¹⁴⁹ The figures were very similar in the vote the year before.¹⁵⁰

The links between region and voting patterns on abolition versus reduction are complicated by the fact that the 1838 and 1839 abolition proposals exempted Cape Breton Island. They did so largely in recognition of the fact that in a region so far from the capital, the ICCP was overwhelmingly the court of choice. Not only was the island literally far away, the poor roads and the need for internal travel by water made the NSSC judges on circuit often late.¹⁵¹ And the divisional chief justice for Cape Breton Island also performed a function not often given to the other chief justices: invariably presiding at capital or otherwise serious criminal trials pursuant to special commissions of oyer and terminer.¹⁵² The result of the exemption was that Cape Breton members could vote for abolition on the mainland without losing courts popular with their constituents. And they did so, by a margin of 8 to 5 in favor of abolition. Therefore, eight of the ten votes that ICCP county members cast for abolition came from Cape Breton. If Cape Breton members are removed from the calculations, members from ICCP counties voted 26 to 2 against abolition over the three votes.

In short, regional loyalties mattered in court reform debates. This is not to say that there was a complete correlation between region and voting patterns. Morton, for example, came from an NSSC county and was the principal sponsor of reduction bills. Presumably his distrust of elite judges, exemplified by his leadership in the fees agitation, led him not to wish to leave the NSSC judges as sole occupiers of the field. On the other side, John Creighton, a conservative and a representative of an ICCP county, Lunenburg, introduced a bill for ICCP abolition in 1836 and voted in favor of abolition again in 1839. Morton and Creighton and others presumably based their votes, at least in part, on the broader arguments about the quality of the courts.

149. *Assembly Journals*, February 28, 1839.

150. *Assembly Journals*, March 3, 1838. On that occasion, ICCP members again voted 71 percent for reduction, whereas NSSC members only voted 42 percent.

151. For more on this, see Phillips and Girard, "Courts, Communities and Communication."

152. See on both these points a petition of John George Marshall, who was the only Cape Breton chief justice in the 18 years the system was in operation. He stated that as the ICCP had concurrent jurisdiction with the NSSC "nearly all the Civil Actions were brought and prosecuted in that Court" on the island, and in one 7-year period there was only one civil suit brought in the NSSC on circuit. He also referred to "several Special Commissions, which were directed to him for the trial of persons charged with capital Offences": Marshall to Lord Stanley, January 3, 1842, NSARM, John G. Marshall Papers, MG 1, vol. 1282, no. 10.

The importance of region is highlighted by a comparison with party affiliation. Reformers were more in favor of abolition of the ICCP than were conservatives; across the three divisions reformers' votes opposed abolition but only by a margin of 31 to 29; conservatives opposed it 29 to 17.¹⁵³ Therefore, a majority of members from both parties were against abolition, even if conservatives were more so,¹⁵⁴ whereas the regional breakdown shows one group (NSSC county members) in favor and one group (ICCP county members) against. Party differences were even more muted on the issue of whether there should be court reform at all; only a handful of members opted for the status quo and resisted both abolition of the ICCP and reductions in judicial staffing levels in both courts.¹⁵⁵

Despite its popularity in some regions, ultimately the ICCP fell victim to several currents in colonial politics. Concern about the expense of the judiciary was especially prominent during the 1830s when infrastructure projects seemed far more worthy of provincial support than did judicial salaries. In addition, abolitionists targeted the court as ill-suited to fostering legal uniformity, an important aim of colonial state formation. Finally, many insisted that the ICCP was democratically illegitimate because it had been foisted on the colony by the insular legal profession and remained unpopular. These themes of accountability, uniformity, and legitimacy link the court reform question in Nova Scotia to many other issues of provincial politics during the age of reform. They also connect it to debates in England and the United States. In England, reformers aimed to foster wider legal uniformity and professionalization in the justice system and, therefore, created a new system of county courts in 1846. Although similar in motive, the English changes kept the inferior court system decentralized

153. We have not been able to categorize all members by party, because some were not clearly affiliated with one or the other. But this is only a problem for the 1836 vote, in which we have only been able to account for 61 percent of members. In the Assembly, which sat from 1837 to 1840, following the first provincial election clearly fought on party lines, approximately 95 percent of members can be categorized. Our principal source for this exercise is Shirley Elliott, *A Directory of the Members of the Legislative Assembly of Nova Scotia, 1758–1983*, rev. ed. (Halifax: Province of Nova Scotia, 1984).

154. This trend continued into the 1840s. In both 1840 and 1841, when large majorities in both parties approved abolition, fewer Tories backed the change (75 percent compared to 91 percent of reformers).

155. For this point, see the two 1838 votes on reduction versus abolition. Only four of the twenty-six who opposed abolishing the ICCP also voted against reducing judges in both courts. It should be conceded that we need to do more work on party distinctions, because the overall figures from the three votes conceal substantial change from year to year. In 1836 and 1839 combined, reformers voted for abolition 21 to 15, whereas they voted against it 16 to 8 in 1838. The corresponding figures for conservatives are the opposite—21 to 9 against in 1836 and 1839 combined, an equal division in 1838.

whereas Nova Scotia sought to achieve the same things by giving a monopoly to the Halifax-based NSSC.¹⁵⁶ Perhaps a more suitable comparison, then, would be to the United States, where almost every state re-examined its justice system during the Jacksonian period and often focused, as in Nova Scotia, on concerns about accountability and popular consent. But the American tendency to demonize judges personally and the widespread conversion of judicial offices into elective positions were very different solutions to what took place in Nova Scotia. ICCP abolition illuminates the distinctive nature of reform culture in the province.

Conclusion

The court system and judiciary were focal points of debate during Nova Scotia's "Age of Reform," which turns out to have been an age also in which a distinct provincial legal culture emerged. We have highlighted here four of the most important issues involving judges and courts in this period: judicial salaries and fees, the chief justice's membership on the Council, and the fate of the inferior civil courts. Taken together, these illustrate how important a target the judiciary was for democratic reformers. The reformers continually rejected salary increases and campaigned to end judges' fees, arguing that such expenditures wasted the colony's scarce resources on an insular, exploitative legal elite. Indeed they publicly attacked the fees system as outright illegal, deeply embarrassing the members of the NSSC, and therefore pressing the judges to agree to a compromise. Nor were critics content to allow the high Tory chief justice to continue guiding government policy and safeguarding his own interests as head of the Council. As the fees issue intensified, the chief's dual role, embodying the corruption of the ancien régime, galvanized the reform movement. These arguments about fiscal waste and an exploitative elite also drove the movement to abolish the ICCP, although here concerns about legal uniformity and judicial quality energized the debate, whereas regional divisions complicated the question and cut across political distinctions.

The court system debates also reveal much about the intellectual underpinnings of the reform period. They highlight shifting trends in constitutional and political thought and demonstrate that, as some historians

156. Patrick Polden, *A History of the County Court, 1846–1971* (Cambridge: Cambridge University Press, 1999), 1–37; H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth Century England*. (Toronto: University of Toronto Press, 1985), esp. 13–49.

have argued, the reform debates should not be reduced to partisan battles or to simple conflicts between gregarious personalities. In short, as this article shows, ideas mattered. In rejecting judicial salary increases and the broader idea of a quasi-aristocratic official class, for example, the Assembly was also rejecting major tenets of the eighteenth-century mixed and balanced constitution. Critics of the court clearly saw judges as citizens on the bench, and not a class apart from the colonial populace. Likewise, the fees question exposes a fundamental divide between the reformers and the judges. The latter based their claim on English custom and argued that fees were a vested right, property that could not lawfully be taken away by the elected colonial legislature. Meanwhile, the reformers contended that the fees were illegal exactions made upon the colonists and that without the Assembly's sanction this amounted to taxation without representation.

A related divide emerged over the chief justice's role in the Council. Here, the old system came under increasing attack as a violation of the separation of powers. This principle had gradually gained ground in colonial constitutional thought and as it was turned on the chief justice it threatened a central bastion of Tory power in the province. Such a shift is also apparent in the ICCP debates, in which public opinion was wielded both to justify and attack the inferior courts. In so doing, conservatives as well as reformers conceded that institutional legitimacy now hinged on popular opinion, and an entire branch of the colony's court system was abolished as a result. In other words, the debates over judges and the courts both fed into and drew from the wider clash of ideologies then pushing the colony toward responsible government. Legal reform in the colony was not "British" and reactionary, nor was it "American" and revolutionary. Nova Scotia had its own dynamic of reform, one shaped by both local influences and concerns and also by larger more general trends.