THE ANGRY POLITICS OF THE ERA OF THE FOUNDING OF THE SOCIAL LAW LIBRARY

By: Frederic D. Grant, Jr.*

The subscription papers for the Social Law Library were signed by its founders in September 1803. Three months later, a writer in one of the main Boston newspapers described the state of the law in this region.

> A STRANGER to visit Boston would suppose that every Judiciary process in the metropolis was steadily prosecuted agreeably to the constitution, promptly and without delay; when he heard the daily ding -- ding -- ding of the Court bell, and saw the innumerable company of Lawyers, who reside within the purlieus of the seat of Justice, he would naturally conclude, that justice ran down our streets like a river, and righteousness like a mighty stream. Such a phalanx of Justices, surrounded on all sides with men learned in the law, and every door and window in the neighborhood displaying in capitals the names of those who are ready to relieve the distressed, and afford consolation to the injured; he would be ready to exclaim in raptures, happy is that people whose laws are their protection. These might be the reflections of a stranger, but, fellow-citizens, are they true?[i]

The writer, of course, suggested that they were not. In the angry politics of the early years of the nineteenth century, the law was actively fought over between the Federalists (then out of national office) and the Jeffersonian Republicans (Anti-Federalists).[ii] Most Massachusetts lawyers were Federalists,[iii] champions of the Common Law of Great Britain, and sought to defend this ancient bastion against such encroachments as arbitration, merchant courts, and the radical French innovation of codified law. The Jeffersonian Republicans sought new legal

models to serve the young commercial nation, hated the idea that the old systems of our hated colonial parent would be meekly followed in the new republic, and demanded a more economical, simple, and rapid process than prevailed under the old forms of action, which were attacked as ruinous to the merchant and the farmer alike.

The organization of a small local law library in these charged times marked important progress on behalf of both sides. The conservative leaders of the bar who helped found the library, notably Theophilus Parsons, named Chief Justice of the Supreme Judicial Court just three years later, in 1806,[iv] demanded greater professionalism, facilitated by making law books more freely available to the bar. As Chief Justice, Parsons demanded more diligent and rapid prosecution of cases, and helped break a severe case backlog that was the subject of bitter comment in 1803 and 1804. An exchange between Chief Justice Parsons and Samuel Dexter became famous.

> Dexter, being stopped in an argument by the Judge's remark that he was trying to persuade the jury of that for which there was no evidence, replied: "Your Honor did not argue your own cases in the way you require us to." "Certainly not," was the reply, "but that was the judge's fault, not mine."[v]

As an American body of law developed, with case reports and treatises appearing in accelerating numbers in the early years of the nineteenth century, the infant Social Law Library kept this body of developing, distinctly American law freely available to the conservative Boston bar.

The capital of the Commonwealth of Massachusetts, which encompassed the State of Maine until 1820, was a small town. As late as 1800, the Boston bar consisted of just thirty-three lawyers.[vi] It was a business town, a town that liked its politics hot, and a town that sought information in several different newspapers with sharply differing political views. The newspapers reported the proceedings of Congress, the actions of President Jefferson, the proceedings of the State Legislature, as well as a considerable body of law news, such as trial reports, from around the United States and Europe, reports of new English decisions, and -- in these hard times -- many notices of meetings of creditors of individuals against whom commissions of bankruptcy had issued under the first Bankruptcy Act.[vii]

The law of 1803-1804 was very different from the law we experience today. The rules were different, the editorial tone of the judiciary was different (tempered early in the nineteenth century),[viii] and there was an explicit moralistic edge that has since disappeared.[ix] A report of a recent Pennsylvania trial, which appeared in the leading Federalist newspaper in Massachusetts in the month of the founding of the library, is instructive.

> WILKESBARRE, AUGUST 20. On the 15th inst. John Dolton, was tried for the murder of Amos Holburd; and after a long and impartial hearing, the jury retired, for six hours, and returned declaring they could not agree. They were sent back, and two constables directed to keep them together, and prevent any nourishment being handed them. In this condition they were kept until Friday, when they returned a verdict "guilty of murder in the second degree."

> The prisoner being placed at the bar, the chief Justice passed sentence, as follows: --
>
> "John Dolton -- you have very narrowly escaped the gallows, by a most merciful verdict of Murder in the second degree. Such, in my judgment, is the aggravated nature of your crime, that from every tribunal, divine and human, a total extermination from society, is the punishment you justly deserve. "Whoso shedeth man's blood, by man shall his blood be shed" -- is not less the dictate of the divine law, than the voice of nature. Never perhaps, did a criminal stand at the bar of an earthly court, of more profligate morals, and blacker malignity of heart. You have murdered Amos Holburd, with circumstances of cruelty, cowardice, and baseness. It is astonishing your slumbers are not haunted by his mangled ghost. His blood calls aloud to Heaven for vengeance, on your guilty head -- and will infallibly pursue you into the other world, unless a timely repentance here shall prevent it.[x]

The Struggle Over the American Courts

The anger between the Federalists and the Jeffersonian Republicans, as it came to bear on the courts, had many causes. The Jeffersonians were enraged at the attempt made in the waning hours of the administration of John Adams to reform the federal judiciary and add sixteen new judges.[xi] With the offending statute promptly repealed, and the "midnight judges" removed from office,[xii] the Jeffersonians sought to control the sitting judiciary, several of whom were undisguised partisans of the other party, through the expedient of impeachment.[xiii] Federalist arguments for the separation of powers, and assertion of the then-unsettled right of the courts to review statutes and declare them unconstitutional,[xiv] were rejected by the Jeffersonians as thinly disguised partisan politics. Judges, the courts and the legal profession came under sharp

Jeffersonian Republican attack in several states, notably Massachusetts and Pennsylvania.[xv]

The Federalists reacted with alarm to the actions of the Jeffersonian Republicans and to the sometimes strident reform proposals made in the Republican newspapers. The Federalists feared that this nation might take the same bloody course as Jacobin France. In Massachusetts, these fears were fanned by the still-recent memory of the bloody suppression in 1787 of Shays' Rebellion,[xvi] a popular uprising against the law and the courts. The rebellion had been spurred by a series of articles which appeared in the Boston Independent Chronicle in 1786. Signed by "Honestus," the articles demanded the total abolition of the practice of law.

Fifteen years later, Federalist concerns were squarely focused on the "mob" and perceived extremes of the popular press. In particular, the Federalists hated Benjamin Austin, Jr., the popular Anti-Federalist leader (former member of the State Senate) who wrote the "Honestus" articles.[xvii] Austin was still actively contributing to the Independent Chronicle (the leading Republican newspaper in Boston), in which he bitterly denounced the Federalists and the existing legal system under the pseudonyms of "The Examiner" and "Old South." In 1803 he published many of these partisan essays under his own name as Constitutional Republicanism.[xviii] Just three years later, Austin accused attorney Thomas O. Selfridge of having solicited an unpaid tavernkeeper's suit against the local Democratic Committee. Shortly thereafter, Selfridge shot and killed

Austin's son Charles at the corner of State Street and Congress Street.[xix]

Some of the fury expressed toward the Common Law in the Republican newspapers may be explained by the continued enforcement of the English law of criminal libel. Truth was no defense, and the jury's authority was severely limited. Abijah Adams, the publisher of the Independent Chronicle, was tried in 1801 for criminal libel and sentenced to thirty days in prison. In an editorial marking Adams' release, the newspaper commented on Chief Justice Dana's proud reference to the Common Law, "our cherished birthright," in this decision. "Yesterday Mr. Abijah Adams was discharged from his imprisonment, after partaking of our adequate proportion of his birthright by a confinement for thirty days under the operation of the Common law of England." John S. Lillie, editor of the Boston Constitutional Telegraph, was indicted for libel in 1801 for referring to Dana as "the Lord Chief Justice of England," "a tyrant judge," who administered "that execrable engine of tyrants the Common Law of England in criminal prosecutions."[xx]

Republican Demands for Law Reform

The Jeffersonian Republicans articulated many concerns of the public with the law, lawyers, and the courts.[xxi] The courts were too slow. The process and procedures of the courts and the lawyers were too expensive. The laws were complicated and hard to understand. Simplified code law after the French model was suggested. Attorneys and judges were unfamiliar with the

business world. Specialized mercantile courts were needed. Better still was the process of arbitration, an informal, rapid procedure that cut the lawyers out.

Systematic delay was the subject of much angry complaint in the Boston newspapers of 1803-1804.[xxii]

> Continuances, appeals, demurrers, and defaults and appeals therefrom, are chiefly all the work of the Attornies; from motives of interest. By these means, the honest creditor, is either delayed, forced to a sacrifice, or utterly deterred from seeking that justice of which our laws have become only the pretense."[xxiii]

"Publius" responded, "If the delay of justice be such as is represented, it is time to lease out our courts, uncommission the Judges and declare the law a mockery; for unnecessary delay is at best but partial justice, and with regard to the poor it operates a denial of justice. Hence I know it to be the case that the poor man when injured, not unfrequently flies from a court as he would from a prison."[xxiv]

There was too much law, it was too complicated, and unless constrained the laws would never cease multiplying. "Decius" asked: "Shall we be directed by reason, equity, and a few simple and plain laws, promptly executed, or shall we be ruled by volumes of statutes and cases decided by the ignorance and intolerance of former times?"[xxv] He observed, "As new cases occur, the law is perpetually found deficient. . . . It is therefore perpetually necessary to make new laws; and the volume in which justice records her prescriptions is for ever increasing; and the world would not contain the books that might be written." Decius demanded simplified law:

> Voluminous Laws, and Constitutions made permanent and unalterable, tend no less than creeds, catechisms and tests, to fix the human mind in a stagnant condition.
>
> Multiplicity of Laws not only fetter reason, but injure morality. He who is perpetually conversant in quibbles, false colors, and sophistry, cannot equally cultivate the generous emotions of the soul; and the nice discernment of rectitude.
>
> That Laws should be few in number, written in plain common language, liable to frequent revision and promptly, and strictly executed is the common wish."[xxvi]

To make matters worse, the lawyers who executed this complex system did not understand the business world and had absolutely no motivation to improve the legal system. Benjamin Austin, Jr. complained that the leaders of the Massachusetts Legislature

> are principally lawyers, or persons whose employments or expectations are not within the circle of mercantile concerns. . . . Of what consequence is it to a lawyer, whether our commerce is extended, or whether the American shipping is encouraged in preference to foreign? This profession is in no way interested in the public prosperity arising from this source; a free trade, a profitable voyage, ample freights, and brisk markets, are considerations which neither advance their interest or give permanency to their vocation. Adversity is more congenial to their employment than prosperity.[xxvii]

Specialized merchant courts were therefore needed. "The character of merchants, should rise superior to the <u>drilled pleadings</u> of a lawyer, and it is time that a body of merchants should be competent to settle their own controversies."[xxviii]

Given the serious problem of delay in the courts, the speedy process of arbitration, before a panel of merchants, stood as a still better solution.

> Circumstanced as we now are, the question is, whether some competent tribunal cannot be established to settle the controversies now depending before the Supreme Court? Will any man say that a body of merchants cannot decide between the parties? One evening of reference would terminate more actions, than a whole term of the Judiciary; three merchants would decide with more precision than six lawyers. . . .[xxix]

"Most honest men prefer to settle their controversies by Reference, rather than by the sophistry and tedious movements of our Courts of Law."[xxx] While Massachusetts had provided for arbitration by statute in 1786, under Anti-Federalist pressure, the hostility of the Common Law courts greatly limited its use.[xxxi]

Attorneys' Fees and Judicial Compensation

Public concern with the law and the courts reflected the growing wealth of the state, the increasing importance of commercial law, and the growing wealth of lawyers. A foreign visitor in the 1790's remarked: "The profession of the law is unhappily one of the most lucrative employments in the state. The expensive forms of the English practice, which good sense and the love of order ought to suppress, are still preserved here and render advocates necessary. These have likewise borrowed from their fathers, the English, the habit of demanding exorbitant fees."[xxxii] Then, as now, the high cost of legal services fueled criticism of the bar.

There was harsh debate over pleas for adequate compensation for state court judges. Federalist bar leaders sought to

improve compensation for judges in order to improve the quality of the judiciary.[xxxiii] Much was required of a judge.

> He must have such knowledge of the law, as cannot be obtained without the most laborious application for many years. This knowledge must amount to a most familiar acquaintance with the events of history, which have given birth to legal establishments, and with the complicated, but justly admired jurisprudence of England, and with such changes or constructions of it, as have been produced by our own Legislative labors. -- The laws of nations, and the treaties and conventions made under them, must have a home in his memory. -- He must be able, and has frequent occasion, to apply the sound doctrines of religion, and morality, as the preservative spirit of the community. -- To these difficult attainments, he must add a perfect knowledge of human nature, and of the multiform, questionable, and deluding shapes it assumes, under the influence of prejudice and passion.[xxxiv]

He added that the salaries of the federal court judges, "are hardly sufficient for their support, yet they are nearly thrice as great as the salaries" the Massachusetts Legislature gives, "when in fact, the duties our Judges perform are thrice as many, and quite as difficult as the duties performed by them." The Republicans responded that judicial salaries must be adequate, as there were plenty of applicants seeking positions as state court judges.[xxxv]

There was bitter debate over an unsuccessful effort to obtain pensions for state judges. Their champions saw a pension as small recompense for a hard life. "A great proportion of his days are necessarily passed on the road, in boarding-houses, and in comfortless taverns, in a state of separation from his family. The residue of his time ought to glide on in scenes of domestic satisfaction; but it must ever be imbittered by the

reflection, that whatever of happiness is enjoyed, may be struck dead, by the termination of his tenure of life; and that his home may become, not only the house of mourning, but the abode of cheerless penury."[xxxvi] The Republicans, however, wanted to minimize governmental expenses and the resulting tax burden on the merchant and the farmer. They understood the claim of an injured war veteran to a government pension, but protested against pensions to judges.

> Pensions and Sinecure places, are a part of the machinery of monarchy. They are closely allied to a standing army, an inextinguishable debt, and a system of oppressive taxation. . . . If a Judge accepts of an honorable office, which endangers neither his life nor his limbs, with an honorable and equivalent salary during his continuance in office, he has no claim upon his Country, because he may chance to grow old, and become incapable any more of earning his compensation. He knows the condition upon which he accepts. . . . No man ever accepted the appointment of a Judge, unless he considered the honor and emoluments of his office, taken together, as a full satisfaction for the private business he might surrender, and the labor and fatigue of his official duty. . . . When he is no longer capable, he can no longer earn his salary, and it is his duty to resign.

The writer added that the failure of the "feeble efforts" which had been made to provide judicial pensions "affords the strongest proof of the broken state of the [Federalist] Phalanx, and the proudest triumph to the Republicans of our Country. Massachusetts is returning rapidly, to her antient glory."[xxxvii]

Republican Greetings to the New Library

The subscription papers for the Social Law Library were signed in Boston on September 6, 1803. After a period during

which further subscribers were sought, and plans for the library worked out, notices appeared in the Federalist Columbian Centinel that the first Annual Meeting would be held at the Concert Hall, on Wednesday, June 13, 1804, at 1:00 p.m.[xxxviii]

The Federalist Columbian Centinel reported on the first meeting of this "new institution" in an article that ran on Saturday, June 16, 1804.[xxxix] Theophilus Parsons had been elected President of the Social Law Library, and Christopher Gore, Rufus G. Amory, and Joseph Hall were elected Trustees. "The Proprietors afterwards partook of an elegant dinner, which was honored by the attendance of a numerous and select company of distinguished Law Characters, Members of the Legislature and Brethren of the Bar from various parts of the Commonwealth. The entertainment was enlivened by a number of excellent songs, and with the show of wit and conviviality." The article mentioned several toasts, offered to the assembled lawyers:

> "The honest lawyer, who is at once faithful to his clients and his conscience."
>
> "The Judiciary of Massachusetts: May their services in the cause of justice receive a just remuneration."
>
> "The 'Social Law Library' -- like Lord Coke's ET CETERAS, may it be full of meaning and learned comment."
>
> "The Common Law: May not the madness of innovation, nor the profligacy of party, ever deprive us of our birthright."
>
> "The Laws of the Land: The Common Law for the people, the Civil law for their friends, and the Canon law for their enemies."

> "Friendship among the gentlemen of the Bar -- May it be a cause frequent in review, and always open to a new trial."[xl]

The Republican press reacted with sardonic delight. "Wonderful to relate! The learned gentlemen of the Bar have taken a small Apartment on the lower floor of the Court House, and deposited a number of books, under the appellation of a "social library"! At the first organization of this society, they had a Dinner at Concert Hall, and as soon as possible, gave a majestic display of their entertainment in the newspapers, together with an explicit declaration, that a variety of social songs were sung, and that they enjoyed themselves over the bottle with an uncommon hilarity!!"[xli]

Benjamin Austin, Jr., writing as "The Examiner," inquired why the lawyers were so eager to inform the citizens of their good cheer. He asked of what consequence it was that Theophilus Parsons presided at the meeting, "and that his stern muscles were relaxed by a number of excellent songs!" He doubted the true purpose of the meeting. "They may christen their institution with a very harmless name, but it appears no more or less, than the old BAR MEETING "praject," taken into new draft."

> Did you only meet together to consecrate your little "social book room," sing a few songs, and tell brother Parsons a number of pleasing anecdotes? Were TRUSTEES chosen to preserve your jovial ditties, witty sayings, and merry puns, in the archives of your library? Or was a CLERK elected, to make true records as to the time, place and manner in which this fund of humor was promulgated? Have you chosen a TREASURER, in whose hands FEES may be deposited, as a premium for the best song, jest, or "et cetera" that may be offered to enliven your annual "flow of wit and conviviality."

> It is true, we have one specimen of wit, exemplified in this toast -- "The Common Law to the people -- the Civil Law to our friends, and the Canon Law to our enemies." -- This I acknowledge has a little spice of humor, at the first appearance; but it partakes of a hostile threat, which may not in the end prove very salutary to society. Do you mean gentlemen, to try the people by the "Common Law," and not by the Statute Laws -- To judge your friends by the Civil Law, and destroy your enemies with the CANNON LAW? That is, blow their brains out -- alas, HONESTUS, what will be your fate!!! If this is Law wit, the Lord deliver the people from participating in the entertainment.[xlii]

Austin expressed concern about the need for the institution. The lawyers had enough books already. "Are the vast number of Lawyers in Court Street, so destitute of information, that they must become incorporated to collected a further STOCK in their profession? Have they not got folios upon folios of authorities & reports in their possession? Have they not already numberless volumes sufficient to embarrass every question in law, without forming a COMBINATION, to collect more abstruse publications, to puzzle themselves and perplex society?" He expressed particular concern that the collection of books in the Social Law Library would result in our simply repeating and following the old British Common Law.

> The Social Library I understand, is to contain all the old authorities practiced in England for centuries back; whereby a new system of jurisprudence, new questions in law, founded on the high monarchical system of those days, may hereafter become the Common Law of this Commonwealth; and from such authorities, "The People" may be tried." Whether we have not enough law quibbles already, without ransacking the tombs of the Henries, is a question which every well disposed citizen will answer in the affirmative.[xliii]

The Social Law Library

Almost two hundred years later, it is in Benjamin Austin's words, more so than in the toasts of the founders, that "a little spice of humor" is found. Legal information continues to expand rapidly, in Massachusetts and around the world, but we have little occasion today to ransack "the tombs of the Henries."

From the original "small apartment" on the lower floor of the Court House that the library occupied in 1804 and furnished at its expense, the Social Law Library moved in 1812 to quarters in the new Court House, designed by Charles Bulfinch, located on School Street.[xliv] The paucity of American decisions and treatises led the Anti-Federalists to fear slavish and literal reliance on existing Common Law precedents (worse yet, the adoption of post-Revolutionary British statutes), but these conditions changed rapidly. Other states went so far as to enact statutes "forbidding the Bar to cite or read in court any decision, opinion, treatise, compilation or exposition of Common Law made or written in Great Britain since July 1, 1776."[xlv]

The office of Reporter of Decisions was established in Massachusetts in 1803, intended at first as an experiment. The first volume of the Massachusetts Reports was published in 1805. The first American collection of forms, American Precedents of Declarations, was published in Boston in 1802. As the open and available collection of the Social Law Library grew, including growing numbers of American case law reports and treatises, many written by Massachusetts lawyers and judges, the availability of

American sources hastened the decline of reliance on English materials through the nineteenth century.[xlvi]

In time, many elements of the Jeffersonian Republican reform were achieved. The complaint that "British courts are throttled by procedures so Byzantine in their complexity that none but the rich . . . need consider bringing a case," is now heard more in Great Britain instead of the United States.[xlvii] In America, only ghosts of English procedure linger.[xlviii]

Our legal system, of course, still faces great challenges. As we near the end of the twentieth century, the size and complexity of legal research materials, in many languages and a growing body of print and electronic media, pose a challenge to anyone seeking to know the law. While that law is increasingly available, in many respects it has become more difficult to find. Controlling the cost of legal research, so that legal services can be afforded by the public and the business community alike, remains a serious challenge. The left and the right still battle over substantive rules of law, sometimes even with the fury of the battles of the early years of the Social Law Library.

From its origins in a "small apartment" in the court house, where lawyers of the first generations labored to define legal rules appropriate for American conditions, the Social Law Library continues its efforts to make legal research materials available to meet the changing needs of our society. Changing with our times, the library will continue to help Massachusetts lawyers, judges, and legislators develop legal rules appropriate

for the twenty-first century and beyond.

Endnotes

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[i] "Remarks on the Judiciary." Independent Chronicle, December 19, 1803, at 1-2.

[ii] The Jeffersonian Republicans were the political successors of the Anti-Federalists. See Gordon S. Wood, THE RADICALISM OF THE AMERICAN REVOLUTION 280-281, 296-299 (1992); Herbert J. Storing, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

[iii] Charles Warren, A HISTORY OF THE AMERICAN BAR 305 (1913) ("Warren").

[iv] Id. at 312 (1913).

[v] Id. at 313-314 (1913).

[vi] Id. at 308 (1913).

[vii] "A Sufferer" complained: "It has been observed, that those men who have been thro' the Bankrupt Mill, have, with very few exceptions, lived at greater expence than before they were ground. We find their stores filled with goods, they occupy large houses, and they often take the most conspicuous places on the Exchange." Independent Chronicle, January 26, 1804, at 2.

[viii] See Lawrence Friedman, A HISTORY OF AMERICAN LAW ("Friedman") 113 (1973) ("Some Federalists made what were in

effect election speeches from the bench. They harangued grand juries in a most partisan way.").

[ix] See "To James Sullivan, Esq.," signed "Fellow Citizens." Columbian Centinel and Massachusetts Federalist ("Columbian Centinel"), December 5, 1804, at 1 ("The Christian religion is a part of our constitution, and the supreme law of the land, annulling every statute and contract, which violates its rules. You, Sir, are officially charged to enquire and complain of crimes, committed against religion. We have heard you with animation and sensibility arraign the blasphemer at the bar of his country. We have heard you justly describe the evils, which must result from contempt and abuse of the scriptures. We have listened to your admonition on the necessity of a religious observance of the sabbath."). James Sullivan, an Anti-Federalist, served as Attorney General of the Commonwealth from 1790 to 1807. Warren, supra, note 2, at 309.

[x] Columbian Centinel, September 10, 1803, at 2 (the defendant was sentenced to 18 years imprisonment at hard labor, with the first three years in a solitary cell on a coarse diet) (emphasis in original).

[xi] K. Turner, The Midnight Judges, 109 U. PA. L. REV. 494 (1961); H. Zobel, Those Honorable Courts -- Early Days on the **First** First Circuit, 73 F.R.D. 511, 517-518 (1976). As "Old South," Benjamin Austin, Jr. denounced the proposed additions to the federal judiciary in 1801. Benjamin Austin, Jr., CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALLACIOUS FEDERALISM 210-211 (1803); Warren, supra note 2, at 253.

[xii] Warren, supra note 2, at 252-253 ("The new Act of 1802, divided the country into six Circuits, restored the number of Supreme Court Associate Justices to five, and assigned each Judge of the Court permanently to one Circuit."); "Circuit Judges," Independent Chronicle, March 3, 1803, at 1 ("Whatever may be the necessity of having a Circuit Court hereafter, it will, at any rate, be a subject of congratulation, that the former Judges have been removed. If the office was not superfluous, it will yet be admitted, that the officers were incompetent, and unqualified for their duty.").

[xiii] See Friedman, supra note 7, at 113-115 (1973). Most notable was the unsuccessful attempt to impeach Samuel Chase, a Justice of the United States Supreme Court.

[xiv] See "The Constitution -- No. IV," Columbian Centinel, February 22, 1804, at 2 ("If the General Court may supersede or evade the Constitution, whenever they may judge it expedient so to do, expediency becomes the Supreme Law, which must perpetually change with circumstances, and consequently can be nothing but the floating bubble of opinion. The Constitution is hereby annihilated; for it must be absolutely Supreme, or nothing. Sovereignty, can have no existence if dependable or controllable. Such is the sovereignty of the people.") (emphasis in original).

[xv] Warren, supra note 2, at 221. See E. Henderson, The Attack on the Judiciary in Pennsylvania, 1800-1810, 61 PENN. MAG. OF HIST.

AND BIOG. 113 (1937); Boston Gazette, May 24, 1804, at 1 ("MISCELLANY -- From the Charleston Courier") ("THE rage for hunting down Federal Judges which prevails at present in America, will, if long continued or successful, make this country as odious and contemptible in the eyes of the rest of the world as the witchcraft delusion in times of yore made the states of New-England ridiculous.") (emphasis in original).

[xvi] See generally David P. Szatmary, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980).

[xvii] The Honestus articles were collected in a pamphlet, "Observations on the Pernicious Practice of the Law," which was published in 1786, and republished, slightly muted in tone, in 1814 and 1819. Grant, Benjamin Austin, Jr.'s Struggle With the Lawyers, 25 BOSTON B.J. 19, 25-26 (September 1981, No. 8) ("Grant'); Grant, Observations on the Pernicious Practice of the Law, 68 A.B.A.J. 580 (1982).

[xviii] Benjamin Austin, Jr., CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALLACIOUS FEDERALISM (1803).

[xix] Grant, supra note 16, at 25-26; Lloyd & Caines, TRIAL OF THOMAS O. SELFRIDGE (1807); Thomas O. Selfridge, A CORRECT STATEMENT OF THE WHOLE PRELIMINARY CONTROVERSY BETWEEN THO. O. SELFRIDGE AND BENJ. AUSTIN (1807).

[xx] Warren, supra note 2, at 236-239 ("Three years later [1808], the Massachusetts Supreme Court, by Chief Justice Parsons, took the first step towards breaking down the old law . . . . Even this was only a partial step; the American law had not yet been brought into conformity with public opinion; and it was not

until the decade from 1820 to 1830 that the States, by legislation largely, finally freed themselves from the bonds of the English law of libel.").

[xxi] "So great is the general dissatisfaction with the administration of justice in the State, that to suppose a reform to be at a distance, is to suppose you inattentive to the best interests of your Constituents." Decius, "To the Legislature of Massachusetts," Independent Chronicle, January 30, 1804, at 1 ("Decius").

[xxii] See id. at 1 ("The present complaint is that the Supreme Court do not clear their docket; nor prosecute the business so as to afford prompt, and constitutional justice, to all parts of the Commonwealth."); Decius, "Remarks on the Judiciary." Independent Chronicle, December 19, 1803, at 1-2.

[xxiii] Decius, supra note 20, at 1.

[xxiv] Letter, signed Publius. Independent Chronicle, December 26, 1803, at 1 (There is a most shameful practice in the Law itself of unnecessarily continuing actions without any the least cause. I believe this is a matter of course: but I call it legal robbery.") (emphasis in original).

[xxv] Decius, supra note 20, at 1 ("The opinion of the public at large on this topic is easily discoverable.").

[xxvi] Id.

[xxvii] "The Examiner -- No. XXVII." Independent Chronicle, June 11, 1804, at 1-2.

[xxviii] "Remarks on the Judiciary," Independent Chronicle, December 19, 1803, at 1-2.

[xxix] "Remarks on the Judiciary." Independent Chronicle, January 2, 1804, at 2.

[xxx] Decius, supra note 20, at 1.

[xxxi] "From the outset, the Supreme Judicial Court multiplied the technical grounds for reversing arbitration awards on the theory that "this, being a special jurisdiction, in derogation of the common law, [it] must be strictly pursued." Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 151 (1977), quoting Mansfield v. Doughty, 3 Mass. 397, 397-398 (1807).

[xxxii] Gerald Gawalt, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840 94 (1979).

[xxxiii] See Curtius, "To the Legislature of Massachusetts." Boston Gazette, January 3, 1803, at 2 ("Curtius") ("It has been uniformly seen, ever since the erection of the present government, that men of the first eminence have been precluded from office, when they had no dependence but the mean emolument issued by the treasury.").

[xxxiv] Id.

[xxxv] "The Judiciary," signed "A Friend to the People," Independent Chronicle, June 20, 1803, at 2-3.

[xxxvi] Curtius, supra note 32, at 2.

[xxxvii] "Sinecure Judges," Independent Chronicle, March 10, 1803, at 1.

[xxxviii] Notice: "Law Library" Columbian Centinel, June 9, 1804, at 1, and June 13, 1804, at 1.

[xxxix] "Social Law Library," Columbian Centinel, June 16, 1804, at 2.

[xl] Id. (emphasis in original).

[xli] "The Examiner -- No. XXVIII," "The LAWYERS FESTIVAL or the SOCIAL progress of SCIENCE and MORALITY," Independent Chronicle, June 21, 1804, at 1.

[xlii] Id.

[xliii] Id.

[xliv] C. Hammond, Bulfinch and the Suffolk County Court House of 1810, 22 BOSTON B.J. 5, 7 (April 1978, No. 4).

[xlv] Warren, supra note 2, at 232; Friedman, supra note 7, at 97-98.

[xlvi] Friedman, supra note 7, at 98; Warren, supra note 2, at 338.

[xlvii] Editorial, "Britain's Antiquated Courts," The Economist, September 16, 1995, at 20.

[xlviii] See Friedman, supra note 7, at 128 ("English procedure had become like a drafty old house. Those born to it and raised in it loved it; but no outsider could tolerate its secret panels, broken windows, and on-again, off-again plumbing."); Frederick W. Maitland, THE FORMS OF ACTION AT COMMON LAW 2 (1941) ("The forms of action we have buried, but they still rule us from their graves.").