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I. Stability Characteristics

Max Weber and Emile Durkheim each made unique and highly significant contributions to the analysis of those characteristics of social and political systems which may contribute to the stability or continuity of specific component institutions or total systems. Their theoretical contributions and the special attention which they focused upon legal professionals and institutions provide an excellent foundation for the development of rigorous cross-national or intra-national comparison of legal personnel and institutions.

Weber's identification of the three modern bases of legitimacy—legality, formally correct rules, and accepted procedure[1]—also suggested both to him and subsequently to others the possible linkages between legal professionalism and the system-maintaining or stabilizing behavior of legislators, judges, and administrators. In advanced societies, legal professionalization is a concomitant of the general development of specialization.[2] The universality of legal professionalism in such societies, and the real or ostensible ubiquity of lawyers in executive, legislative, or judicial offices suggests a comparative research strategy which eschews, at least temporarily, the exceedingly difficult task of determining the cross-system comparability of structural or functional variables.[3] Instead, this strategy embodies: (1) the identification of those system-maintaining norms and those attributes of legal professional behavior which, according to the theoretical assump-

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1 M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 77 (A. M. Henderson and Talcott Parsons translation, 1947).

2 For an empirical investigation of some possible explanations of the relationship of legal specialization and social characteristics see R. Schwartz & J. Miller, *Legal Evolution and Societal Complexity,* 70 AM. J. SOCIOLOGY 167 (1964).

3 For example, is "judicial review" as ordained in the contemporary constitutions of Japan, West Germany or Italy conceptually equivalent to the American or U.S. model? For a definitive analysis of the necessity for such shift in emphasis see J. Wahlke, *Policy Demands and System Support* in MODERN PARLIAMENTS 141-71 (G. Loewenberg ed. 1971). Gerhard Loewenberg, assessing the empirical problems raised by the functional approach in comparative legislative research, states flatly that "unless the functional requisites of political systems are defined in operational terms which are equivalent cross-nationally, the concept cannot be used in comparative research. . . ." In the same analysis, he also observed that ". . . whether any set of functions is performed in all political systems is itself an empirical question, which has hardly been raised, let alone answered. . ." G. Loewenberg, *Comparative Legislative Research* in COMPARATIVE LEGISLATIVE BEHAVIOR: FRONTIERS OF RESEARCH 11 (S. Patterson & J. Wahlke eds. 1972). Among the small, but hardy, band of comparative judicial researchers, scholars of the calibre of Donald P. Kommers have performed yeoman service by directly attacking identical problems in the judicial area. See, for example, D. Kommers, Cross-national Comparisons of Constitutional Courts: Toward a Theory of Judicial Review (unpublished paper delivered at the 66th annual meeting of the American Political Science Association, Los Angeles, California, September, 1970).

tions of Weber and Durkheim, are universal in complex modern societies and (2) their application to determine empirically the validity of two of Durkheim's hypotheses that are related directly to the stability of political institutions and total systems.

The first of these hypotheses is embodied in Durkheim's *Professional Ethics and Civic Morals,* where he stated that professions which have a "public character" such as "the army, education, the law . . . ," because of their association with governments in power or regimes, possess a high degree of cohesiveness and are supportive of "public" purposes and the stability of regimes.[4] Secondly, because Durkheim was primarily concerned about social integration, or the investigation of what holds societies together, he attempted to develop explanatory hypotheses of even broader scope than those based upon conceptions of the public professions. With respect to this broader perspective, Talcott Parsons has underscored the importance of Durkheim's idea of "mechanical solidarity"—"the integration of the common values of the society with the commitments of units within it to contribute to the attainment of collective goals—either negatively by refraining from action which would be felt to be disruptive of this function, or positively by taking responsibility for it."[5] Durkheim frequently emphasized that units of government would comprise the institutions most likely to demonstrate mechanical solidarity.[6] This concept of mechanical solidarity provides one means of determining variances in regime stability which are more subtle than the extreme of either political immobility or violent revolution. As Gerhard Loewenberg put it, "some of the most abrupt and fundamental political changes occur . . . without significant internal violence, without significant fluctuations in authority, and without the disappearance of political systems."[7]

Drawing upon this background, systems stability is defined in this analysis as the maintenance of those institutions, norms, and values which in balance comprise the constitution (whether written or unwritten) of a particular political system. Behavior which weakens or seeks to weaken one institution or essential norms in relation to others is thus defined as antistabilizing. The emphasis is upon actual behavior rather than on attitudes.

One means of testing these hypotheses is to compare the voting behavior of lawyer-legislators and nonlawyer-legislators on "institution-weakening" legislation concerned with the key judicial institution for a sufficiently long and continuous time period in a suitable political system. For the purpose of this preliminary analysis, the roll call voting behavior of all members of the U.S. House of Representatives and Senate on every "institution-weakening" proposal relating to the Supreme Court of the United States during the period 1927-1968 was categorized as stabilizing or antistabilizing. For example, legislation designed to limit the capacity of the Supreme Court to render definitive decisions in federal-state relations or to deny the Court jurisdictional authority to provide sub-

4 Emile Durkheim, *Professional Ethics and Civic Morals* 7-8 (1958).
5 T. Parsons, *Durkheim's Contribution to the Theory of Integration of Social Systems,* EMILE DURKHEIM, 1858-1917 127 (K. Wolff ed. 1960).
6 *See id.* at 127-29.
7 G. Loewenberg, *The Influence of Parliamentary Behavior on Regime Stability,* 3 COMPARATIVE POLITICS 182 (January, 1971).

stantive or procedural safeguards in criminal justice or internal security cases would weaken substantially the power and influence of the Supreme Court and alter the balance of power within the system. Objectives of this sort were fundamental to the Jenner legislation which came before the 85th Congress, or Representative Howard Smith's anti-Court bill (H.R.3) in the 86th Congress.[8]

In addition, the voting behavior of all members of two specialized units within each legislative chamber, the House and Senate Judiciary Committees, was similarly categorized for the identical time span (utilizing roll calls on the same "institution-weakening" legislation) as a more direct operationalization of Durkheim's "mechanical solidarity." Thus, House and Senate Judiciary Committee members, who by the modern norms of American congressional committee selection are legal professionals, not only may be expected to support the stability of the system because they are lawyers but also because they are members of units established both to facilitate judicial legislation and to contribute to and maintain the total governmental system. Indeed, these committees are assigned responsibility for initially screening proposals for the most fundamental changes in the system—constitutional amendments. If Durkheim's hypotheses are valid, Judiciary Committee members presumably would be stronger supporters of the Court than other lawyer-legislators and both would be more supportive than legislators who are not legal professionals. Membership on the Senate and House Judiciary Committees is actively pursued by some lawyer-legislators.[9] It seems reasonable to suggest that lawyer-legislators who actively seek membership on the committees with direct responsibility for much of the legislation related to the courts and the federal judicial system would be among those members of Congress more likely to be legal professionals and presumably more likely to be supportive of the stability of system. Furthermore, if ever professional norms were to be salient, it should be to these people who in their daily activities have the opportunity to shape the attitudes of their colleagues and of the public to the judiciary. Before undertaking direct tests of the validity of these hypotheses, appropriate attention must be directed to several definitional and classificatory problems which are basic to cross-national comparative research.

II. Comparative Utilization of Concepts of Lawyers and Legal Professional Norms

The generality of a theory refers, in the words of Przeworski and Teune "to the range of social phenomena to which it is applicable."[10] In order to meet the requirements of conceptual equivalence which are prerequisites for subsequent use of those measures which may be universally applied to determine accuracy and, if possible, causality, the broadest possible definition of the term "lawyer"

8 A complete description and listing of this legislation can be obtained directly from the authors. A description of these roll calls for the period from 1947 through 1968 can be found in L. Berg, The Supreme Court and Congress: Conflict and Interaction, 1947-1968, 425-48 (University of California, Santa Barbara, unpublished Ph.D. dissertation 1972).

9 *Id.* at 348.

10 A. Przeworski & H. Teune, THE LOGIC OF COMPARATIVE SOCIAL INQUIRY 21 (1970). Universality is, of course, only one of four attributes for empirically interpretable comparative social science research. The others comprise accuracy, parsimony, and causality.

has been applied: Any individual who meets the requirements of legal education, such as passing entrance examinations, is defined as a lawyer. Acceptance of this broad definition eliminates distinctions between categories of lawyers, distinctions based upon styles of practice, or differences between individuals admitted to the bar but not engaged in private practice and the private practitioner. Mogens Pedersen's contention that such a general definition should be consistently applied is predicated upon his belief that "it is the relationship between the whole legal profession and politics which should occupy our interest."[11] Indeed, the general applicability of the norms of the American legal profession relating to systems maintenance encompasses all who were admitted to the bar. These norms are explicitly related to judicial institutions and personnel of the sort which are utilized in the empirical tests of Durkheim's hypotheses.

Not only does utilization of an all-encompassing definition of legal professionals provide the basis for general application in cross-national or intra-national research, but the concomitant universality of the judicial systems support or maintenance norms of the legal profession presumably may facilitate cross-national testing of the hypotheses investigated herein. Alexis de Tocqueville preceded Durkheim in stressing the stabilizing propensities of lawyers and the occupational and legal educational characteristics which purportedly strengthened or contributed to those propensities. In a section of *Democracy in America* entitled "Mitigations of the Tyranny of the Majority" de Tocqueville summed up the rationale for his emphasis upon the linkage between lawyers and stability:

> Men who have more especially devoted themselves to legal pursuits, derive from those occupations certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.
>
> The special information which lawyers derive from their studies, ensures them a separate station in society; and they constitute a sort of privileged body in the scale of intelligence. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary, but which is not very generally known: they serve as arbiters between the citizens; and the habit of directing the blind passions of parties in litigation to their purposes, inspires them with a certain contempt for the judgement of the multitude. To this it may be added, that they naturally constitute a body; not by any previous understanding, or by an agreement which directs them to a common end; but the analogy of their studies and the uniformity of their proceedings connect their minds together, as much as a common interest could combine their endeavours. . . .[12]

To what extent do the norms of the legal profession emphasize system support and, in particular, support for the judiciary? Do the norms tentatively verify or contradict the hypotheses or heuristic statements of Durkheim, de Tocqueville, and to a more guarded extent, Weber? Virtually every group within the United States legal profession asserts (or at least gives lip service to) the pro-

11 M. Pedersen, *Lawyers in Politics: The Danish Folketing and United States Legislatures*, in COMPARATIVE LEGISLATIVE BEHAVIOR: FRONTIERS OF RESEARCH 49 (1972). Pedersen provides an excellent discussion of the variety of conceptualizations of lawyers. *Id.* at 46-49.

12 A. de Tocqueville, 1 DEMOCRACY IN AMERICA 322-23 (1961).

fession's obligation to maintain the integrity of the courts. Indeed, this norm is reinforced not only by the canons of professional ethics but also by the tradition which describes an attorney as an officer of the court and through frequent invocation by the courts themselves.

The editors of *American Jurisprudence* indicated that the role of an attorney as an officer of the court is fairly explicit—while the lawyer is not a "public officer" in an official sense, he "must maintain a respectful and courteous attitude toward" the courts.[13] This imperative is frequently reiterated by the courts in a very direct manner. For example, a decision of a Nevada court asserted, "It is the special duty and obligation of members of the bar to protect the good name of the courts against ill-founded and unwarranted attacks."[14]

Specifically referring to the lawyer's obligation to the courts, the Canons of Professional Ethics of the American Bar Association are described as undertaking "to codify the traditions and practice recognized over the centuries as part of the common law with respect to lawyers' obligations."[15] This Canon is very explicit:

> It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. . . .[16]

The intimate relationship between the organized bar and state and federal judicial systems is constantly reinforced by the development of reciprocal obligations such as the traditional advisory role fulfilled by the bar regarding modification of judicial rules.[17] Thus, lawyers not only are professionally socialized to maintain respect for the courts, but they also presumably may be motivated to maintain a system within which they enjoy a preferred status.

A. *One System's Experience*

The data set with which Durkheim's hypotheses were tested consisted of the total universe of 38 roll calls on institution-weakening legislation during the period 1927-1968 in both Houses of the United States Congress. The unit of analysis chosen was the congressional session (one calendar year) so that a series of roll calls on a single issue would not distort the broader relationships being sought. This process resulted in the examination of roll-call voting behavior in eight years for the Senate and six for the House of Representatives. An institution support score was computed for each member for each year. It consisted of the number of votes determined to be in support of the judiciary normed by the total number of roll calls on institution-weakening legislation. The Congress-

13 7 AM. JUR. 2d *Attorneys at Law* §§ 3-4 (1963).
14 *Id.* at 46, citing In Re Breen, 30 Nev. 164, 93 p. 997 (1908).
15 *Id.*
16 AM. JUR. 2d DESK BOOK, Doc. 91 (1962).
17 *See* Order Adopting Revised Rules of the Supreme Court of the United States, 348 U.S. 945 (1964).

men were then separated into groups within each chamber according to the several independent variables discussed below.

The test of the hypotheses consists of a comparison of mean support scores between groups. If one group consistently outscores the other in terms of support for the judiciary as determined by the binomial sign test, it then can be concluded that the independent variable defining the groups represents an axis along which judiciary-related attitudes divide.[18]

It was originally reported that an analysis of all court-related legislation—both institution-weakening and those merely modifying policy, such as congressional reversal of judicial statutory interpretations (but omitting judicial nomination and housekeeping roll calls) for the period 1937-1968—indicated that lawyer-legislators were no more supportive of the judiciary than their nonlawyer colleagues. It was further pointed out that a legislator's political party seemed to be a variable contributing substantially to the explanation of voting behavior on court-related legislation.[19]

A second appraisal of the same data set considered the voting behavior of members of the Judiciary Committees. It was concluded therein that the gatekeeper function with respect to judiciary-oriented legislation appeared to have little if any effect on committee members. Their voting behavior was not significantly different from that of noncommittee members, whether lawyers or not.[20]

This research, therefore, is limited to the analysis of voting behavior on institution-weakening legislation in order to test directly Durkheim's hypotheses. Essentially a control for the meaning of the legislation has been imposed on the lawyer data set. The concern is not with legislation seeking to modify or reverse Supreme Court decisions but with a narrowly defined set of issues that strike at the basic functioning of the judiciary and its relations with other branches of government. Charts 1A through 2B indicate that invoking this control has changed somewhat the tenor of the argument. Lawyers in the Senate rank higher than nonlawyers in support of the Court in six of the eight years, a difference significant at the .05 level.[21] The opposite is true in the House of Representatives where lawyers outscored nonlawyers only once in six years, although this pattern is not significantly different from chance. It would seem, therefore, that on the basic issues, those affecting the role of the judiciary in the American political system, the members of the legal profession in the Senate do conform, at least partially, to Durkheim's first hypothesis. It must be stipulated, however, that the hypothesis was tested with only a small number of cases. When the data set is extended back to include substantially more institution-weakening votes, then perhaps a more definitive statement about lawyer-nonlawyer legislative voting behavior can be made.

When the focus is shifted to the Judiciary Committees, Durkheim's theories

18 A more extensive description of the methodology can be found in J. Green, J. Schmidhauser, L. Berg & D. Brady, *Lawyers in Congress: A New Look at Some Old Assumptions*, 26 WESTERN POL. Q. 441-43 (1973).

19 *Id.*

20 J. Schmidhauser, J. Green & L. Berg, The Supreme Court and the Congress: The Lawyer Monopoly Committees and the Myth of Reverence Toward the Court (unpublished paper).

21 S. Siegal, NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES (1956).

TABLE 1A
Lawyer-Nonlawyer Behavior,
Senate 1927-1968

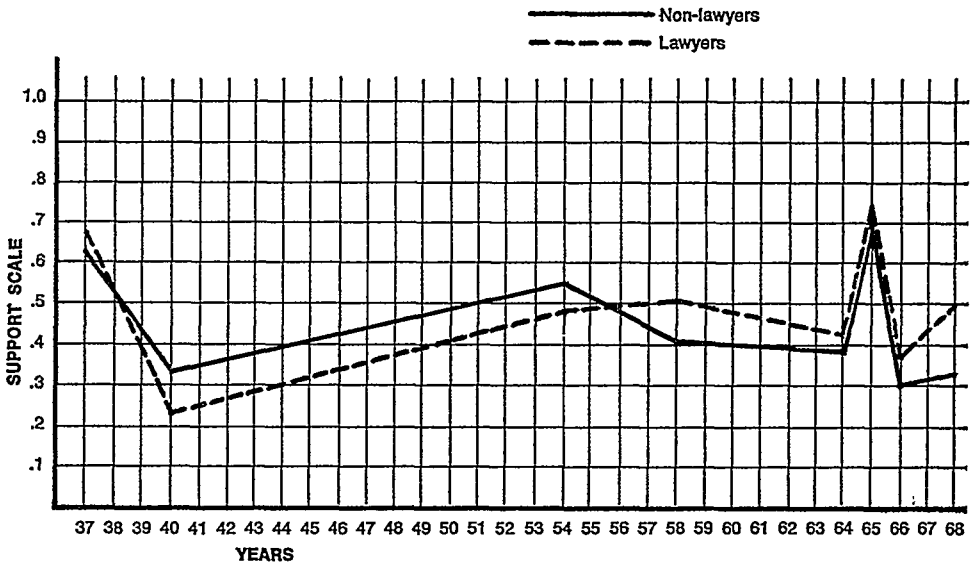


TABLE 1B
Lawyer-Nonlawyer Behavior,
House of Representatives
1927-1968

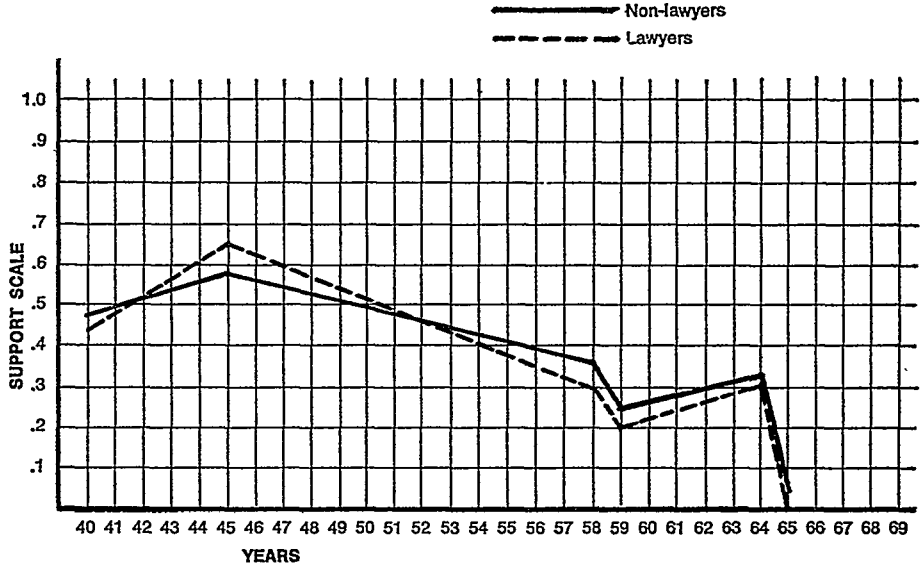


Figure 2A
Distribution of Adjusted Mean Scores
on Type 1 Roll Calls by
Judiciary Committee Members, and All Other Members
U. S. Senate, 1937-1968

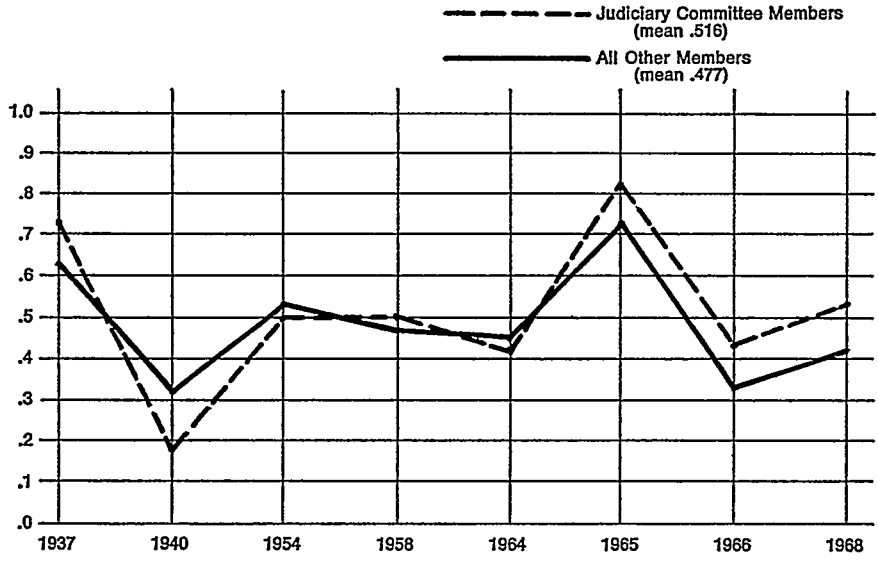
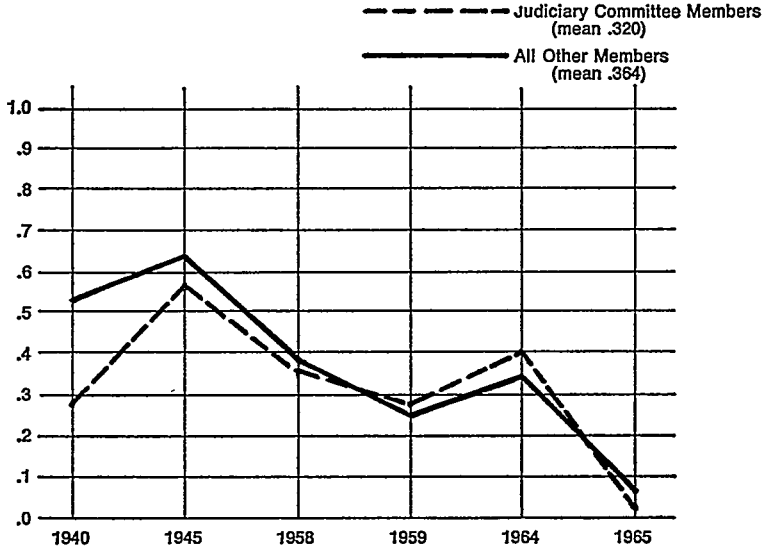


Figure 2B
Distribution of Adjusted Mean Scores
on Type 1 Roll Calls by
Judiciary Committee Members, and All Other Members
U. S. House of Representatives, 1937-1968*



*The first rollcall occurred in 1940.

fare much worse.[22] Members of the House of Representatives Committee on the Judiciary actually demonstrated less support for the Supreme Court in the thirteen roll-call divisions in six years than did all other House members (see Figure 2B). The overall mean score for the lawyer monopolized committee was .320 while the mean score for all noncommittee members was .364. The distribution of mean annual computed Court support scores in Figure 2B is, however, relatively similar for both groups in the House. The Senate data on roll calls on institution-weakening proposals (Figure 2A) differ in that Senate Judiciary Committee members recorded stronger Court support scores than noncommittee members, but again the distributions are basically similar. Members of the Senate also recorded higher overall Court support scores on such proposals than did members of the House of Representatives for the entire period 1937-68.

Additional information about the voting behavior of lawyer legislators and of the Judiciary Committee members in particular was obtained by dividing the nonmember category into lawyers and nonlawyers. Comparisons of mean support scores from overall roll calls for these three groups are presented in Table 1.

Table 1

Mean Support Scores
by Group on Institution-weakening Legislation

	H.R.	Sen.
Judiciary Committee Member	.320	.516
Nonmember lawyer	.358	.492
Nonmember nonlawyer	.372	.454

Several conclusions can be drawn from the table. First, within each column the range of scores is quite small, a maximum of .062 for the Senate. It, therefore, can be said that the differences between the three groups do not permit us to infer that service on the Judiciary Committee in any way affects the member's attitude toward the Court. Second, after examining the ranking of the three groups in terms of strength of support, the data again do not single out the Committee as a bastion of support for the Supreme Court. Committee members are strongest in support only in the Senate and, as already noted, by very minimal margins. It is interesting to note that in the House, nonlawyers rank highest in support of the Court; but again the figures best support a conclusion of no difference between the groups.

In conclusion, the evidence generated by the United States Congress is somewhat contradictory. There is one point at which Durkheim's hypothesis is supported by the data; voting behavior on institution-weakening legislation by members of the Senate Committee on the Judiciary; but three other tests do not support the mechanical solidarity hypothesis.

B. *Comparative Research on the Judiciary*

Institution-weakening legislation represents something more than a fit of

22 The Supreme Court and the Congress, *supra,* note 20.

pique on the part of some members of Congress. It goes beyond the immediate object of wrath, the public policy expressed in a specific decision, and seeks to punish the responsible party—in this case the Supreme Court—so as to prevent reoccurrence. In Durkheim's terms such proposals represent a crisis in the political system. At stake is the concept of judicial independence and the ability of the courts to interpret and apply the law as they deem proper. A continuously successful campaign against a judiciary by the legislature would render it impotent and little more than an arbiter in relatively trivial interpersonal conflicts.

Every modern political system possesses a judiciary, and all charge it with the interpretation and enforcement of laws, including a constitution should there be one. This status of the judiciary in all cases is subject to change by a legislature although the consent of other parties might also be required. Thus, the United States scheme is not at all atypical and it should be possible to identify within each of a number of countries issues that serve the function of institution-weakening legislative proposals. These must constitute a test of the existence or independence of the judiciary, or a measure of its ability to fulfill the role of constitutional referee in either a traditional or an emerging society.

How then can Durkheim's hypothesis be operationalized? To what can we look for evidence of system stability? The frequency with which such crises occur is one measure. In the United States, for example, a decade passed without roll calls on institution-weakening legislation, between 1927 and 1937, even though this was a period of severe dislocation and stress in other sectors of the political system. Not all political, social, or economic crises place the judiciary and the legislature in confrontation with each other so when it happens the roots of the system are endangered. Although during the Depression and the New Deal periods the economic and political fabric of the country underwent substantial alterations, the judiciary was not attacked by a roll call on institution-weakening legislation in Congress even though the court-packing controversy produced volumes of rhetorical exchanges in Congress regarding the role of the Supreme Court.

It is highly likely that the results of similar investigations in other nations will reveal a wide range of circumstances. Nevertheless, all are interpretable within the context of the systems maintenance and mechanical solidarity models posited by Durkheim. Systems in which the legislature never votes on the equivalent of institution-weakening legislation have adequately stabilized the position of the judiciary within the political environment. It may or may not be the same relatively high status experienced in the United States. The point is that the judiciary has found its niche and performs whatever functions it has without serious external challenge.

More interesting are those systems, such as the United States, in which the struggle continues. In these cases, the research reported here is of some interest because the more often lawyer-legislators are found to be nonsupportive of the judiciary, comparatively speaking, then the less useful become the branches of public professions as a source of reciprocal support for coordinate branches of government. It is abundantly clear that the system in the United States was a valid test of the Durkheim hypothesis: the legal profession itself explicitly

adapted the role Durkheim had prescribed for it. What of other nations, perhaps those in which the legal profession like many other features of the political system, is not developed or is nonexistent? This configuration should have no consequence for testing the hypotheses in that Durkheim did not specify limited applicability for his theorems. Lawyers everywhere constitute a public profession not by constitutional or statutory fiat but by the very nature of their activities. It is to be expected that even in the absence of strictures similar to those found in *American Jurisprudence* or the *Canons of Legal Ethics,* lawyers will support the judiciary.

In a sense this reasoning ignores some basic findings of legislative research in countries other than the United States. What of the role of political parties? Do they not dominate legislative behavior in parliamentary systems "unlike" the United States? There are some researchable questions here in spite of a seemingly formidable array of facts. To what extent, however, are institution-weakening proposals perceived by party leaders as requiring party discipline? To the extent that they are so visualized, the assumption underlying this research is valid. Roll calls on institution-weakening legislation represent periods of crisis for a political system during which fundamental or etiological questions are to be answered. If, however, whips are not brought out and party discipline not enforced, then parliament members are free to vote other convictions and the ideas of Durkheim are as likely a basis for expectations as any others.

An allied question is the relationship between parties and the legal profession. In the United States Congress between 1937 and 1968, for example, the Democratic Party had proportionately more lawyers among its members than did the Republican Party. Even though at times the majority of Democrats were lawyers, the party never was dominated or controlled by an occupational bloc. Not yet has a party under the clear control of the legal profession been shown to exist in any country although not everywhere has the point been researched. It is possible, though admittedly highly unlikely, that party divisions conceal a lawyer-nonlawyer split on institution-weakening legislation and issues; hence the enforcement of party discipline would have an additional meaning.

If all present indications prove to be valid and the dominance of political parties is demonstrated on legislative votes involving judicial institutions, then a relatively broad generalization is in order. The concept of law as a public profession operationalized in a rather obvious behavioral context is dysfunctional. If political scientists are to continue seeking the roots of system stability and the factors that control relationships within a government, the legal profession is not a fruitful source for answers. The data from the United States suggests that this is indeed the case. Although the paucity of data made findings of statistical significance difficult, the general direction suggested by the analysis points to party and, perhaps, ideology and not occupation as a correlate of attitudes toward the judiciary. If it can be shown that this experience is generalizable to the effect that judiciaries without regard to national boundaries are proven to be dependent upon political supports such as parties, ideological, regional, ethnic, or other groupings for their continued institutional viability, then perhaps something of interest has been demonstrated.