"A Government of Laws and Not of Men": John Adams, Attorney, and the Massachusetts Constitution of 1780

Author: Amanda A. Mathews

"A Government of Laws and Not of Men"

John Adams, Attorney, and the Massachusetts Constitution of 1780

Amanda A. Mathews

Boston College April 2008
Department of History
College of Arts & Sciences Honors Program
Advanced Independent Research Project

Thesis Advisor: Professor Alan Rogers, History Department

Undergraduate Honors Program

History Department

"A Government of Laws, and Not of Men":
John Adams, Attorney, and the Massachusetts Constitution of 1780

by

Amanda A. Mathews

submitted in partial fulfillment of the requirements
for the degree of

B.A.

"If we cannot speak the law as it is where is our liberty?"

John Adams 1770

Acknowledgements

When I have gotten the question over the past year, “What is your thesis about?” many followed my answer with, “Wow, that sounds really boring.” Of course, I explained to them that I did not feel the same way but they were still unsure as to why it mattered and why I wanted to study it.

At some point, most political controversies in this country become constitutional controversies; we rely on our constitutions, both state and federal, to be the final arbiter of political truth. Constitutions, however, are not created in a vacuum, separated from time and space. Rather, human beings write them in specific places and times and if we are to have an understanding of what those documents mean, we must first understand the times in which they were created and the flesh and blood humans that wrote them. This thesis represents my small contribution to that field of study, but this project could never have been completed without the help and support of a number of people.

First, I would like to thank my advisor, Professor Alan Rogers, for everything he has done for me throughout this thesis-writing process. Professor Rogers is responsible for instilling in me an interest in and a true love for legal history when he took me on as an Undergraduate Research Assistant two years ago. It was at his suggestion that I began exploring legal issues during the Revolution. He also suggested that I attend a meeting of the Massachusetts Historical Society’s Boston Area Early American History Seminar last fall, an experience that has helped acquaint me with the historian’s world. He has put up with completely unedited drafts and has provided me with a number of useful ideas and comments to help keep me on track; I cannot thank him enough.

I also thank Professor Brendan McConville at Boston University, my second reader. Although he did not enter the process until the end, his input has been invaluable. I am looking forward to working with him when I attend Boston University in the fall as I enter their Ph.D. program in History.

For Professors Daniel Coquillette and Mary Binder at the Boston College Law School for taking the time to meet with an undergraduate, share their expertise, and give a number of helpful leads to follow and suggestions for structuring my thesis.

I would also like to say a special thank you to Professor Lynn Lyerly, not only for proof reading the majority of this thesis although she did not have to, but also for her occasional prodding and continual encouragement of me in my pursuit to become a historian. The many hour-long sessions in her office and long late night e-mails will remain some of my most cherished memories of my time at Boston College.

I would also like to thank my roommates and close friends who saw me when I was not putting on the face of someone who had it together, as I did in front of my professors. Not only did they watch an ever-growing stack of books take over our kitchen table over the past semester, they also patiently listened to many long diatribes on different aspects of my thesis. Whether I was stressing over my latest writer's block or thrilled that my argument actually made sense, there was always someone with whom I could talk and work out my frustrations. Thank you for at least pretending to care.

These acknowledgments would not be complete if I did not also recognize all the history teachers I have had since middle school who have helped lead me to this moment. For Mr. Michael Jalbert, Mr. Paul Downey, Mr. Timothy Harrington, and Mr. Edward Kawczynski, through your passion for your subject and for your students, you showed me just how fascinating

and rich the study of history truly is. Your classes and the way you engaged your students have made me love the study of history.

Finally, I would like to thank my family for always supporting my dreams. For my father, who has engaged me in countless debates on the founding and never ceased to share his support and his laughter with me and for my mother, who is truly the rock of our family. You always made me sure that I knew I was loved and that I had the ability to achieve any dream and reach any goal. Your love and encouragement mean the world to me and this work is for you.

Amanda A. Mathews
Boston College
April 2008

Table of Contents

Author’s Note

Even by the late eighteenth century rules of spelling, capitalization, and punctuation were not standardized. The same author may not be consistent from work to work, or even within the same work on the use of punctuation and proper spelling. John Adams in particular had a few recurring quirks, defense was spelled “defence” and he frequently capitalized random words. All quotations have maintained the author’s original spelling, capitalization, and punctuation, except where otherwise noted.

Illustrations are found on the final page of each chapter. While the particular citation given is to the electronic source from which I downloaded the image, these images have been reproduced in most written works on Adams. The signature used for section breaks is taken from The Handwriting Analysis Group, http://www.handwriting.org/images/samples/pressigs.htm.

"A Government of Laws and Not of Men":
John Adams, Attorney, and the Massachusetts Constitution of 1780

Introduction

"Now to what higher object, to what greater Character, can any Mortal aspire, than to be possessed of all this [legal] Knowledge, well digested, and ready at Command, to assist the feeble and Friendless, to discountenance the haughty and lawless, to procure Redress of Wrongs, the Advancement of Right, to assert and maintain Liberty and Virtue, to discourage and abolish Tyranny and Vice." [1]

Written constitutions have become such an integral part of nation building in the modern world that it can be easy to forget that this concept is relatively new. It was not until the American Revolution that a process of constitution writing developed, and at that time, it was entirely experimental. While the colonists often spoke of the English Constitution, it was not a written document. It consisted rather of an assortment of documents, primarily the Magna Carta of 1215 and the English Bill of Rights of 1689 along with legal decisions, and traditions. The English Constitution was supposed to be the protector and repository of the "rights of Englishmen," however, as the American colonists found out during the imperial crisis of the 1760s and 1770s, the English Constitution's unwritten, and therefore variable, character was not always a sure guarantor of freedom.

The American colonists knew that nothing would be more important in a republican society than to ensure that government would never again tyrannize them. The first and most important step to prevent that was to settle government in fixed forms using popularly ratified written constitutions. A constitution, after all, is meant to be a statement of fundamental law, the

[1] Adams, October 1759, *Diary and Autobiography of John Adams*, ed. L.H. Butterfield (Cambridge, MA: The Belknap Press of Harvard University Press, 1962), 1:124 (hereafter *Diary*).

place where one can look to see the basic principles by which the society is to be governed. After declaring independence, the American people, living at a time "when the greatest lawgivers of antiquity would have wished to live,"[2] had the opportunity to do something that the philosophers of old had only dreamed of – create brand new governments, not by accident or caprice, but through careful and purposeful development.

Historian Gordon Wood's seminal work, *The Creation of the American Republic, 1776-1787*, delves deeply into the thought and work that the newly independent states put into framing new governments. Indeed, Wood contends that the May 15, 1776 resolution authorizing the states to establish new governments and write constitutions ranks above the Declaration of Independence of July 4, 1776 in terms of significance. He explains, "For if, as [several of the founders] agreed, the formation of new governments was the whole object of the Revolution, then the May resolution authorizing the drafting of new constitutions was the most important act of the Continental Congress in its history. There in the May 15 resolution was the real declaration of independence, from which the measures of early July could be but derivations." [3] If the colonists had achieved nothing else, their example of constitution writing was to have a profound effect on the history of the modern world.

The Constitution of the Commonwealth of Massachusetts, ratified in 1780, is the oldest active written constitution in the world. It is also the first produced by a special constitutional convention convened called by the people, specifically and solely for the purpose of drafting a new constitution, rather than in the sitting legislature, and then ratified by the people. Although Pennsylvania and Delaware also produced constitutions in conventions rather than in the

[2] Adams, *Thoughts on Government*, reprinted in *Revolutionary Writings of John Adams*, ed. C. Bradley Thompson (Indianapolis: Liberty Fund, 2000), 293 (hereafter *Revolutionary Writings*).
[3] Gordon S. Wood, *Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998), 132.

legislature, these conventions were called by legislative act, not by popular referendum, and in neither state was the final draft submitted to the populace for ratification.

As the last state constitutions produced during the American Revolutionary War, the Massachusetts Constitution shows sophistication in both content and structure. It was to serve as a model of government for the rest of the states, many of whom rewrote their constitutions in the years following the American Revolution, and for the federal government. It exemplified the best political science of the day, employing the concepts of bicameralism, separation of powers, and mixed government. It championed an independent judiciary and guaranteed personal liberty to such an extent that slavery was ruled unconstitutional within three years of its ratification. While the state has amended the original document many times since its original passage, its essential provisions, which have remained largely unaltered, are undoubtedly the work of a single man – John Adams.

John Adams was born on October 30, 1735 (October 19 in the old style calendar) in Braintree, Massachusetts to John and Susanna Boylston Adams, their first child. The Adams family was of middling, yeoman stock. John Adams the elder was a farmer, a shoemaker, as well as the deacon of the town's Congregational Church and, therefore, a man of some importance in the town of Braintree, but the name of Adams certainly did not carry the weight of the elite like Hutchinson, Sewall, Oliver and Otis.

In accordance with the Puritan values of his father, Adams learned the value of hard work, and weekly church attendance. Vice, namely excessive leisure and pleasure, sexual promiscuity, and litigiousness on the other hand was excoriated. Generally, John Adams experienced a typical New England boyhood – he hunted, fished, played with other boys his age and his two younger brothers, and learned to read at home with the help of his mother. When he

was older, his father, who saw a strong value in education for his first born, sent John to a local school and eventually to Harvard, from which he graduated in 1755.

While Adams initially did not take to schooling as a boy, he did enjoy his time at Harvard and the intellectual stimulation he experienced there, awakened in him a love of books that would continue throughout his lifetime. After an unsatisfying year as a schoolmaster in Worcester, and the realization that he had neither the temperament nor the desire to go into ministry, Adams decided to go into law, a decision that would eventually help him rise in social standing and rank among the elite in the changing world produced by the American Revolution. In 1764, Adams married Abigail Smith, a match that came to be known as one of the greatest early American love stories for the numerous letters written between the two that would survive. He and Abigail had five children, one of whom, John Quincy Adams, would become the sixth president of the United States.[4]

Adams's contributions to the founding of this country are vast in both quantity and importance. Indeed, he was one of the major actors in the formation of the United States. Nevertheless, despite his critical role in securing a resolution of independence, acquiring funds from European nations to keep the Continental Army paid, equipped, and in the field, and writing a number of influential tracts to solidify the revolution's ideological basis, he is perhaps the least studied of the major figures of the Revolutionary era. One could describe the study of Adams much like his presidency – sandwiched between the glowing figures of George Washington and Thomas Jefferson, important but overshadowed, worthy more of a footnote than extensive research. While the work of David McCullough has certainly recently revitalized him in popular culture, scholarly works by accepted academics on his life and thought are lacking.

[4] For background on Adams's early life, see the first chapter of David McCullough, *John Adams* (New York: Simon & Schuster, 2001) and John Ferling, *John Adams: A Life* (Knoxville: The University of Tennessee Press, 1992).

There is no Adams equivalent, for example, of Douglas Southall Freeman's authoritative seven-volume biography of Washington, or Dumas Malone's six-volume treatise *Jefferson and His Time*, despite the voluminous written record Adams left behind. Perhaps the fact that Adams left so much has worked against him, perhaps he revealed too much of himself. He was often a vain, arrogant, and at times, a self-pitying man, and he knew it. He did not care much what the public thought of him, wanting the respect only those he considered the virtuous and the elite. Indeed, he never geared his many newspaper articles and pamphlets toward the "every-man" as was Thomas Paine's *Common Sense*; rather he wanted the learned, particularly those learned in the law, to see the force and intelligence of his arguments.

Nevertheless, one cannot possibly tell the history of the American Revolution without John Adams. Serving in both the First and Second Continental Congresses, he supported the move for Independence earlier than most, and was part of the drafting committee from which the Declaration of Independence came. He worked to have George Washington approved as Commander-in-Chief for the Continental Army, assuring that the war would not simply be a New England effort. He served as ambassador to France where he helped secure finances and foreign recognition of American independence, making several trips to neighboring European countries to garner further support. During the 1780s, he was an ambassador to Great Britain, and signed the 1783 peace treaty that concluded the American War for Independence. After the ratification of the Federal Constitution, Adams became the first Vice President of the United States. In 1796, the nation chose John Adams to succeed George Washington as the second president of the United States. During his one term in office, he appointed John Marshall as Chief Justice of the Supreme Court and successfully navigated a difficult foreign policy situation

with France, ending the Quasi-War, an action that paved the way for Thomas Jefferson's acquisition of the Louisiana Territory during his presidency.

Of all his many accomplishments in his active and eventful ninety-year life however, his drafting of the Massachusetts State Constitution was one of his most significant and long lasting achievements. Adams's background – two decades of legal experience – made him particularly qualified for the task. His successful legal practice reflected a deep commitment to the rule of law and the principles of good government. Even a cursory glance at his diary and other papers reveal the extent to which the law was part of Adams's life, and his published tracts are so full of legal precedents that one cannot deny the esteem in which Adams held the law. It is curious, therefore, that so few have seen fit to write on the subject. To write about John Adams's political thought without understanding the legal career that drove so much of it leaves one with only a shallow understanding of how that thought developed.

The purpose of this study is to put a magnifying glass on two important aspects of Adams's life and give them the detailed study that they deserve: his legal career and its impact on the Massachusetts Constitution. In addition, I will establish a link between theory and practice, philosophy and government, law and constitutionalism. Adams's legal career was *the* defining factor in his developing political thought.

Historians have routinely neglected Adams's years as a lawyer, feeling much more content to talk about Adams's political contributions. The sources that do deal with Adams's legal career are relatively short works, merely journal articles or smaller overviews within a work. For example, Richard Alan Ryerson's compilation *John Adams and the Founding* is a collection of conference papers on various aspects of Adams's life, some of which touch on his legal career. No full-length studies of Adams's legal career have been published despite the

sources that have been available now for forty years, namely *The Legal Papers of John Adams*, published in 1965.

Ignoring his legal years however, carries with it the price of neglecting a major influence on Adams's thoughts. Adams's political thought as expressed in his pamphlets, letters, and other written material, relied heavily on legal authors, precedents, and ideas. Adams's entire legal career meanwhile, one in which he handled hundreds of cases, has been reduced to just a couple big ones: his record of James Otis's argument against the writs of assistance in 1761, his defense of John Hancock in a smuggling case, and most notably, his defense of the British soldiers following the Boston Massacre in 1770. As important as these cases are they cannot show the entire range of Adams's legal ability or the extent to which his practice affected his life. Additionally, the brilliance of the federal Constitution written just seven years later often obscures the importance of the Massachusetts Constitution. The ideas and principles of government that were made famous by the Constitution of the United States were, however, largely articulated first in the Massachusetts Constitution of 1780, drafted almost entirely by John Adams.

This question is of the utmost historical significance not only because historians have neglected it, but also because many contemporary conflicts come down to questions of constitutionality. As Alexis de Tocqueville pointed out following his tour of the United States, most political questions ultimately become legal questions. With so much riding on the interpretation of these framing documents, it therefore becomes increasingly important to understand the history behind the documents one is trying to interpret. When it comes to the Massachusetts State Constitution, no one is more important to understand than John Adams is, and that requires understanding Adams the lawyer.

This thesis will primarily focus on establishing the connection between Adams's legal career and his drafting of the Massachusetts State Constitution. This link is no doubt an important aspect of understanding that document. Adams had a legally oriented mind and routinely made references to legal philosophy in his published materials. His legal career expressed not only depth but also breadth. In addition to the common and the province law, Adams also read the civil law of ancient Rome and the law theories of Rousseau and Montesquieu. He saw the absolute necessity in an independent judiciary, which, in many ways, was the crowning jewel of the Massachusetts Constitution of 1780. His experience with the judicial arm of government no doubt fueled this insistence on a strong and independent judiciary, especially when one considers how the Revolutionary crisis threatened the colonial courts, forcing them to close, harming not only Adams's business, but also social stability.

In order to establish this link, the thesis will be divided into four sections, each looking at an aspect of Adams's life: student, attorney, political theorist, and lawgiver. Following the introduction, there will be an in-depth look at the late colonial courts of Massachusetts, the state of the bar during Adams's practice, and Adams's legal training, his philosophy and early years of practice. I will begin by exploring what it was like to be a member of the legal profession in the years leading up to the Revolution in Massachusetts. Turning then to Adams, I will attempt to determine what Adams's philosophy of law was by analyzing both the extent and breadth of his training. The next chapter will look at the important cases and issues with which he dealt as an attorney. This will primarily entail a case study looking at two of his less well-known cases, *Gill v. Mein* (1768), in which he defended a patriot newspaper printer, and *King v. Stewart* (1774) in which Adams defended a Tory merchant. These cases will put Adams's defense of the British soldiers in the well-studied Boston Massacre trials of 1770 into their fuller context.

The third chapter investigates the intersection of law and constitutionalism. Adams's views on law and government will be explored through his published works such as *A Dissertation on the Canon and Feudal Law* (1765), "On the Independence of the Judiciary" (1773), *Novanglus; or, A History of the Dispute with America, From Its Origin, in 1754, to the Present Time* (1775), and his extremely influential *Thoughts on Government* (1776). These writings are important because they show just how much the law mattered to Adams in forming political opinions. Rather than making a mass appeal, Adams appeals to legal precedent in these works, a tactic which failed to grant him the popularity of Thomas Paine, but which showed a depth of learning and understanding of the law not easily matched by most of his contemporaries.

The final chapter will discuss the Massachusetts Constitutional Convention of 1779, the events leading up to the first constitutional convention and the document that came out of that convention. Adams's draft, which came to being in a particular social and political context, is still singularly Adams's creation, and through a close reading of that document, the link between its important provisions and Adams's years as an attorney will become apparent. I will conclude with an analysis of Adams's political thought at the end of his life as the Massachusetts Constitution underwent amendment in 1820 and his legacy to this country.

This thesis relies primarily on the multi-volume John Adams Papers, consisting of Adams's diaries, autobiography, letters, legal papers, and published works. Additionally, the later chapters employ documentary histories of the Massachusetts Constitutional Convention of 1779, as well as contemporary newspapers and broadsides. A number of biographies on Adams as well as books on the development of the legal profession in colonial America and the state constitutions of the era, particularly *Law in Colonial Massachusetts* and *The First American*

Constitutions, have provided context and background. Numerous journal articles that deal with specific aspects of these various issues have also supplemented this information.

From early on in his legal career, John Adams realized that there was an important relationship between law and government; he strove throughout his life to gain an appreciation and an understanding of that link to see how it could be applied for the benefit of society. As early as 1759, Adams could see the bigger picture in studying the law, as he wrote in his diary.

> Labour to get distinct Ideas of Law, Right, Wrong, Justice, Equity. Search for them in your mind, in Roman, grecian, french, English Treatises of natural, civil, common, Statute Law. Aim at an exact Knowledge of the Nature, End, and Means of Government. Compare the different forms of it with each other and each of them with their Effects on public and private Happiness. Study Seneca, Cicero, and all other good moral Writers. Study Montesque, Bolinbroke, [Vinnius?], etc. and all other good, civil Writers, etc.[5]

It was through the study of these and many other authors along with his own reflection and the experiences of his legal practice that Adams came to understand how vital the law was for a nation. Indeed, for Adams, law was the basis for good government itself, "to the end that it may be a government of laws and not of men."

[5] Adams Diary, Volume I, January 1759, page 73.

Chapter 1
"Let us look upon a Lawyer": John Adams, Student

"Let us look upon a Lawyer: In the beginning of Life we see him, fumbling and raking amidst the rubbish of Writs, indightments, Pleas, ejectments, enfiefed, illatebration, and a 1000 other lignum Vitae words that have neither harmony nor meaning. When he getts into Business, he often foments more quarrells than he composes, and inriches himself at the expence of impoverishing others more honest and deserving than himself…The study of Law is indeed an Avenue to the more important offices of the state, and the happiness of human Society is an object worth the pursuit of any man. But the Acquisition of these important offices depends upon [so] many Circumstances of Birth and fortune, not to mention Capacity, which I have not, that I can have no hopes of Being Usefull that way."[6]

It is fortunate that John Adams did not let his early doubts about the law's value and his abilities prevent him from making the decision to pursue the study and practice of law. His decision had tremendous implications for both Adams's personal life and for the United States. When John Adams began his legal career in 1758, he entered a society that was rapidly approaching unforeseen changes of revolutionary proportions. The conclusion to the alternatively named French and Indian, Seven Years', or Great War for Empire increasingly strained the relationship between the American colonies and Great Britain, eventually leading to permanent separation and independence for the colonies. In these events, Adams played a

[6] Adams to Charles Cushing, April 1, 1756 in *Papers of John Adams*, ed. Robert J. Taylor (Cambridge, MA: The Belknap Press of Harvard University Press, 1977), 1:12-13 (hereafter *Papers*).

leading role, but long before “the child Independence was born,” he embarked on an uncertain path as a principally self-trained lawyer.

In order to understand Adams, it is necessary to look at the era in which Adams became a lawyer. The legal profession was itself in a period of transformation as the first bar associations began to form and a sense of professionalism emerged. Professional lawyers were still struggling for recognition as legitimate and respectable in a society that, like so many others, was hostile to lawyers. Adams in particular wrestled with the decision to go into the law but it was that decision, which, in the end, opened doors for him that, no other choice could have. While at times, his fifteen-year career felt to him to be no more than “raking amidst the rubbish of Writs,” it uniquely prepared him for the role he took later on in life. It exposed him to every aspect of society as he represented both poor yeomen farmers with their minor land disputes and major political figures in large smuggling cases. He took on both royal governors and patriot mobs. He met people from all over New England as he rode a circuit that ran as far north as Maine and as far south as Cape Cod. He became knowledgeable in every aspect of the law and was an avid law student throughout his career.

From his earliest days as a lawyer, Adams took seriously the call to improve society through the law. His experience with the law as both a student and a practitioner gave him a uniquely legalistic worldview in which questions of law, order, and justice were paramount.

Part I: Law, Lawyers, and Legalism in Late Colonial Massachusetts

John Adams began his legal practice in an era very much separated from the modern day. There were no law schools, no formal bar associations, and no requirements, beyond good moral character, to plead a case in court. On the other hand, Massachusetts had a codified set of laws, a

stable judicial system that included an appellate process, judges both elected and appointed, and a commitment to law and order. This created a unique legal situation for those who wished to practice law in Massachusetts in the late colonial period.

The first colonists of Massachusetts had come to New England in an effort to practice their religious beliefs without persecution. The Puritans carried with them a profound respect for the rule of law as it was vested in authority. Law was not simply a man made construction, but a manifestation of God's will. It existed not merely to protect people from the aggressive tendencies of their fellow humans, but also to maintain the personal morality of individuals. Historian George Haskins notes, "Authority, that is, government and law, were thought to have been made necessary by man's fall from grace and subjection thereto was regarded as a religious duty. The end of law was thus seen as the accomplishment of God's will in a regenerate society bound together by a religious and political covenant."[7] *The Book of the General Lawes and Libertyes Concerning the Inhabitants of Massachusetts* printed in 1648 was the first codification of its kind in the English-speaking world[8] and this early work expressed from its openings lines an understanding of the fundamental need for and purpose of laws: "For a Common-wealth without lawes is like a Ship without rigging and steeradge."

Contrary to what numerous lawyers have asserted, however, there is such a thing as "law without lawyers."[9] Like many societies, both past and present, the people of colonial Massachusetts in the 1750s did not have a generally positive view of professional lawyers despite their esteem for law and the colony's complex judicial system. First, for all of its respect

[7] George Lee Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (1960, repr., Hamden, CT: Archon Books, 1968), 223-224. For a fuller look at the process of legal transformation in colonial Massachusetts see John M. Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth Century Massachusetts," *Colonial America: Essays in Politics and Social Development*, Stanley Katz and John Murrin, eds. (New York: Knopf, 1983).
[8] Haskins, *Law and Authority*, 2.
[9] Anton-Hermann Chroust, *The Colonial Experience*, vol. 1 of *The Rise of the Legal Profession in America* (Norman: University of Oklahoma Press, 1965), 3.

for the law, the Puritan religion itself did not hold lawyers in high regard. Puritan ministers saw professional lawyers as Adams described them, a group that "often foments more quarrells than [it] composes" and as potentially immoral as they defended men regardless of their innocence. Additionally, these open court battles were potential breeding grounds for societal conflict and dissention with their inherently adversarial nature. Puritan leaders also sought a rationalization in the law which would make it the province of all citizens and not the simply the legally trained elite, such as the Englishmen who had excluded John Winthrop from practice for his differing religious views.[10]

This distrust of lawyers can also be traced to a general distaste common to Englishmen, to the particular Puritan experience with English government and English lawyers who used the legal system against the Puritans, and to the overly complex nature of English law.[11] Additionally, in the small-town, tight-knit communities of colonial Massachusetts, there was a preference for community-resolved disputes, making lawyers largely unnecessary. Taken together, these views stunted the growth of the legal profession in Massachusetts for most of its early history and led most sons of elite men to turn to the ministry and public service instead.

Without a large number of trained attorneys, nonprofessionals became the legal practitioners for most of the colony's history. This in turn meant that most judges in the colonial period and throughout the revolutionary crisis had not formally trained as lawyers, but were simply laymen who gained their position through either their practical experience in local government and reputations as fair and honest men or, at times, solely through personal connections and wealth. From the years 1692 to 1776, only three of the ten chief justices of the

[10] Gerard W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts 1760-1840* (Westport, CT: Greenwood Press, 1979), 8.
[11] Haskins, *Law and Authority*, 186; Haskins, "Lay Judges: Magistrates and Justices in Early Massachusetts," in *Law in Colonial Massachusetts 1630-1800*, ed. Daniel R. Coquillette (Boston: The Colonial Society of Massachusetts, 1984), 41.

Superior Court of Judicature were trained lawyers and only three of twenty-three associate justices had received legal training.[12]

As lawyers began to professionalize, tensions arose between these specially trained lawyers and lay judges; indeed, many judges opposed the formation of bar associations and requirements for legal practice fearing they would jeopardize their positions of authority.[13]

Regardless of the lack of professionalism in the judiciary, the Massachusetts legal system was quite jurisdictionally complex. Justices of the peace, appointed by each county, held individual courts to handle smaller matters of both a criminal and a civil nature. The day-to-day concerns of the communities – debts, trespasses, controversies involving less than forty shillings, breaches of the peace, and violations of the Sabbath were heard at this level. On the civil side, the Court of the General Sessions of the Peace heard appeals. This court consisted of a quorum of the county justices of the peace, and jurors who determined questions of fact. Criminal appeals went to the Inferior Court of Common Pleas, which was comprised of four judges appointed by the Governor and Governor's Council. In both cases, the Superior Court of Judicature heard appeals.

The Superior Court of Judicature, Court of Assize and General Gaol Delivery consisted of five appointed judges. It held appellate jurisdiction on all matters that arose within the colony and had no original jurisdiction of its own except in matters that involved the crown. The Governor and Council could also constitute a court in certain cases. They held appellate jurisdiction in matters of wills that came up from the County Courts of Probate and they held sole jurisdiction in divorce cases.

[12] Gawalt, *Promise of Power*, 39.
[13] Gawalt, 23.

Completely separate from this system of courts was the Court of Vice Admiralty. Unlike the Massachusetts judiciary, it derived its authority not from the colonial legislature but from the Crown itself. This court did not have jury trials, and therefore, the Crown used these courts to hear many of the explosive political cases of the revolutionary crisis, particularly those involving revenue, since royal officials would have a better chance of success when they were not up against juries that likely had patriot sympathies.[14]

Just as John Adams was entering on the scene in this particular legal world, the legal profession was beginning to transform and redefine itself as a respectable, necessary, and trained profession. Two broad causes stimulated this change. One, the mid-eighteenth century saw a burgeoning merchant class that required more technical use of commercial and land law than was necessary in a purely agrarian society. Two, the Puritan and Congregationalist hold relaxed with both the budding Enlightenment and secular philosophies of the era as well as from the effects of the opening religious thought in Massachusetts following the First Great Awakening. These developments allowed the respectability of the legal class to grow and therefore, the number of elite sons following their Harvard years with legal study grew as well.

Looking at Harvard graduation data demonstrates the remarkable change that had occurred in the colony. In its first seventy-five graduating classes, out of 741 graduates, only fourteen, amounting to less than two percent became lawyers. On the other hand, when John Adams graduated from Harvard in 1755, three out of the twenty-four, or twelve percent, chose law.[15] "Yet," as John Murrin observes, "size alone barely illustrates the remarkable growth that the bar experienced in the generation before independence. Perhaps even more important were its

[14] L. Kinvin Wroth and Hiller B. Zobel, eds., introduction to *Legal Papers of John Papers* (Cambridge, MA: The Belknap Press of Harvard University Press, 1965), 1:xxxviii-xliv (hereafter *Legal Papers*).
[15] John E. Ferling, "Before Fame: Young John Adams and Thomas Jefferson," *John Adams and the Founding of the Republic*, ed. Richard Alan Ryerson (Boston: Massachusetts Historical Society, 2001), 82, see also footnote 30.

expanding prestige and increasing solidarity." The key to such acceptance by society, as colonial lawyers saw it, was in their liberal education, which, in theory, made them part of "a 'learned profession' rather than a 'skilled trade.'" [16]

The task of gaining society's respect, however, was easier to say than it was to do and was in large part hindered by the large numbers of "pettifoggers." Historian Charles McKirdy defines "pettifoggers" as "'amateur' lawyers," men "who often plied some other trade, but earned money from drafting documents and performing other legal functions." He goes on to explain, "Sometimes the difference between these practitioners and the recognized members of the bar was merely a question of degree."[17] The men who dabbled in the law with no formal training were often perceived as the ones responsible for causing more conflicts than they resolved, making it harder for professional lawyers to gain respect.

One of Adams's earliest battles as a young attorney did not take place in a courtroom but in public as he worked to get the pettifoggers excluded from practice. He thought of them as "dirty Dablers in the Law." In a draft of an argument against the pettifoggers, Adams wrote in his diary indignantly, "To see the Forms and Processes of Law and Justice thus prostituted …to revenge an imaginary Indignity, offered in a Tavern…. To have a mere Piece of Jocular Amuzement, thus hitched into an Action at Law, a mere frolick converted into a Law suit, is a Degree of meanness that deserves no Mercy and shall have none from me."[18]

Furthermore, one of the earliest actions of the newly established Suffolk County Bar in the 1760s was to set up rules to govern practice. The fourth rule read, "That no Attorney be allowed to Practice here unless sworn in this Court [The Suffolk County Inferior Court of

[16] Murrin, "Legal Transformation," 555; Gawalt, 7, 18-19.
[17] Charles R. McKirdy, "Massachusetts Lawyers on the Eve of the American Revolution: The State of the Profession," in *Law and Colonial Massachusetts*, 314.
[18] Adams, June 20, 1760, *Diary*, 1:138.

Common Pleas] or in the superior Court," a privilege that was not open to the untrained pettifoggers. This motion failed however, when James Otis, Jr., a member of the Bar, in a burst of democratic enthusiasm, opposed the rule, saying that it was contrary to both "Province law" and "the Rights of Mankind." [19]

While trained attorneys certainly opposed these irregular practitioners because they took away potential business, their complaints were not merely mercenary. McKirdy notes, "The attack on pettifoggers in the early 1760's, originating in part from a desire to reduce competition, also represented a sincere effort on the part of some lawyers to rid the colony of what they considered a real evil."[20] The pettifoggers represented a roadblock to the creation of a unified, professional occupation both because they themselves were untrained but also because they often, as Adams described, engaged in the type of behavior that caused lawyers to become so despised by promoting lawsuits for petty disputes better solved privately than in a court of law.

As lawyers struggled for recognition in the late colonial period, they worked on organizing and regulating themselves. Through newly created bar associations, they established regular rules for the training and swearing of attorneys of the bar, settled on regular fees, created internal divisions of practice that allowed for a hierarchy within the profession, and met regularly for both social and intellectual advancement.[21] One of the early, if not particularly long-lived, achievements of the early Suffolk County bar, of which Adams was a part, was the creation of "Sodalitas, A Clubb of Friends." This organization as Adams described it was "a private Association, for the study of Law and oratory…to support the Honour and Dignity of the Bar."[22] The proposed regular meetings centered on different legal topics and issues; the earliest meetings

[19] Adams, February 5, 1763, *Diary*, 1:236
[20] McKirdy, "The State of the Profession," in *Law in Colonial Massachusetts*, 327.
[21] Gawalt, 15.
[22] Adams, January 24, 1765, *Diary*, 1:251.

in January 1765 were on the feudal law and likely influenced Adams's later publishing of *A Dissertation on the Canon and the Feudal Law*. While it does not appear that the little club, which consisted of only a handful of Boston's elite lawyers, lasted very long (Adams's diary entries record no more meetings after February 1765), it certainly had an important effect on Adams's views on the law and brought him into contact with other members of the Boston bar.[23] "Sodalitas" was also indicative of the type of actions taken by those who wished to see the legal profession elevated. The legal world that Adams entered into in the late 1750s was much different from the one he left when he tried his last case in 1778. Nonetheless, despite years of change around him, Adams's views of the law, developed in his early career, remained constant.

Part II: Discerning the Law: John Adams's Legal Training and Philosophy

John Adams like many college graduates, then and now, was unsure of what he wanted to do once he left Harvard in 1755. He spent a year in contemplation while earning a living through teaching, a profession he could not stand. His other options, however, were limited. He could become a physician, a minister or "Divine," or a lawyer. The first option was unattractive in part because medicine had not yet become the science it is today, but rather was more of an art, something that did not appeal to Adams's intellectual mind. The ministry would certainly have been a respectable option, and one he may have felt impelled towards, but Adams was self-aware enough to know he did not have the temperament to be a good minister. He was brusque, impersonal, and far too sensitive to be under the daily scrutiny of his potential parishioners. Still, he hesitated to go into law. He grew up listening to sermons on the vice of litigiousness and was

[23] Daniel R. Coquillette, "Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism," in *Law in Colonial Massachusetts*, 379-382.

no doubt aware of the colony's distaste for lawyers. He also knew his father would disapprove of his choice and that he would need to pay his own way through his period of study. He spent months debating with himself, unable to make a decision. He wondered if he even had the ability to be a great lawyer or if he should go along with father's wishes and become a minister.[24]

On Saturday, August 21, 1756, Adams made up his mind. He signed a contract with a young, but prominent attorney in Worcester, James Putnam. He studied under Putnam in his home for two years for a fee of one hundred dollars, in addition to room and board. Adams's concerns about the potential conflict between his religious convictions and occupation come through quite clearly in his diary entry the following day: "Necessity drove me to this Determination, but my Inclination I think was to preach. However that would not do. But I set out with firm Resolutions I think never to commit any meanness or injustice in the Practice of Law. The Study and Practice of Law, I am sure does not dissolve the obligations of morality or of Religion."[25] He believed that he could use the law to promote human happiness and virtue while discouraging immorality and vice. Therefore, with the decision made, Adams began his study of the law that Monday. He continued to teach for the income and "In this Situation [he] remained, for about two Years Reading Law in the night and keeping School in the day."[26]

His legal education, as was the standard at that time, consisted mostly of reading available law books from Putnam's library. Before law schools and public libraries, apprenticeship was the path to the law, the attorney-in-training becoming a clerk for a local established lawyer. Charles McKirdy explains, "From his mentor and his mentor's associates, the clerk learned the mores, the etiquette, and the technique of a lawyer's role."[27] By working

[24] Ferling, "Before Fame," in *John Adams and the Founding*, 81-83. Ferling, *John Adams: A Life*, 17-19.
[25] Adams, August 22, 1756, *Diary*, 1:43.
[26] Adams, *Diary*, 3:264.
[27] McKirdy, "The State of the Profession," in *Law in Colonial Massachusetts*, 316-317.

closely with an individual attorney, following his practice and making use of his legal resources, the law student gained the knowledge and learned the skills he needed to start his own practice. Putnam's library, while far from complete, was sufficient, and during his two years there, Adams read Wood's *Institute of the Laws of England*, Hawkins's *Abridgement of Coke's Institutes*, as well as his *Treatise of the Pleas of the Crown*, Salkeld's *Reports*, and Coke's *Entries*, among other works.

The second part of Adams's training consisted of listening to cases in the local court and providing some minimal assistance to Putnam in preparing cases. This work was not particularly instructive however, and left much to be desired, exposing the faults with the apprenticeship system generally. Putnam himself was a young attorney who had only been practicing for six years when he took on Adams and therefore, had little experience as a lawyer, and even less as a teacher. Putnam, like many mentors, did little to prepare Adams for the actual daily work of lawyers, namely drawing up various writs required by the common-law system and when Adams entered into practice for himself, he quickly learned the deficiencies of his earliest training. Nonetheless, Adams's time in Worcester and his largely self-directed course of study did pay off.

In early October 1758, Adams concluded his study with Putnam and returned to his father's house in Braintree despite having local elites encourage him to he set up practice there. Adams knew, however, that real reputations could only develop in Boston and he did not want to have to compete with his former teacher. Back in Braintree, he reconnected with old friends, helped with the farm work, and continued his study of the law. It was at this time that Adams began in earnest his study of the Civil Law of Ancient Rome with Vinnius's *Notes* on Justinian's *Institutes* as well as Geoffrey Gilbert's *Treatise of Feudal Tenures*.[28] Adams was aware that this course of study was unique, commenting in his diary, "Few of my Contemporary Beginners, in

[28] Ferling, "Before Fame," in *John Adams and the Founding*, 83; David G. McCullough, *John Adams*, 43-44.

the Study of the Law, have the Resolution, to aim at much Knowledge in the Civil Law. Let me therefore distinguish my self from them, by the study of the Civil Law, in its native languages."[29] Difficult reading indeed, but it was something Adams was well suited for as the study quenched his desire for an understanding of legal theory. Additionally, this preparation could potentially earn him the support and respect of Boston's elite lawyers – Oxenbridge Thatcher, Benjamin Prat, James Otis, Jr. and Jeremiah Gridley, a prerequisite for successful practice in Boston.

In late October, Adams felt prepared to approach these giants of the Suffolk bar. He needed their support in vouching for his qualifications in order to become a sworn attorney in Suffolk County. The meetings with each were unique, offering perspective on the different personalities present in the bar at that time. His meeting with Thatcher was pleasant, and although they did not discuss the law at all (they actually discussed metaphysics), Thatcher promised to vouch for Adams. Otis was friendly as well, treating him "more like a Brother than a father," and began with Adams a lengthy discourse on Homer and Horace.[30] Benjamin Prat on the other hand, was cold and curt, chastising Adams for his failure to be sworn in Worcester or at least have a letter of introduction and recommendation from Putnam. He was reluctant to back Adams without these steps completed because, "No Body in the County knows any Thing about you. So no Body can say Thing in your favour but by hearsay."[31] As important as these meetings were however, it was the first meeting Adams had with Jeremiah Gridley that would prove to be the most important and most influential for the rest of his life.

On Wednesday morning, October 25, Adams made his way to see Jeremiah Gridley who was immediately receptive to the young Adams. He drilled him on his knowledge of the law and offered priceless advice that Adams immediately took to heart. The meeting between the two

[29] Adams, October 5, 1758, *Diary*, 1:44.
[30] Adams, *Diary*, 3:273.
[31] Adams, October 26, 1758, *Diary*, 1:56.

lasted for hours. Gridley promised to be Adams's patron from the start, but he wanted to know what Adams had done to prepare himself for a career in law. He asked him about his background in works in Latin, Greek, and French and then proceeded to loan Adams a number of books he thought the young lawyer should read. He then offered some advice that Adams never forgot: "One is to pursue the Study of the Law rather than the Gain of it. Pursue the Gain of it enough to keep out of the Briars, but give your main Attention to the study of it. The next is, not to marry early. For an early Marriage will obstruct your Improvement, and in the next place, twill involve you in Expence."[32] The first piece of advice was well in keeping with Adams's own intellectual nature, understanding as Gridley had told him, "A lawyer in this Country must study common Law and civil Law, and natural Law, and Admiralty Law, and must do the duty of a Counsellor, a Lawyer, an Attorney, a sollicitor, and even of a scrivener."[33]

This concept of becoming widely knowledgeable about the law and its many facets became an integral part of Adams's outlook. The idea was so important to him and so tied to his fateful meeting with Gridley that the account of his meeting with Gridley in his autobiography, written in the early part of the nineteenth century when his public career had ended, contains a number of striking differences with the account penned in his diary. These differences, more than simply demonstrating the lack of a clear memory after forty years, as well as a failure to consult his primary sources before writing, instead demonstrate what *had* remained clear and constant after so many years of change. In particular, Adams's autobiography includes an exchange not present in his diary account in which Gridley asked if Adams had read the works of Grotius and Puffendorf. Although they had been available at Putnam's, Adams admitted that he had not. Gridley emphasized that they were "great Writers" and that Adams should take the time to read

[32] Adams, October 25, 1758, *Diary*, 1:55.
[33] Adams, October 25, 1758, *Diary*, 1:55.

them. He went on to say, "Indeed a Lawyer through his whole Life ought to have some Book on Ethicks or the Law of Nations always on his Table. They are all Treatises of individual or national Morality and *ought to be the Study of our whole Lives*."[34] Whether that exchange took place at that time, or at all, is in some significant ways, irrelevant. What does matter is that from that moment forward Adams was dedicated to mastering the law.

That early meeting therefore shaped Adams's legal philosophy in profound ways. He saw the legal profession as dignified and intellectually challenging and expected others to view it the same way. Even before his meeting with Gridley, Adams's favorable description of Peter Chardon, a young law student with whom he was acquainted bears out this assertion. Adams was effusive, "He has a sense of the Dignity and Importance of his Profession, that of the Law. He has a just Contempt of the idle, incurious, Pleasure hunting young fellows of the Town, who pretend to study Law. He scorns the Character, and aims at a nobler. " Not only did Chardon believe in the nobility of law, he, like Adams, believed in a broad study of the law. Adams went on to say, "He [Chardon] talks of exulting in an unlimited field of natural, civil, and common Law, talks of nerving, sharpening the mind by the Study of Law and Mathematicks." A man like this, Adams concluded, "will make something."[35]

It was with this view of the legal profession that Adams took on the pettifoggers. As historian Daniel Coquillette explains,

> Adams was a genuine elitist concerning the legal profession. He aspired to make it an aristocracy of talent and learning…. Adams believed that humanist learning in general, and neoclassical legal studies in particular were useful in achieving this goal…Finally, if Adams encouraged high standards and restrictions on bar membership, he surely did not advocate a narrow view of legal education….Adams envied cosmopolitan legal learning.[36]

[34] Adams, *Diary*, 3:271-272, emphasis added.
[35] Adams, October 11, 1758, *Diary*, 1:47.
[36] Coquillette, "Justinian in Braintree," in *Law in Colonial Massachusetts*, 398-399.

In Adams's mind, the legal profession was too potentially important to society to allow men into it who were not serious and dedicated to those ideals of broad study in a noble occupation. He held himself to high standards and constantly considered ways he could improve himself. He often thought about his role as an attorney and about his ability to do honor to that profession. He urged himself, "Let my Views concenter, and terminate in one focus, in one Point, a great, useful, virtuous Lawyer. With this View I might plan a system of study for seven Years to come, that should take in most Parts of Science and Literature…, but my principal Attention should be directed at british Law, and roman and Grecian Antiquities."[37]

One cannot know whether Adams was familiar with the lengthy 1710 exhortation to lawyers penned by the influential Puritan minister Cotton Mather, but it is reasonable to assume that he would have agreed with the sentiments expressed in Mather's pamphlet *Bonifacius*.

> The Gentlemen of the LAW, who have that in their hands, the End whereof is, *To Do Good*; and the Pervention of which from its Professed End, is one of the *Worst of Evils*. Gentlemen, Your Opportunities to *Do Good*, are such, and so Liberal, and Gentlemanly, is your Education,…that PROPOSALS of what you *may do* cannot but Promise themselves an Obliging Reception with you….A *Lawyer* should be a *Scholar*….But, Sirs, When you are called upon to be *Wise*, the main Intention is, *That you may be wise to do Good*…. There has been an old Complaint, *That a Good Lawyer seldom is Good Neighbour*. You know how to Confute it, *Gentlemen*, by making your *Skill in the Law*, a Blessing to your Neighbourhood.[38]

Regardless of whether Adams ever read those words, he certainly was committed to the idea that lawyers had an opportunity and indeed the duty "to do good" with their chosen profession. The only question that remained was what constituted "a great, useful, virtuous Lawyer." To what end was all that study? To what practical end was the legal profession?

---

[37] Adams, summer 1759, *Diary*, 1:106.

[38] Cotton Mather, *Bonaficius*, Boston, Massachusetts, 1710 (accessed 3 October 2007), available from Early American Imprints, Series I: Evans, 1639-1800 [hereafter Early American Imprints] at http://infoweb.newsbank.com, 155-163.

In some sense, "The Law" itself was an end. Historian Page Smith puts this idea beautifully in his masterful biography of Adams: "Most attractive of all to [Adams] were the historical and intellectual dimensions of the law – the way it led from precedent to precedent, drawing from history, philosophy, and theology, buttressed by opinions, learned and ingenious, to erect a structure marvelous in its intricacy."[39] Such a worthy definition of the law no doubt appealed to Adams, but there was also more to it. Adams was keenly aware of the fact that he was not studying the law in that manner simply for his own personal enrichment but for some higher goal of public benefit that would earn him the recognition and respect of Boston's elite.

After three years of legal study, Adams felt sufficiently able to answer the question of the legal profession's goal. He wrote to his friend Jonathan Sewall noting the many ways lawyers could benefit society: "Now to what higher object, to what greater Character, can any Mortal aspire, than to be possessed of all this [legal] Knowledge…to assist the feeble and Friendless, to discountenance the haughty and lawless, to procure Redress of Wrongs, the Advancement of Right, to assert and maintain Liberty and Virtue, to discourage and abolish Tyranny and Vice." [40] Law, Adams asserted, existed for both the maintenance and benefit of human society. Since he looked at the profession as more than a trade, or a path to wealth he was able to see the valuable aspects of the law as a whole outside of the courtroom. "From this [broad] course of study," the editors of Adams's legal papers point out, "came the appreciation of law as politics, law as philosophy, and law as jurisprudence which so colored Adams' later approach to the problems of his time and was so much a part of his contribution to their solution."[41] As much of an elitist as Adams was, and his actions to restrict membership in the legal profession do seem to carry that mark, he still believed that the law did not exist solely for the elite but was there for the "feeble

[39] Page Smith, *John Adams* (Garden City, NY: Doubleday, 1962), 1:34.
[40] Adams to Jonathan Sewall, October 1759, *Diary*, 1:124.
[41] Wroth, introduction to *Legal Papers*, 1:lxxiv.

and friendless." He simply understood that in order to achieve these ideals in the law, one needed a great deal of training and education.

Adams began creating his own legal theories early on in his career. In the summer of 1759, Adams came to a remarkable conclusion. He wrote in his diary, "Law is human Reason. It governs all the Inhabitants of the Earth; the political and civil Laws of each Nation should be only the particular Cases, in which human Reason is applied."[42] Adams also developed some harsh opinions on the canon law, the internal ecclesiastical law of various churches, specifically the Roman Catholic Church, the study of which Gridley, whose personal opinions on the subject likely influenced Adams, encouraged. He wrote that the study of the canon law had "open[ed] that system of fraud, Bigotry, Nonsense, Impudence, and Superstition, on which the Papal Usurpations are founded."[43] This unsympathetic outlook on the canon law, common in British America, stood out in Adams's first major published work, *A Dissertation on the Canon and the Feudal Law* printed in 1765, a work prompted by his discussion in the Sodalitas club and the Stamp Act crisis in which Adams contrasted "the corrupt customary laws of Europe" with "the ideals of righteous American settlers."[44]

Vital to Adams's legal philosophy was his belief that law held a superior position over both politics and people. In late 1760, while visiting with Colonel Josiah Quincy, the conversation turned towards the law. Adams noted in his diary, "Several Instances were mentioned, when the Independency and Superiority of the Law in general over particular Departments of officers, civil and military, has been asserted and maintained, by the Judges, at

[42] Adams, summer 1759, *Diary*, 1:117.
[43] Adams, February 6, 1761, *Diary*, 1:199.
[44] Coquillette, "Justinian in Braintree," in *Law in Colonial Massachusetts*, 404. For a full discussion of Adams's *Dissertation*, see Chapter 3, Part II.

Home."[45] This outlook resonated with Adams who viewed the law as fundamental and invariable. Indeed, for Adams, putting the law first became more than simply a legal theory – it became a commitment and a standard to which he held himself and others.

This commitment to the law became increasingly evident throughout the Revolutionary crisis. In 1765, the passage of the Stamp Act, which required a taxed stamp to be placed on all paper documents, newspapers, wills, and even playing cards, produced a firestorm of protest within the colonies and in Massachusetts in particular. Many colonists expressed the anger they felt toward the new and unprecedented tax through riots that destroyed the property of those who they felt were supportive of, or in some way aided, the British policy.

Adams simply could not tolerate this behavior. In a draft of an article he thought to submit to a Boston newspaper in 1765, Adams excoriated the patriot mob, saying that their actions were "a very attrocious Violation of the Peace and of dangerous Tendency and Consequence."[46] Ten years later, despite the increasing hostilities between England and the colonies, and the imposition of the so-called "Intolerable Acts," Adams's feelings against these mobs were just as strong. In a letter to Abigail Adams, he reiterated these sentiments:

> These private Mobs, I do and will detest. If Popular Commotions can be justified, in Opposition to Attacks upon the Constitution, it can be only when Fundamentals are invaded, nor then unless for absolute Necessity and with great Caution. But these Tarrings and Featherings, these breaking open Houses by rude and insolent Rabbles, in Resentment for private Wrongs or in pursuance of private Prejudices and Passions, must be discountenanced, cannot be even excused upon any Principle which can be entertained by a good Citizen – a worthy member of Society.[47]

With such an enduring dedication to the law, it should not be surprising that Adams took his time before completely committing himself to the patriot movement. When he did, it was

[45] Adams, November 15, 1760, *Diary*, 1:170.
[46] Adams, August 15, 1765, *Diary*, 1:260.
[47] Adams to Abigail Adams, July 7, 1774, *Adams Family Correspondence*, ed. L.H. Butterfield (Cambridge, MA: The Belknap Press of Harvard University Press, 1963), 1:131 (hereafter *Family Correspondence*). For more on Adams and Boston mobs, see Chapter 2.

because he believed that there were good legal arguments for it. While Adams is often viewed as an early advocate of the patriot cause, his legalistic mind did not permit radical revolutionary thinking; the law was simply too important to be discarded simply because he disagreed with a few British policies. As historian Robert J. Taylor discusses in his essay, "John Adams: Legalist as Revolutionist," Adams would not take a politically convenient position without a strong, almost irrefutable legal argument backing him: "As a lawyer, Adams preferred legal precedents to abstract political theory, charters to vague concepts of natural law – if they could be made to serve."[48] His legal philosophy and theories were not, however, simply the idle thoughts of a man who likely viewed himself as a "classical Roman character."[49] He consistently acted on these theories and beliefs, not only in his many writings, but also in his practice. Over fifteen years as a practicing attorney, Adams handled hundreds of cases, but he never allowed the often tedious, repetitive nature of law practice to obscure the big picture as he saw it, that is the essential and fundamental nature of the law. Whether he was trying a petty land dispute between local farmers or a momentous murder case involving the King's soldiers, this legal philosophy guided Adams from his earliest days and very first case in 1758 throughout his career.

With a period of study completed and with the support of a number of prominent Boston attorneys, Adams was now ready to take his place in the legal world of late colonial Massachusetts and begin his own practice. Adams presented himself as Gridley had instructed on the appointed day for his swearing in at the Suffolk County Inferior Court on November 6, 1758.

[48] Robert J. Taylor, "John Adams: Legalist as Revolutionist," *Proceedings of the Massachusetts Historical Society* 89 (1977), 63.
[49] Coquillette, "Justinian in Braintree," in *Law and Colonial Massachusetts*, 360.

After some anxious moments, waiting for Gridley to arrive at the Courthouse, fearing he had forgotten, Gridley appeared, and the occasion for which Adams had been preparing arrived. Gridley stood and vouched for the young Adams telling the court of his study under Putnam and his own impressions garnered from his own long interview with Adams earlier that month. Adams then repeated the oath given to all sworn into practice at the Massachusetts bar, promising honest and faithful service to the courts.[50] Adams was now a full-fledged attorney – he just needed a client.

Adams's first case, *Field v. Lambert*, came in late December of that same year, but rather than marking an early success, the case demonstrated just how much he still had to learn. The first writ he drew was "a Declaration in Trespass for a Rescue." The case involved a typical dispute between local farmers in Braintree. Luke Lambert owned two horses that broke into Joseph Field's enclosure destroying some of his crop. Lambert went onto Field's property to get his horses back despite Field's protestations and removed the horses, leaving without paying for the damage his horses had caused.

Adams was counsel for the plaintiff Field, looking to secure damages for his destroyed crops. As Adams's first case, and his first writ, he was naturally concerned with his performance. He wanted to make a good impression from the start, but he was aware that his first writ did not meet his own high standards. It was at this moment of extreme anxiety that Adams came to realize the defects in his legal training under Putnam and how his "neglect" and the lack of "hints concerning Practice" hindered Adams from becoming familiar with the practical aspects of the law. Unfortunately for the young Adams, his worries were justified. The defendant was able to enter a plea in abatement, which did not answer the substance of the charges against him, but rather pointed out a defect in Adams's writ, which had failed to include the words, "'the county

[50] Adams, November 6, 1758, *Diary*, 1:58-59. Wroth, introduction to *Legal Papers*, 1:lv-lvi.

in the direction to the constables of Braintree.'" Thus, Adams lost his first case on a technicality, but an important one in a society that still relied on English common-law forms of pleading.[51]

As Adams became painfully aware, his knowledge of the province law of Massachusetts was not sufficient; a fact that he noted at several different points in his diary. He was anxious to succeed and to make a name for himself – he just needed a plan. He contemplated visiting neighbors, chatting with them, looking for opportunities to show off his legal knowledge. He abandoned this idea however because "this will require much Thought, and Time, and a very particular Knowledge of the Province Law, and common Matters, of which I know much less than I do of the Roman Law."[52] This lack of knowledge of "common Matters" led his writ to be abated and, for a time, his error was the talk of the town, a major setback for an aspiring attorney. As historian Richard Brown points out, "Townspeople must recognize him as the person with whom they felt comfortable and confident when it came to legal questions."[53] Adams castigated himself from rushing into business too quickly; he resolved never to take on a writ until he had the time to insure that the court could not abate it. Despite his first over-reactive fears that the other young attorneys, specifically Robert Treat Paine, were laughing at him, spreading the story, thus destroying his business, Adams was back in court the next month trying small cases before local justices of the peace. The experience had given him a new appreciation for the province law and for the concerns of the yeomen farmers that would be his clients. "Mix with the Croud in a Tavern, in a Meeting House, or the Training Field," Adams encouraged himself, "and grow popular by your agreeable assistance in the Tittle tattle of the Hour" and, "in

[51] McCullough, 45. Adams, December 18 and 29, 1758, *Diary*, 1:62-65.
[52] Adams, March 14, 1759, *Diary*, 1:78.
[53] Richard D. Brown, "Lawyers, Public Office, and Communication Patterns in Provincial Massachusetts," Chapter 4 of *Knowledge is power: The Diffusion of Information in Early America, 1700-1865* (New York: Oxford University Press, 1989), 94.

the course of making himself familiar and visible, [Adams] discovered he was learning both about his own society and the law of Massachusetts along the way."[54]

The life of a colonial lawyer was not an easy one; indeed, it could be a "lonely and arduous routine"[55] as many of the habits of the profession at that time led to an often-solitary lifestyle. In this era before partnerships, each lawyer struck out his own, making his own way. While there was certainly some sense of camaraderie among the members of the bar as evidenced through organizations such as the "Sodalitas," it was still up to Adams to "dig Treasures with [his] own fingers."[56] Two attorneys working jointly argued most cases but as the editors of his legal papers point out, Adams usually worked alone. As with any lawyer who is just starting out, Adams did not have many clients at first and he therefore dedicated his free time to adding to his legal knowledge both through traditional study and by sitting in on other cases in court.

Circuit riding was another necessary if tedious part of colonial practice. All colonial lawyers were part of the legal circuit that extended as far north as Falmouth, now Portland, Maine, a district of Massachusetts until 1820, farther west than Worcester, and as far south as Cape Cod and Martha's Vineyard. The many trips to the county courts of these areas kept Adams, and other colonial lawyers, away from their families for weeks at a time each year. While there often was some company for him with the other lawyers and judges who made these long trips as well, Adams found the trips long and lonely. They nonetheless constituted a necessary and often lucrative part of his practice, the trips to Bristol and Plymouth often

[54] Adams, Spring 1759, *Diary* 1:96; Brown, "Communication Patterns," 95.
[55] Wroth, introduction to *Legal Papers*, 1:lv-lvi.
[56] Adams, December 18, 1758, *Diary*, 1:63.

providing him with many clients.[57] Additionally, the nature of Adams's practice made him one of the country's first commuters, living in Braintree while working in the city of Boston, a long trip in this era before the motor vehicle.[58]

His early years however were not all drudgery. In his desire to make a name for himself, Adams pondered two courses, one was through years more of long study, another was to take up a public cause and make it his own. He wrote in his diary, "That is the Question. A bold Push, a resolute attempt, a determined Enterprize, a slow, silent, imperceptible creeping. Shall I creep or fly?"[59] The bold push that Adams undertook had a two-pronged approach. He first took up the number of inns and saloons in Braintree as his personal cause. He appealed to the town's Board of Selectmen to have the number reduced and actually succeeded. Less practically successful, but perhaps more influential, was his campaign against the pettifoggers. He made his complaint public in a court case in which he defended a client in a trivial complaint over a hat, an issue that Adams felt never should have come before the court. It was during his remarks in court that Adams took his shot against the pettifoggers. In his first draft, Adams's disgust was apparent: "These dirty and ridiculous Litigations have been multiplied in this Town, till the very Earth groans and the stones cry out…. I take this opportunity publickly to declare that I will take all legal Advantages, against every Action brought by…any other Petty fogger in this Town. For I am determined if I live in this Town to break up this scene of strife, Vexation and Immorality."[60] As Adams biographer John E. Ferling notes, "Adams had little initial success in this crusade,

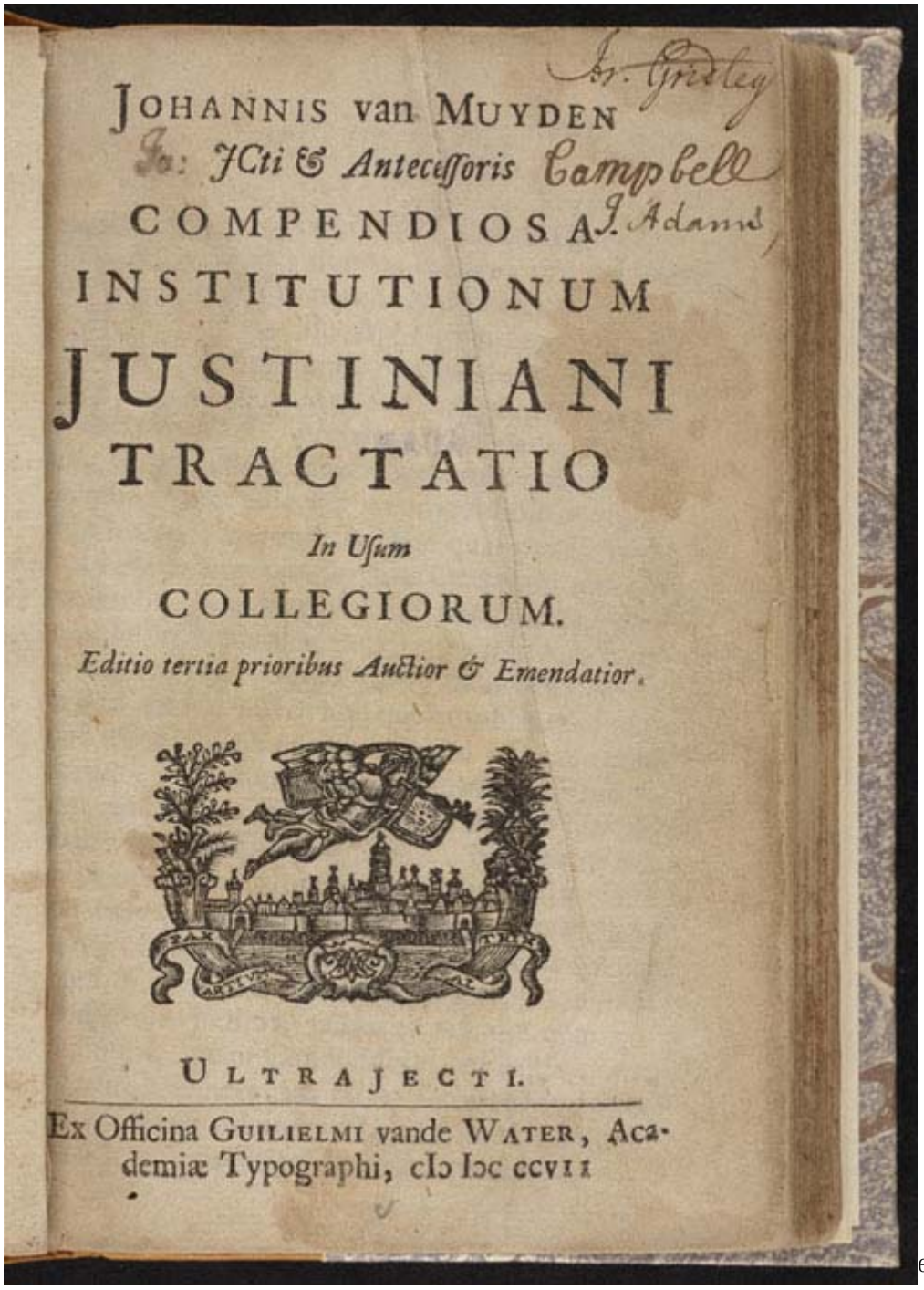
[57] See Ferling, "Before Fame," in *John Adams and the Founding*, 94; Wroth, introduction to *Legal Papers*, 1:lxvii-lxix.
[58] Wroth, introduction to *Legal Papers*, 1:lxv.
[59] Adams, March 14, 1759, *Diary*, 1:78.
[60] Adams, June 19, 1760, *Diary*, 1:137.

although he surely must have gained the admiration of other barristers who harbored the same adverse opinions toward these interlopers."[61]

In November 1761, just three years after he had initially been sworn as an attorney, Adams was admitted to practice in the Superior Court of Judicature, entitling him to the rank of barrister. Reforms in the legal system the following year by Chief Justice and Lieutenant Governor Thomas Hutchinson created a stratified profession, entitling those who had risen to the rank of barrister to wear the traditional wigs and robes of English practice. Despite these marks of distinction, Adams never made a fortune as a lawyer; indeed, it was only by the sheer size of his practice that Adams made any money at all.[62] Nevertheless, Adams's practice was slowly, but surely, progressing and with a growing practice, he also experienced a growing reputation.

As Wroth and Zobel, editors of Adams's legal papers, point out in their introduction, "we may conclude that, in the practice of law and, most of all, in his own profoundly intellectual approach to the law, Adams found the great sources of inspiration which shaped and directed his contribution to the founding of this nation."[63] Adams's earliest years of law cemented in him the principles and ideological basis that served him for the rest of his life. These principles manifested themselves in several ways throughout his long public career, but the courtroom provided the first stage on which Adams expressed his legal ideology and it was in the courtroom that the Boston elite first became aware of his potential to bring something unique and important to a changing world.

[61] Ferling, *John Adams: A Life*, 28.
[62] Wroth, introduction to *Legal Papers*, 1:lxix.
[63] Wroth, introduction to *Legal Papers*, 1:xciv.


Jr. Gridley
JOHANNIS van MUYDEN
Jo: JCti & Antecessoris Campbell
COMPENDIOS A J. Adams,
INSTITUTIONUM
JUSTINIANI
TRACTATIO
In Usum
COLLEGIORUM.
Editio tertia prioribus Auctior & Emendatior.
ULTRAJECTI.
Ex Officina GUILIELMI vande WATER, Academiæ Typographi, cIↃ IↃc ccvii

[64]

[64] John Adams's copy of Justinian's Institutes, from Jeremiah Gridley's library, from The John Adams Library at the Boston Public Library Online, http://johnadamslibrary.org/explore/highlights/highlights2.aspx, accessed 14 April 2008.

Chapter 2
"*Every lawyer must hold himself responsible*": John Adams, Attorney at Law

"I had no hesitation in answering that Council ought to be the very last thing that an accused Person should want in a free Country. That the Bar ought in my opinion to be independent and impartial at all Times And in every Circumstance. And that Persons whose Lives were at Stake ought to have the Council they preferred…and that every lawyer must hold himself responsible not only to his Country, but the highest and most infallible of all Trybunals for the Part he should Act."[65]

If Adams had hesitated in becoming a lawyer and in taking on his first case, he certainly showed no hesitation thereafter in taking on any case, big or small, in his fifteen years as an active, practicing attorney. Over those fifteen years, Adams tried hundred of cases and dealt with every legal issue of the period: contracts, torts, commercial law, property, domestic relations, administrative law, town government, conservation, religion, slavery, revenue law, and of course, criminal law. He tried cases on every level of the court system from the one-man courts run by justices of the peace, to the Supreme Judicial Court of Massachusetts, as well as the jury-less Vice Admiralty Courts run by the royal government. From petty disputes to landmark litigation, Adams was likely the busiest lawyer of the late colonial period in Massachusetts.[66]

[65] Adams, *Diary*, 3:293.
[66] Wroth, introduction to *Legal Papers*, 1:lix.

It is impossible to distill here Adams's entire legal career and look at all the issues and cases with which he dealt.[67] In a career as long and as varied as Adams's, there is simply no way to summarize his legal views or how he practiced. Nevertheless, it is still worth selecting a few cases that can demonstrate how he put his legal theories into practice, how he valued the law, and how he dealt with the interaction between law and politics in a society where the line between the two was blurry.[68]

Adams's dedication to the supremacy of law has been described; however, legal theory and legal practice is not necessarily the same thing when it comes down to maintaining political alliances. As the colonial crisis grew, as would be true throughout American history, the politics, not to mention the mobs, of the streets found their way into the courts. As John Phillip Reid explains, "The politics that divided competing parties was to a large extent a politics that turned on legal issues and was debated before legal institutions, and …the eighteenth-century legal theory that made some mobs – especially political mobs – quasilegal" only complicated matters.[69]

Two lesser-known cases, *Gill v. Mein* (1768) and *King v. Stewart* (1774) are useful in illuminating the politics and conflicts of the era as well as Adams's views on the intersection of politics and law. These cases are also useful because they put Adams's most famous case, his defense of the soldiers involved with the inaccurately named Boston Massacre in 1770. His participation with one of the most momentous events of the Revolutionary crisis can only be properly viewed when it is taken out of the realm of mythology and placed into the larger context of the times. Adams's involvement with the Boston Massacre trials has been criticized and

[67] For information on the many other cases with which Adams dealt, see Wroth, *Legal Papers*, 3 vols.
[68] John Phillip Reid, "A Lawyer Acquitted: John Adams and the Boston Massacre Trials," *American Journal of Legal History* 18 (1974): 190.
[69] Reid, "A Lawyer Acquitted," 190, 192.

eulogized, the object of crass cynicism and deferential praise.[70] Neither, however, are necessary when those trials are seen as part of Adams's career as a whole. Throughout his career, as evidenced by the cases described, Adams put his legal theory into practice, maintaining a wholehearted commitment to the law that disregarded politics, factions, and personal gain.

Part I: Boston in Revolution: *Gill v. Mein* and *King v. Stewart*

Historian Hiller B. Zobel aptly remarked in the introduction to *The Boston Massacre*, "This is not the place to undertake an analysis of the causes of the American Revolution, nor even a descriptive list of the events which underlay those causes."[71] The same is true of the present study. The familiar story of the growing rupture between Great Britain and the North American colonies has been well documented.[72] Nevertheless, it is still necessary to put the cases in which Adams participated during this period into the larger context. In particular, it is necessary to understand the use of mob action to affect political change. While some colonists protested British Parliamentary policies through learned pamphlets and petitions, "some Americans expressed their opposition to the revenue acts not through legal niceties but through direct action, by pulling down houses and threatening the lives of stampmasters."[73]

It is worthy of note here that "mobs" and "mobbing" had a variety of functions and statuses in the colonial system. This is evident from the various charges that could be brought against a mob depending on its actions and its purpose. Pauline Maier explains,

---

[70] Russell Bourne, *Cradle of Violence: How Boston's Waterfront Mobs Ignited the American Revolution* (Hoboken, New Jersey: John Wiley & Sons, Inc., 2006) is a good example of the former, Hugh P. Williamson, "John Adams, Counsellor of Courage," *American Bar Association Journal* 54 (February 1968): 148-151 is one of the latter.
[71] Hiller B. Zobel, *The Boston Massacre* (New York: W.W. Norton & Company, Inc., 1970), 4.
[72] For good (and brief) overviews of the coming of the American Revolution see Gordon Wood, *The American Revolution* (New York: Modern Library, 2002) and Edward Countryman, *The American Revolution* (New York: Hill and Wang, 2003).
[73] Robert J. Taylor, "John Adams: Legalist as Revolutionist," *Massachusetts Historical Society Proceedings* 89 (1977): 55-71.

> The English common law prohibited riot, defined as an uprising of three or more persons who perfomed what Blackstone called an 'unlawful act of violence" for a private purpose…. And if the purpose of the uprising was public rather than private – tearing down whorehouses, for example, or destroying all enclosures rather than just those personally affecting the insurgents – the offense became treason, since it constituted a usurpation of the King's function.[74]

There is no doubt, that in an age before mass democracy, mobbing was a grudgingly accepted part of the political landscape. Without effective legal methods for airing grievances, the lower classes used mobbing as a political tool, and had done so throughout the century leading up to the American Revolution. There was in some instances even a quasi-extra-legal quality to many of these mobs, and their actions were not always merely on the fringes of society, even if the direct participants were.

Russell Bourne's *Cradle of Violence: How Boston's Waterfront Mobs Ignited the American Revolution* argues for a central place for the Boston mobs in the coming of the Revolution. He contends that it was "their spontaneous uprisings and planned maneuvers [that] steered America toward enormous change, even toward the awful risk of revolution." Rather than being the unwitting pawns of the educated elite, these sailors, dockworkers, fishermen, and smugglers consciously adopted the language of liberty to strike a blow for their own causes.[75]

Boston's first significant mob uprising took place on April 18, 1689, in order to overthrow Governor Edmund Andros who angered both the elite and the working class as he undercut the power of the Puritan clergy and enforced the Navigation Acts on seamen. The mob, armed and angry, stormed Boston, took Andros prisoner by force, and locked him up in the fort's prison as they prepared to ship him back to England.

---

[74] Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776* (New York: Alfred A. Knopf, 1972), 19.
[75] Bourne, *Cradle of Violence*, x.

Throughout the eighteenth century periodic acts of mob violence affected Boston, therefore, when the colonial crisis broke out in the mid 1760s, there was already a history of using mob action for political purposes. Of particular importance were the Pope's Day celebrations that fell each November 5. Traditionally, this day pitted a North End parade against a South End parade, as each side proclaimed its disdain for the Pope by burning him in effigy. These annual riots "provided a chance for them [the lower classes] to make a declarative statement about their undismissable presence – to assert themselves as a public force that demanded attention" according to Bourne.[76]

With the passage of the Stamp Act, mobbing began to increase dramatically, most notably, of course, with the attack on the stamp collector Andrew Oliver. Not all of these mob actions however, were for strictly political reasons. Some mobs, cloaking themselves in the day's political rhetoric, calling themselves "sons of liberty" or members of a "political club," used their mob's actions to destroy pertinent papers and notes in the homes they ransacked "afford[ing] a rough kind of debtor's relief."[77] Regardless of the mobs intentions, however, there was a widespread understanding in 1765 and 1766 that mobs could and did affect political ends. With the courts in disarray due to the Stamp Act, their potency and esteem lost, "a willingness…to summon up violence" became part of Boston's political landscape.[78]

Not all of this violence, however, was physical. Indeed, a great deal of the battling in the years leading up to the Revolutionary War took place, not in the streets, but at the printing presses. Instead of clubs, newspaper writers and pamphleteers took up their pens in support of their cause. Adams described the newspaper printers as "hot, indiscreet Men, and they are under

[76] Bourne, *Cradle of Violence*, chapter 2; 92.
[77] Zobel, *Massacre*, 36.
[78] Zobel, *Massacre*, 47.

the Influence of others as hot, rash and injudicious as themselves."[79] While the vast majority of writers and printers were supporters of the patriot cause backed by the anonymous submissions of Samuel Adams, Joseph Warren, and others, Tory printers did exist. John Mein of the *Boston Chronicle* was the principal Tory printer in Boston. "Mein sought controversy the way John Hancock sought adulation or Bernard financial security," notes historian Hiller B. Zobel. "Because he combined physical and moral courage with Tory leanings, his penchant for combat found a ready outlet in Boston."[80]

One of the first issues of the *Boston Chronicle* in late 1767 set the tone for Mein's newspaper as he ran a scathing attack on William Pitt the Elder, the Earl of Chatham, and Former Prime Minister of Great Britain, under a London dateline. The patriots of Boston saw Pitt as a hero and an ally and Mein's attack on him amounted to an indirect attack on the Sons of Liberty and the patriot cause.

Almost a month later, an anonymous response to Mein's piece appeared in the *Boston Gazette*, a patriot newspaper printed by partners Benjamin Edes and John Gill. This response piece attacked Mein and ultimately accused him of supporting the Jacobites, a group that wanted the restoration of the Stuart monarchs and denied the legitimacy of the Glorious Revolution of 1688, a severe charge against any freedom-loving Englishman. The writer, under the name "Americus," railed against Mein and his printing partner Fleeming:

> They have made Choice of, or printed under Guise of being taken from the London Papers, the most infamous and reproachful Invectives, that ever was invented against the worst of Traitors to their King and County, and who are these that are thus censur'd? … Patriots and Friends and Deliverers of America from Oppression…. Could the Sons of America be ingrateful, or countenance the greatest Falsities, rais'd only to prejudice their

[79] Adams to Abigail Adams, July 4, 1774, *Family Correspondence*, 1:123.
[80] Zobel, *Massacre*, 67. For more on Mein's experience in Boston see, John E. Alden, "John Mein: Scourge of Patriots," *Publications of The Colonial Society of Massachusetts* 34 (1942): 571-599.

> best Friends and Benefactors – God forbid! Let that Dishonor stain with the blackest Infamy the Jacobite Party.[81]

Mein did not take kindly to the accusation, and the war of words that began in the newspaper moved to the streets when Mein confronted the *Gazette*'s printers in their office, demanding the name of the man who had slandered him. According to Benjamin Edes in the version of events he related in a later issue of the *Gazette*, Mein came by their office before five the same afternoon the piece ran, demanding that Edes tell him who the author was. He threatened that if Edes did not reveal the writer's name, Mein would look upon Edes and Gill as the writers and "the affair shall be decided in three minutes," a not-so-veiled threat of physical retaliation upon the printers. Edes responded to him, "Mr. Mein, above all persons in the world, I should not have thought a Printer would have ask'd such an impertinent, improper question; and told him that we never divulg'd authors." Edes did agree to think it over however, and suggested that Mein return the next morning to obtain their final answer.

Mein returned to their office at the appointed time, and unsurprisingly, Edes still refused to give up the author's name but did ask that Mein clarify what he meant when he said he would settle the affair in three minutes. Mein allegedly responded, "If I would take my hat, and take a walk with him to the southward, he would let me know." [82] Edes declined this offer and Mein departed. A letter, in Mein's handwriting, found among Governor Francis Bernard's papers, provides the rest of the story. Mein's version of events coincides with Edes's: "The abusive piece in Edes & Gill against me…obliged me to call on the Printers, and on their refusal to name the

[81] "Messieurs Edes & Gill," *Boston Gazette and Country Journal*, 18 January 1768, 1 [newspaper online]; available from America's Historical Newspapers, 1690 – 1876 [hereafter America's Newspapers] at http://infoweb.newsbank.com, accessed 11 March 2008.
[82] "From the Massachusetts-Gazette of Thursday Last," *Boston Gazette and Country Journal*, 25 January 1768, 2 [newspaper online]; available from America's Newspapers, accessed 17 January 2008.

Authors to ask them one after another to take a short Walk; and on their declining to cane the first of them I mett."[83]

Unfortunately for Gill, Mein met him first that evening. Gill sued Mein, asking for £200 in damages, and was represented by Adams in the first trial at the Suffolk Inferior Court in April of 1768. Gill was victorious but was awarded only £130. Both Gill and Mein appealed the ruling and the trial was heard the following spring in the Suffolk Superior Court, this time with James Otis, who, ironically, Mein suspected to be the author of the piece attacking him, joining Adams in attempting to gain full restitution for Gill.

Adams's minutes of the second trial indicate that he opened for the plaintiff, although he did not record his remarks, followed by Benjamin Kent for the defense. Kent's arguments suggest that Mein did not deny the assault as much as he attempted to make it seem justified, by arguing that Edes and Gill provoked him by printing that article which attacked him. It appears from Adams's notes that Kent argued that accusing Mein of being part of the Jacobite Party amounted to a "Kick upon the A-se,"[84] making Mein's violent response reasonable. It was also a moot point to attempt to deny the assault, although Mein's official plea traversed or denied the assault, since Mein had already been convicted of it in a criminal hearing in 1768 and was fined forty shillings.

Gill's witnesses then testified. Since the assault itself was not actually in question their testimony mostly dealt with the issue of provocation. Benjamin Edes, Gill's partner, testified that there had been no arrangement between the two printers "agreeing not to abuse one Another, nor to mention one Another." He also commented that everything he had printed about the matter

[83] Reprinted in Wroth, *Legal Papers*, 1:154-155, note 11.
[84] Wroth, *Legal Papers*, 1:154.

was true. The other witness, Anthony Oliver, reiterated that Mein had never requested that he not be mentioned in the *Gazette*.

Mein did not present any witnesses and so his other attorney, Robert Auchmuty, closed for the defense. Again, the question for Auchmuty was not whether Mein had attacked Gill, but how much Gill actually deserved to receive in compensation. The thrust of Auchmuty's argument lay in the point that "the Passions are sometimes, excused by Law." Auchmuty defended Mein's belief that if the printers refuse to name the author of the piece then they may reasonably be held accountable as the authors. Auchmuty found it "uncandid and uncivil, not to tell the Author." The attacks against Mein were so egregious, so profoundly personal, that his passionate reaction was only to be expected, especially since more insults continued to be published after the initial incident. An article signed by "Populus" attacked Mein, "The People in this Province, and this Town in particular, must for the foregoing Reasons, be justified in their general Disapprobation of, and Disgust to Mr. Mein, for his late *Spaniard-like Attempt* on Mr. Gill, and in him, upon the Freedom of the Press."[85] "A Man must be made of Oakum," Auchmuty declared, "not to feel Cutting, and tearing Characters."[86]

James Otis made his closing statement for the plaintiff. Otis reminded the jury that that a "crime of passion" did not apply in this case. "Observations [show] a cool deliberate Action. No sudden Heat, or Ruffle of Passion. Went once and twice to the office, and took an Opportunity afterwards to beat [Gill]." He also made it clear that the words printed about Mein in the *Gazette* did not amount to libel and that it was Mein's actions that not only caused physical harm to Gill, but were also destroying freedom of the press by making it harder for printers to go about their business. To push the point further, Otis took the example of John Green and Joseph Russell who

[85] "Messieurs Edes & Gill," *Boston Gazette and Country Journal*, 1 February 1768, 2 [newspaper online]; available from America's Newspapers, accessed 17 January 2008, emphasis added.
T[86] Wroth, *Legal Papers*, 1:155-156.

printed the *Boston Post-Boy*, another pro-Administration paper, but who did not experience any problems with the public and "go on in [a] pe[a]cable quiet, harmless, dovelike, inoffensive Manner."[87] Despite the work of the very capable Adams and Otis, however, Gill's damages were actually reduced to £75 along with the costs of his defense.

In 1769, Mein was still raising the ire of local patriots as he printed articles that undermined the non-importation agreement signed by Boston merchants. He was outspoken in his critique of non-importation and exposed those merchants who were claiming to go along with the boycott but were secretly continuing to import and making a lot of money in the process. Historian Russell Bourne explains, "Reasonable people in Boston and abroad paid attention to his protests against mob action and the resulting dictatorship by the unelected. For that outspokenness, as well as for his attacks on patriot leaders, Mein had to be 'catechized.'"[88] The patriot mob was more than willing to teach Mein the proper lesson, a lesson that led to Mein fleeing Boston in fear of his life. The mob would have its way, by any means necessary, and Mein was only one of many victims of their wrath.

Very early in the morning of Thursday, March 20, 1766, an armed mob, purporting to be "Suns of liburty," broke into the house and store of Richard King in Scarborough in the province of Maine, then part of Massachusetts. The mob, of perhaps more than thirty people according to the account published in *The Boston News-Letter and New-England Chronicle*, carrying axes and clubs, smashed the windows and destroyed a good deal of King's furniture. In addition to

[87] Wroth, *Legal Papers*,1:156.
[88] Bourne, *Cradle of Violence*, 144.

terrorizing King, their main objective was to burn a good number of the papers he had in his desk that pertained to debts owed to him. Once the mob had satisfied themselves in the destruction of King's property, "Then retreating, they gathered together round a small Elm which they most preposterously stiled the Tree of Liberty; having destroyed most of the Evidences and Securities for Debts which he had against them and others." The mob's actions were particularly distressing considering that asleep in the house along with King were his pregnant wife, and five children, including eleven-year-old future Federalist politician Rufus King.

The day following the break-in, King found a note posted on his gate:

> In Consideration what a number of the Suns of liburty have Shun a mordrit resment for the repeated abus which they have reseved for many yers past Do herby hartily Signyfy to the Said Riched. King that in Cas the Said riched or any Other parson Within the Couty should us greet or menthen or be insterimental of any Warants or Summen's to be Sarvd on any Pasen or Pasens he ma Depend onit that he not onley will have houses and barnes burnt and Consumed but him Self Cut in Peses and burnt to ASHES we also think it best for him to Submit to Provadences, and behave beter for the futer and think him Self well youseed.[89]

The members of the mob were true to their word. King, undaunted, pressed ahead with legal action to recoup his losses over the next few months, he continued to be harassed. One of King's tenants, John Fitts, also received a threatening letter, demanding that he vacate the premises or risk the mob's wrath. In May of 1766, the house Fitts was renting was set on fire and a large barn King owned was burned down. A year later, *The Boston News-Letter* was still reporting mob actions against King and his property. "'The rioter's party still continue their injurious treatment of Mr. Richard King of this place, acording to their threatening letters sent to him soon after the riot… a dwelling house of his, which they had greatly damag'd the summer past, but since

[89] "Boston, March 27," *Boston News-Letter and New-England Chronicle*, 27 March 1766, 3 [newspaper online]; available from America's Newspapers, accessed 17 January 2008.

refitted, was on Monday night last again attack'd by them, and is now almost render'd irreparable.'"[90]

John Adams's legal papers editors Wroth and Zobel note two major reasons why the mob targeted Richard King in particular. First, as evidenced by their targeting of his papers, many of those who participated in the riot were King's customers who were in debt to him, and in destroying the notes against them, hoped to avoid having to repay him. Second, King's loyalist leanings, his support for the royal government's new tax acts, along with his prominent position in the town, led many of the townspeople to believe that the Crown was making him a Stamp Act collector.[91]

King pushed ahead for legal action against those who had attacked him in spite of the the threats. At the beginning of 1768, King petitioned the General Court for relief, recounting the rioters' activity. "Unsuccessful in his efforts to obtain either vengeance or recompense," King turned to the courts with a civil action against nine of the rioters, namely "*John Stewart* Yeoman Jonathan Andrews Blacksmith, Amos Andrews Yeoman *Timothy Stewart Yeoman*, *Samuel Stewart* Yeoman, and Jonathan Andrews junr. Blacksmith…and also Jonathan Wingate Silas Burbank and Benjamin Carl."[92] King asked the Superior Court for relief, "Wherefore Your Remonstrant Humbly Supplicates Your Honours to take his Case under Consideration, and that Your Honours would be pleased to Take such Imediate measuers as may Tend to reduce his Distroyers to reason and open the way for his redress." Ultimately, the court saw fit to award King £200 of the £2000 for which he called. Neither the plaintiff nor the defendants were satisfied with this verdict and both sides drew up a writ of review, the defendants trying to

[90] "Scarborough, March 4, 1767," *Boston-News Letter and New-England Chronicle*, 26 March 1767, 2 [newspaper online]; available from America's Newspapers, accessed 17 January 2008.
[91] Wroth, *Legal Papers*, 1:106.
[92] Wroth, *Legal Papers*, 1:106, 114.

reverse the judgment against them and King looking for full damages. It was at this stage of the litigation that John Adams became involved in the case, becoming the attorney for King drawing up the writ of review. In the trial *de novo,* King dismissed his suit against Wingate, Burbank, and Carl, so they could serve as witnesses for him.

Adams took detailed minutes of the trial, which provide a good glimpse into the legal world of the late colonial period in Massachusetts. Adams's co-counsel, Theophilus Bradbury, a Harvard graduate who commonly practiced in Falmouth, made some opening remarks, then Silas Burbank, who was one of those against whom King dropped the charges, testified on behalf of King. Burbank testified that the defendants, members of the Stewart and Andrews families, had approached him "about making Sir Richard a Visit" and that they "thought he deserved a good Whipping and to have his Ears cutt of, because he had treated him ill and others." Burbank described the damage done to King's property, but also commented that neither Amos nor Jonathan Andrews had suggested the destruction of King's property, but sought only to attack King himself. Jonathan Wingate, another of those who had the charges against him dropped, testified next that, "Amos Andross came in and talk'd about the Riots in the Prov[ince] and said he thought it would be a very good Thing to make Mr. King a visit and to mob him and that he ought to be mobbed."[93]

Ten other witnesses described either the damage done to King's property, or the comments about the riot made by the rioters. These witnesses at times gave conflicting views about the mood of the participants. Some were enthusiastic at first and later regretted it; others were hesitant from the start and still others thought their actions completely justified. One witness testified that he had spoken to a man who had not participated in the riot but said, "If there was ever another he would be in it. For it was justifiable in the sight of God and Man. The

[93] Wroth, *Legal Papers*, 1:129, 130.

Common Law could not take hold of a Mob. If [a] man was injured and could not get his Remedy at common law, he might take it himself." Another testified that Jonathan Andrews said, "the best Way for K[ing] to find who had mobb'd him is to go to his Books and see who he has wrong'd."[94]

As Pauline Maier notes, "Repeatedly, insurgents defended the urgent interests of their communities when lawful authorities failed to act."[95] With the variable nature of eighteenth century law enforcement, and with the Stamp Act crisis providing some amount of political cover, it is not surprising to hear that the members of the mob did genuinely believe their actions to be justifiable.

In his opening statement for the defense, James Sullivan began by declaring his distaste for mobs. First, he argued that since the plaintiff's witnesses agreed that Amos Andrews had not participated in the riot due to a "Belly Ache," he could not be held responsible because conspiracy to commit a riot was not a crime. Second, he noted that the "Prov[ince] [is] in an Uproar, on Account of Stampd Papers." This brief sentence is all Adams notes, but one can imagine that Sullivan may have played to the jury's patriot sympathies by painting King as a loyalist. John Sullivan followed his brother James, chiefly repeating the argument that conspiracy and accessory to a riot were not crimes. The older Sullivan brother also attacked the integrity of the witnesses who had originally been defendants but against whom the charges had been dismissed.[96]

The witnesses for the defense gave testimony to discredit King's witnesses, to give other alibis for the defendants, or to suggest, by comments King made to them, that the damage was not nearly so great as he and his witnesses had claimed. One witness, John Gookin, testified,

[94] Wroth, *Legal Papers*, 1:132, 131.
[95] Maier, *Resistance to Revolution*, 4.
[96] Wroth, *Legal Papers*, 1:131-135.

"King told me, as I understood him, he lost nothing of any Value. His Books, Bonds and Notes were all safe…. Principal Part of the Papers they took were waste Papers and Memorandums."

In his closing statements, defense attorney John Sullivan reiterated that because the actions taken by the mob that night were not what the Andrews men had originally advised – since they had wanted King himself whipped – they could not be held accountable for the damage. Another cryptic note in Adams's minutes says that Sullivan mentioned, "People was divided about the Destruction of the Tea." Sullivan's use of the current political situation may have been intended to remind the jury that the mob participants were patriots, or that the current turmoil made it impossible to hold individuals responsible for political acts. With that, the defense closed their case and Adams rose to give what must have been a stirring closing argument.[97]

Adams's closing can be divided into four main themes: the physical damage done to King's property and reputation, the terror and pain the mob brought upon King's family, the terrible consequences the night could have had, and the importance of upholding the law in all circumstances.

Adams began with the laundry list of damages King suffered at the hands of the rioters, the destruction of his house, his furniture, his papers, and his credit in trade by the destruction of the notes. He then turned to the more figurative damage done to King's reputation and honor. The mob's actions made it appear as if King had done something gravely wrong even if he had not because people would assume "that where there is so much Smoke there is always some fire." Adams noted, "Such popular Hurricanes always scatter Dust upon a Man. They make the World suspect very often where there is no just Cause or Ground for Jealousy…. In short I know

[97] Wroth, *Legal Papers*, 1:135-136.

of nothing that happens in society which is such a Nursery of Scandal, and Calumny, of obloquy and Defamation as a Mob."

Not only did the rioters damage his reputation, but they also deprived him of his honor and pride as an Englishman, whose "dwelling House is his castle." Adams brilliantly turned the tables on the rioters, making them and their actions the affront to the "rights of Englishmen," and not any actions taken by the suspected Tory, King:

> Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull Tranquillity which the Laws have thus secured to him in his own House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave – like a miserable Turk, or Tartar.[98]

Adams employed here one of the favorite images of the Revolutionary period – the colonists as slaves to the actions of the British Parliament. While the rioters may have felt that way towards King in his keeping their notes against them, Adams makes it clear that it was not King, but the rioters, who acted as tyrants and who violated an Englishman's sacred liberty.

Adams then moved away from the injury done to King and turned to his family, his children, and his wife who were also terrorized by the mob's actions. Adams focused here on the psychological trauma the children faced with such a "sudden Terror." Adams noted, "There is a natural Courage in Children, which once abated, and Habits of Fear fixed in their Minds, they never can be cured." The actions of the mob that night, Adams was arguing, could permanently affect King's children, giving them over to fits of terror. King's "amiable wife" was similarly affected, and to make it worse, Adams pointed out that she was pregnant at the time. Adams went straight for the jury's heartstrings as he asked, "What had the innocent Babe in her Womb

[98] Wroth, *Legal Papers*, 1:136-137.

done to this abandon'd Mob, that its Existence should be put at Hazard, by their Fury, Malice, Madness and Revenge."[99]

The next part of Adams's striking closing argument painted a picture to the jury of "The Cruelty the Terror, the Horror of the whole Dismal scene." Adams's words cannot adequately be described or summarized, but an extended quotation here will be illustrative of his flair for the dramatic and show that his passion for his client and job as an attorney were as great as anything that one might see in an episode of *Law & Order*.

> Be pleased then to imagine yourselves each one for himself – in bed with his pregnant Wife, in the dead of Midnight, five Children also asleep, and all the servants. 3 Children in the same Chamber, two above. The Doors and Windows all barrd, bolted and locked – all asleep, suspecting nothing, harbouring no Malice, Envy or Revenge in your own Bosoms nor dreaming of any in your Neighbors. In the Darkness, the stillness the silence of Midnight.
> All of a sudden, in an Instant, in a twinkling of an Eye, an armed Banditti of Felons, Thieves, Robbers, and Burglars, rush upon the House. Like Savages from the Wilderness, or like Legions from the Blackness of Darkness, they yell and Houl, they dash in all the Windows and enter. Enterd they Roar, they stamp, they Yell, they houl, they cutt break tear and burn all before them.
> Do you see a tender and affectionate Husband, an amiable deserving Wife near her Time, 3 young children, all in one chamber, awakened all at once, ignorant what was the Cause, terrifyd, inquisitive to know it. The Husband attempting to run down the stairs, his Wife, laying hold of his Arm, to stay him and sinking fainting dying away in his Arms. The Children crying and clinging round their Parents – *father will they kill me* – father save me! The other Children and servants in other Parts of the House, joining in the Cries of Distress.[100]

One can almost imagine the building drama around Adams's words until they reach their climax in "*father will they kill me*." But as was characteristic of Adams, no matter his flights of rhetoric, he returned to what mattered most to him, and what should matter most to the jury – the law. He concluded that King would have been within his rights of self-defense to kill all those who broke into his home and his humanity and mercy should be rewarded with full compensation. Adams reminded the jury of their duty to uphold the law regardless of who King

[99] Worth, *Legal Papers*, 1:138.
[100] Wroth, *Legal Papers*, 1:139.

was or the fact that King was a creditor, while many of the jury members were, like the members of the mob, debtors. He observed, "It would be a stain of this excellent and noble Tryal by Jury, if it should not afford Justice in such Cases. There are Levellers, but they disgrace Juries."[101]

Despite the testimony of King's witnesses, and Adams's exceedingly eloquent closing statement, the jury only awarded King an additional £60, and furthermore, ordered him to pay Jonathan Andrews £40, reversing the former verdict against him. Despite the outcome however, what comes through is Adams's abhorrence for the patriot mobs that destroyed order and violated the rights of those they targeted. Adams's opinion on the mob has already been discussed above,[102] but it is worth noting here some nuances in Adams's thought on mobs that had developed as the revolutionary crisis continued. The day before Adams wrote to Abigail decrying that "these Tarrings and Featherings, these breaking open Houses by rude and insolent Rabbles, in Resentment for private Wrongs or in pursuance of private Prejudices and Passions, must be discountenanced," he sent another letter that seems to send the opposite message. In that letter, Adams, while not exactly defending mob action, says that the actions by the British were just as bad. He wrote to Abigail,

> Shall we submit to Parliamentary Taxation to avoid Mobs? Will not Parliamentary Taxation if established, occasion Vices, Crimes and Follies, infinitely more numerous, dangerous, and fatal to the Community [than mob action]? ... Is not the Killing of a Child by R[ichardson] and the slaughter of half a Dozen Citizens by a Party of Soldiers, as bad as pulling down a House, or drowning a Cargo of Tea? Even if both should be allowed to be unlawfull.[103]

It is important to note here the distinction Adams is drawing. He does not deviate from his view that mob action is unlawful, however, in the context of the times, and the unlawful actions of the British, the mobs do serve some purpose in defending the rights of the colonists.

---

[101] Wroth, *Legal Papers*, 1:140.
[102] See Chapter 1, Page 28.
[103] Adams to Abigail Adams, July 6, 1774, in *Family Correspondence*, 1:131, 126.

Additionally, when looking at the two letters, one recognizes that Adams also sees a difference between the mobs protesting for legitimate reasons such as the violation of their fundamental rights, and those that attack private citizens for private reasons, such as those who attacked King because they owed him money.[104] While Adams supported resistance against the British and their policies, he expected order to be maintained and law to be upheld. Pauline Maier notes, "Even to farsighted contemporaries like John Adams, the weakness of authority was an inescapable aspect of the social order that necessarily conditioned the way rulers could act."[105] The distinction that he recognized in various types of mob action can be particularly highlighted in how he defended the soldiers in Boston and how he characterized that mob.

Gill v. Mein and *King v. Stewart* are important because they put Adams's defense of the British soldiers after the Boston Massacre into a fuller context. Adams's concern was the law above all else and, four years after the Boston Massacre trials, Adams's defense of Richard King only shows that Adams's commitment to the law and his aversion to patriot mobs was consistent, even as it became apparent that revolution and independence were inevitable. As Adams Papers Editor Robert J. Taylor points out, "John Adams did not like violence as a substitute for law" but violence there would be as the tension between Great Britain and her North American colonies grew, leading to a crisis that shook the city of Boston to its core.

Part II: John Adams and the Boston Massacre

British troops arrived in Boston to "conserve the peace" in1768. Boston subjects, suffering economically from Parliament's new revenue policies, were increasingly restless and

[104] John R. Howe, *The Changing Political Thought of John Adams* (Princeton: Princeton University Press, 1966), 13.
[105] Maier, *Resistance to Revolution,* 18.

angry. A lone sentry on duty, harassed by a crowd of young boys and men, called for the support of his fellow soldiers. Scuffles, shouts of "Fire!", and eventually, a shot. When the smoke cleared, three were dead and two more lay dying. The legend of the "Boston Massacre" was born.

There is little more that history can know concretely about the events that took place on March 5, 1770 on King Street in Boston. It has become so wrapped up in the mythology of this nation's founding that excavating the truth from under that cloak of fallen patriots is nearly impossible, since every source that comes down to us is in some way clearly biased.

While the complete details of what took place on that fateful night are beyond the scope of this study, some brief context is helpful in understanding the trials that followed. Less than two weeks before "the bloody massacre," on February 22, Ebenezer Richardson, an informer for the customs office, shot into a riotous crowd protesting and threatening him in front of his house. This shot killed eleven-year old Christopher Seider. Boston patriots were outraged, demanding that Richardson be punished. Meanwhile, the funeral served to unite the patriot cause and rouse even further animosity towards the supporters of British policy. Adams said of Seider's funeral "a vast Number of Boys walked before the Coffin, a vast Number of Women and Men after it, and a number of Carriages. My Eyes never beheld such a funeral. The Procession extended further than can be well imagined."[106] Richardson was eventually tried and convicted – although the King pardoned him – but the events that were to come just a week later were to force the Richardson affair into obscurity.

As the sentry, Private Hugh White, stood watch outside of the Customs house, a small crowd approached and began harassing him. White called for backup and seven more soldiers and their Captain, Thomas Preston, arrived on the scene, as a larger and larger crowd pushed in

[106] Adams, *Diary*, 1:349-350 (and the note).

around them. The mob threw sticks, snowballs, ice, and oyster shells as well as insults at the British soldiers, daring them to fire on the crowd. The soldiers loaded their muskets and fixed bayonets as tensions rose. At some point, someone in the crowd struck Private Hugh Montgomery with a club and Montgomery's musket fell from his hands. He got up, recovered his musket, and fired into the crowd. This shot sparked the rest of the soldiers to fire, and when the cloud of gunpowder settled, three were dead and two more were to die from their wounds. The British troops were removed from the town and the crowd dispersed, while the local authorities took the eight soldiers and Captain Preston into custody and indicted them for murder.

"After this basic scenario, some of us learn a sequel," notes historian Hiller Zobel. "It might be called The Birth of American Justice, or (because every eighteenth-century play needs a subtitle) Even the Guilty Deserve a Fair Trial…. We are not sure of the details, but we know that purely from a sense of duty, at great risk to his own popularity, lawyer Adams took the impossible case, and somehow convinced an implacably hostile jury to acquit his clients."[107] The history of these trials, particularly Adams's involvement in them, has been even more distorted than the true history of March 5. John Adams's defense of the British captain and soldiers accused of murder is seen as either as the political maneuverings by Samuel Adams to give a show of a fair trial that would find the British officer and soldiers guilty or as the self-sacrificing actions of a righteous man concerned with nothing but justice and law.

Both interpretations continue to prevail largely because studies of Adams's legal career outside of this case are largely nonexistent. Removed from the context of his fifteen-year legal career, his defense of the British soldiers seems more remarkable than it really is. While there is no doubt that these cases were special – Adams himself said that the two trials were "the most

[107] Zobel, *Massacre*, 3-4.

exhausting and fatiguing Causes I ever tried,"[108] – the trials' infamy has tended to obscure rather than illume the truth of the matter.

Adams's motives in taking on this case are, like anyone's motives, complex. There were many reasons for and against accepting. Some things are clear. He certainly did not do it for the money, despite the claim that his "conservative merchant clients" persuaded him to take the case.[109] It is also clear that Adams did not take this case because his cousin Samuel and other Boston radicals bribed him with a seat in the Massachusetts General Court, as historian John Ferling contends.[110] While Adams was elected to the legislature in June 1770 after Captain Preston and his men had retained him for their defense, the election took place before the trials were held. There is no doubt that while Samuel Adams knew of Adams's position as defense attorney for the soldiers, and in fact, may have encouraged, or even directed it, he certainly did not expect John Adams to tank the case. As Zobel points out, "No evidence suggests it; what we know of John Adams's character flatly refutes it."[111] The radicals simply did not think that any jury in Massachusetts would acquit these men coming as it did right on the heels of the Richardson affair. Additionally, it is not even clear that the Boston radicals completely approved of the mob's actions that night themselves. In fact, they were actually working to curb violence in Boston, even if they immediately saw the Massacre's political value.[112] For these reasons, the radicals could confidently seat Adams in the legislature.

On the other hand, Adams's memory of the event in his *Autobiography* is less than accurate as well. Written in the first years of the nineteenth century, after Adams's public career

---

[108] Adams, *Diary*, 3:293.
[109] Bourne, *Cradle of Violence*, ix. Bourne fails to cite any source to support this contention. See the account of defense expenses in Wroth, *Legal Papers*, 3:32n. While Adams may have made more on this case than was typical, that is more reflective of the lengthy and complicated nature of this case than it is of bribery.
[110] Ferling, *John Adams: A Life*, 67-68.
[111] Zobel, *Massacre*, 221.
[112] Pauline Maier, "Revolutionary Violence and the Relevance of History," *The Journal of Interdisciplinary History* 2 (Summer 1971): 123-125.

had come to a bitter end, his self-congratulatory and self-pitying tone are evident. In Adams's account, no other lawyer would take the case without his lead. Adams claims he told James Forrest, a loyalist who had come to his office on behalf of Preston,

> Council ought to be the very last thing than an accused Person should want in a free Country. That the Bar ought in my opinion to be independent and impartial at all Times And in every Circumstance. And that Persons whose Lives were at Stake ought to have the Council they preferred: But…He must therefore expect from me no Art or Address, No Sophistry or Prevarication in such a Cause; nor anything more than Fact, Evidence and Law would justify…. That [Preston's innocence] must be ascertained by his Tryal, and if he thinks he cannot have a fair Tryal of that Issue without my Assistance, without hesitation he shall have it.[113]

While is quite unlikely that this particular exchange ever took place, Adams no doubt probably did feel some duty to take the case. As Adams biographer Page Smith astutely notes, "John Adams knew himself well enough to make a careful audit of his motives and to recognize that, like all motives, they were not entirely pure."[114] His commitment to the law and his ambivalent feelings toward the mobs of Boston were a potent combination.

This was not the first time Adams defended the loyalist side in court. The previous year he defended a Crown customs officer in his seizure of a vessel,[115] and it was not the last as shown by his defense of Richard King. There is also no doubt that Adams was an ambitious man and a case this well known could potentially be a boon, despite the potential for short term harm. Finally, there is reason to believe that Adams took it to appear impartial in a political world in flux. He had turned down a lucrative position as the Crown's advocate-general two years before the Massacre. Adams recalled in his *Autobiography*, "I had always rejected these proposals, on Account of the unsettled State of the Country, and my Scruples about laying myself under any

[113] Adams, *Diary*, 3:293.
[114] Page Smith, *John Adams*, 122.
[115] *Butler v. The* Union, Wroth, *Legal Papers*, 2:218-222.

restraints, or Obligations of Gratitude to the Government for any of their favours."[116] Adams's choice here, as well as in 1770, served the two-fold purpose of one, making him appear neutral until it was clear which side history was on, and two, making it clear that he was an independent man and would be the pawn of neither side.

Whatever his reasons, Adams, along with Josiah Quincy, as well as Robert Auchmuty who joined in Preston's case, agreed to defend Captain Thomas Preston, and eight soldiers, William Wemms, James Hartegan, William McCauley, Hugh White, Matthew Killroy, William Warren, John Carrol, and Hugh Montgomery in the murders of Crispus Attucks, Patrick Carr, Samuel Maverick, Samuel Gray, and James Caldwell. Chief Justice Thomas Hutchinson postponed the trials until the fall term of the Superior Court in an attempt to allow town fury to cool before the soldiers were tried.

In the meantime, Adams, along with Quincy, faced a legal dilemma not easily solved. The easiest way to defend Preston, who it was agreed, did not actually fire on the civilians, would be to simply controvert the fact that he had given the order to fire. On the other hand, the easiest way to defend the soldiers would be to claim that they were simply following orders. Acquitting one would almost certainly lead to the conviction of the other. That the trials were severed did not the make the situation any easier.[117] Ultimately, in Preston's case, the defense argued he had not given the order to fire and in the soldiers' trial, Adams and his co-counsel focused on the issues of provocation and justification, rather than on the order.

The two trials, *Rex v. Preston* and *Rex v. Wemms*, were unique for their times, not only because of the particular political climate and the occupation of those on trial, but also simply because each trial took so many days to try. In an age when nearly all litigation was heard and

[116] Adams, *Diary*, 3:288.
[117] Wroth, *Legal Papers*, 3:16-17.

decided in less than a day, that Preston's case took a week and the soldiers' case eight days is remarkable.[118] With that many days of witnesses and evidence to sift through, this is not the place to go through the minutes of the trial; the details have been well addressed in other works.[119] Rather, the following will focus on Adams's defense strategy and his views at the conclusion of the trial.

The biggest question facing Adams was the extent to which Boston and the mobs it spawned ought to be put on trial to prove justification. This was a delicate subject. On the one hand, by showing that Boston crowds had a habit of using violence, it would be easier to argue that the soldiers had every reason to fear for their lives when the mob surrounded them that night if only because of what had happened in the past. Adams's co-counsel, Josiah Quincy, was particularly interested in pursuing this line of defense. On the other hand, such a tactic could serve only to alienate further the town and its radical leaders, which could have a number of negative consequences for Preston and his men, as well as, potentially, their lawyers.

Adams and Quincy's partnership nearly ended over this issue. According to letters Hutchinson wrote at the time and William Gordon's history of the event, Adams and Quincy fought over this during both trials with Adams threatening to quit the case if evidence condemning Boston and the mobs continued to be presented for the defense. This led to the clients scrambling to find a new attorney as they lost faith in Adams until he convinced them of his position and his faithfulness to their cause.[120] Quincy bowed to the wishes of the senior council, albeit reluctantly, and evidence condemning the town of Boston's actions in protesting parliamentary policy was held back as much as possible. It is worth noting that in the lead up to

[118] Wroth, *Legal Papers*, 3:21.
[119] Zobel's *Boston Massacre* and the entire third volume of Adams's Legal Papers lay out the details and documents of the two trials.
[120] Wroth, *Legal Papers*, 3:26-27.

Rex v. Wemms, Adams did argue that evidence about prior provocation by people in Boston ought to be allowed if the prosecution was going to present evidence on the prior provocative acts of the soldiers. The stipulation was agreed to by the chief prosecutor Robert Treat Paine, however, when it came time to use that tactic, Adams stopped Quincy from going any further after the first day of presenting the defense's case, where Quincy used the agreement to its full extent. Adams had heard enough of that sort of testimony, but the loyalists had not been "betrayed" as they feared.[121]

While Adams's decision against pushing the issue of mobbing in Boston has been widely criticized, there was good reason not to push the issue. First, the tactic could just as easily backfire as it could help acquit Preston and his men. No jury of Boston men, and especially any of its more radical members, would take kindly to hearing testimony that not only attacked the particular mob the night of March 5, but also condemned the whole city. Adams believed that by attacking the Radicals, they might retaliate by threatening the jury into convicting or by simply lynching Preston and the other soldiers after the trials.[122] Additionally as John Reid suggests, such a tactic had the potential to backfire, because the prosecution could use it to show that Preston had intentionally and recklessly led his men into a dangerous situation for no reason, still making him responsible for his soldiers actions that night.[123]

This conflict was not particular to Adams. "The dilemma faced by an Adams wondering how vigorously to prosecute the Boston mob in order to justify the homicide committed by his clients is the same issue confronting the appointed attorney for, let us say, a foreign spy apprehended perhaps by counterintelligence methods whose effectiveness and value to national

[121] Zobel, *Massacre*, 279-282.
[122] Zobel, *Massacre*, 260.
[123] Reid, "A Lawyer Acquitted," 203.

security wholly ignore the suspect's constitutional rights."[124] Everything that is known about Adams's character and personality discounts the idea that he acted out of any sort of prearranged agreement with his cousin or in an attempt to placate the radicals in the town. In fact, Thomas Hutchinson himself, who did not care much for Adams's defense regardless of its outcome, at the conclusion of the trials remarked, "'The Counsel for the prisoners have done more to hurt the general cause in which they have been warmly engaged than they ever intended.'" Regardless of his reason, Adams would not have taken this course of action if he believed it would be detrimental to his client. A note in the margin of Adams's copy of William Gordon's *History of the Rise of the Independence of the United States of America*, which recounts Adams's falling out with Quincy over trial strategy, reads, "'Adams' Motive is not here perceived. His Clients lives were hazarded by Quincy's too youthful ardor.'"[125] Adams simply did not believe that such testimony was necessary; the town's previous bad behavior was irrelevant to the case at hand, potentially dangerous, and in the end, Adams won acquittals without it.

If Adams was reluctant to prosecute the town of Boston in his defense of Preston and his men, he was not at all reluctant to condemn the mob that formed on the night of March 5. "The plain English is gentlemen," Adams exclaimed in his closing, "most probably a motley rabble of saucy boys, negroes, and molattoes, Irish teagues and out landish jack tarrs. – And why we should scruple to call such a set of people a mob, I can't conceive, unless the name is too respectable for them." He also took the occasion to make it clear that the leaders of that mob were not native Bostonians: "And it is in this manner, this town has been often treated, a *Carr* from *Ireland*, and an *Attucks* from *Framingham*, happening to be here, shall sally out upon their

[124] Wroth, *Legal Papers*, 3:27.
[125] Quoted in Zobel, *Massacre*, 302; Wroth, *Legal Papers*, 3:26.

thoughtless enterprises,…, and then there are not wanting, persons to ascribe all their doings to the good people of the town."[126]

While Russell Bourne reduces Adams's legal strategy to painting the victims as no accounts whose deaths could be overlooked,[127] Adams's main goal was to prove justification. A great deal of the testimony given dealt with the actions of the mob and their behavior toward the soldiers. In Captain Preston's trial, the major bit of evidence came from Richard Palmes who was standing next to Preston, speaking with him, when the shooting began. Palmes explained, "The instant he spoke I saw something resembling Snow or Ice strike the Grenadier on the Captains right hand being the only one then at his right. He instantly stepd one foot back and fired the first Gun. I had then my hand on the Captains shoulder. After the Gun went off I heard the word fire…. I dont know who gave the word fire."[128] Since Preston's defense essentially relied on proving a negative, namely that he had not given the order to fire, this was very convincing testimony. Palmes's testimony also established provocation, when he described the "Snow or Ice" thrown at the soldier.

Many other witnesses also testified to the behavior of the mob, of particular note is the testimony of Newton Prince, a free black living in Boston. "The people were calling them Lobsters," Prince testified, "daring 'em to fire saying damn you why don't you fire…I heard no Orders given to fire, only the people in general called fire." Two slaves of Boston citizens, apparently without objection, also gave similar testimony. These witnesses repeated their testimony in support of the soldiers during that trial. Another witness for the defense, James Woodall, stated, "I saw one Soldier knock'd down. His Gun fell from him. I saw a great many sticks and pieces of sticks and Ice thrown at the Soldiers. The Soldier who was knock'd down

[126] Wroth, *Legal Papers*, 3:266, 269.
[127] Bourne, *Cradle of Violence*, ix and 167.
[128] Wroth, *Legal Papers*, 3:66.

took up his Gun and fired directly." [129] There was no doubt, after the evidence was taken together, that the soldiers had been harassed and likely even provoked by the crowd. As Zobel points out, however, there was "that pervasive problem, the absolute biblical injunction that '*whosoever* sheddeth man's blood' must die."[130] Five men were dead – someone had to be held responsible. This idea could not be dispelled through testimony; it was a challenge that Adams would have to overcome in his closing argument to the jury.

Adams's closing statements in both *Preston* and *Wemms* were triumphant examples of Adams's legal and oratorical skills and, as Zobel points out, it "has never received its true measure of fame." Even Thomas Hutchinson, who was never completely convinced of Adams's loyalty to his clients, remarked that Adams "'closed extremely well & with great fidelity to his Clients.'"[131] Since Adams used the same legal sources in both cases, the following discussion focuses on his closing in *Rex v. Wemms* since no full account of his remakrs in *Rex v. Preston* has survived.

Adams began by recognizing that, while his cause was unpopular, it was just. "'If I can but be the instrument of preserving one life,'" Adams quoted from Marquis Beccaria's *Essay on Crimes and Punishment*, "'his blessing and tears of transport, shall be a sufficient consolation to me, for the contempt of all mankind.'" Preserving the innocent was more important, he continued, than condemning the guilty and that it was better that all go free, even if some were guilty, than a single innocent man be punished. Zobel remarks that this was a risky strategy because it in effect conceded the guilt of some of his clients, rather than showing that the Crown

[129] Wroth, *Legal Papers*, 3:77.
[130] Zobel, *Massacre*, 288.
[131] Zobel, *Massacre*, 289, Quoted at Ibid., 293.

had not proved its case, perhaps even more detrimental because it was one of the first things the jury heard.[132]

Adams did not tarry with this topic long, however, and quickly moved on to a lengthy discussion of legal support for his main argument, that these were justifiable homicides. Adams explained justifiable homicide as a product of self-love, "interwoven in the heart of every individual." He cited one legal source after another – Francis Bacon, Matthew Hale, William Blackstone, William Hawkins, and many others, to define and explain his meaning of justifiable self-defense. For the strategy to work however, the jury had to believe that the mob harassed the soldiers with the intention of committing a felony, either robbery or murder. Adams explained to the jury, "The question is, are you satisfied, the people made the attack in order to kill the soldiers? If you are satisfied that the people, who ever they were, made that assault, with a design to kill or maim the soldiers, this was such an assault, as will justify the soldiers killing in their own defence." Adams also clarified that not only the person who is directly threatened, but also anyone who sees the felony attempt by the attacker may help to subdue the attacker by force.[133] Adams used here the testimony of those who heard members of the crowd yell "Kill them! Kill them!" to prove their homicidal intent.

Adams confronted directly the issue of innocent blood slain. Adams admits that some of those who fell may well have been innocent of any wrongdoing, namely Maverick and Caldwell. He recognizes, "Many people may think, that as he [Maverick], and perhaps another [Caldwell] was innocent, therefore innocent blood having been shed, that must be expiated by the death of somebody or other." Adams again goes to his legal authorities to show that if in lawfully defending themselves, the soldiers accidentally killed another, the justness of the intended act

[132] Zobel, *Massacre*, 289; Wroth, *Legal Papers*, 3:242.
[133] Wroth, *Legal Papers*, 3:245-247.

transferred. Adams explained, "If two men are together, and attack me, and I have a right to kill them, I strike at them, and by mistake, strike a third and kill him, as I had a right to kill the first, my killing the other, will be excusable, as it happened by accident."[134]

Adams then turned to the issue of murder without "malice aforethought" or manslaughter. The purpose of this discussion was to remind the jury that even if they did not believe that the mob went there that night with the intention of killing the soldiers, their mere provocation, by their language and behavior, mitigated the soldiers' actions, making them if criminal, manslaughter, and not murder. Adams picked apart the evidence given at trial, reinforcing the defense's evidence and tearing down the Crown's. Again, the thrust of this argument was to show that the soldiers had every reason to fear for their lives because even though they had guns and the crowd did not, the clubs carried by some were deadly weapons enough. [135]

As Adams's closing in *King v. Stewart* demonstrated, Adams knew how to paint a picture for a jury, and did so here:

> When the multitude was shouting and huzzaing, and threatening life, the bells all ringing, the mob whistle screaming and rending like an Indian yell, the people from all quarters throwing every species of rubbish they could pick up in the street, and some who were quite on the other side of the street throwing clubs at the whole party, *Montgomery* in particular, smote with a club and knocked down, and as soon as he could rise and take up his firelock, another club from a far struck his breast or shoulder, what could he do? Do you expect he should behave like a Stoick Philosopher lost in Apathy? Patient as *Epictatus* while his master was breaking his leggs with a cudgel? It is impossible you should find him guilty of murder. You must suppose him divested of all human passions, if you don't think him at the least provoked, thrown off his guard, and into the *furor brevis*, by such treatment as this.[136]

Adams's closing was not however, all dry legal citations mixed in with rhetorical flourishes, it was also an opportunity for Adams to make a political statement. Perhaps this was

[134] Wroth, *Legal Papers*, 3:255, 256.
[135] Wroth, *Legal Papers*, 3:260, 262.
[136] Wroth, *Legal Papers*, 3:268.

his way of letting the Boston patriots know where he stood, even if he did stand as defense council for the British soldiers. It is also true that Adams rarely missed an opportunity to make his opinions known. Adams's political rhetoric grew as his closing went on. He began with a powerful, but innocuous comparison. Just as the English who killed Frenchmen on the Plains of Abraham, which was a major battle site in the North American theater of the French and Indian War, were justified in doing so, so too, were his clients' actions justified. Even as he castigated the mob, he would not say that they had no right to be armed as they were. Adams noted, "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not their offence, that distinction is material and must be attended to." Adams commented soon after that, mobs are a natural part of the political world to which humans belong but, "the virtue and wisdom of the administration, may generally be measured by the peace and order, that are seen among the people." Adams also reminded the jury of the Corbet case, concluded in 1769, in which a sailor killed an officer attempting to impress him.[137] He explained that just as a man defending himself from impressment may justifiably use force, the soldiers that used force that night were equally justified. Finally, in his most open attack on British policies, just as he described the mob as a "rabble of saucy boys," Adams both defended Boston and took what Zobel describes as a "neat hit at the administration."

> The sun is not about to stand still or go out, nor the rivers to dry up because there was a mob in *Boston* on the 5th of *March* that attacked a party of soldiers. – Such things are not new in the world, nor in the British dominions, though they are comparatively, rareties and novelties in this town. *Carr* a native of *Ireland* had often been concerned in such attacks, and indeed, from the nature of things, soldiers quartered in a populous town, will always occasion two mobs, where they prevent one. – They are wretched conservators of the peace![138]

[137] *Rex v. Corbet* (1769), Wroth, *Legal Papers*, 2:276-335.
[138] Wroth, *Legal Papers*, 3:244, 248, 250, 253, 266; Zobel, *Massacre*, 292.

Hutchinson was not pleased with the way Adams made political use of his closing, describing his tactics as "'great indecencies…respecting the conduct of Administration in sending Troops here.'"[139] Adams had done his best to clear the town of Boston of responsibility for the Massacre while still making it clear that the mob had gone too far. Adams's closing stands as a good example of his distinction between "public" and "private" mobs. The mob that gathered on the night of March 5 was entirely a public mob; in fact, Adams later claimed that the Boston radicals had orchestrated it[140] so while Adams could not allow the soldiers, the unwitting pawns of British policy, to suffer, he also could not entirely condemn the actions of the mob that night. It was a natural outgrowth of British policy in Adams's eyes and he wanted that to be understood.

Just as he would in *King v. Stewart*, however, regardless of whatever tactics Adams might take in a closing statement, be they rhetorical or political, he always concluded with an appeal to the law above all else. Adams had asked the jury early on in his closing, "If we cannot speak the law as it is, where is our liberty?"[141] He concluded in a similar bent, asking the jurors to forget their prejudices and remember only the law. Quoting Algernon Sidney's *Discourses Concerning Government*, Adams reminded the jurors of the law's essential nature.

> "'The law, (says [Sidney],) no passion can disturb. 'Tis void of desire and fear, lust and anger. 'Tis *mens sine affectu*; written reason; retaining some measure of the divine perfection. It does not enjoin that which pleases a weak, frail man, but without regard to persons, commands that which is good, and punishes evil in all, whether rich, or poor, high or low, - 'Tis deaf, inexorable, inflexible.' On the one hand it is inexorable to the cries and lamentations of the prisoners; on the other it is deaf, deaf as an adder to the clamours of the populace."[142]

And with that, Adams work on the most important trials of his career came to an end.

---

[139] Quoted in Zobel, *Massacre*, 290.
[140] Adams, *Diary*, 3:292.
[141] Wroth, *Legal Papers*, 3:252.
[142] Wroth, *Legal Papers*, 3:270.

At the conclusion of these exhausting trials, Adams and his co-counsel won acquittals for all the men except for soldiers Montgomery and Kilroy, who were convicted of manslaughter instead of murder and were branded on the thumb. While the radicals decried the miscarriage of justice in the newspapers, the town was relatively quiet, and no mob of angry Bostonians attempted to take "justice" into their own hands. Adams, meanwhile, was justifiably proud of his work if a bit nervous about the state of his career and standing in the town. While there is no doubt that Adams did endure some hostility from the Boston citizenry for his defense of the soldiers, it did not do any significant or long term damage to his legal career. In December of 1770, Adams wrote to a fellow attorney, "Being generally Speaking a son of Liberty, notwithstanding the Cloud of Toryism that has lately, you know, passed over me, a Number of Gentlemen have retain[d] me, with you."[143]

At the third anniversary of the Massacre, after listening to the annual oration, which Adams had been asked to give, an offer he declined, Adams remarked in his diary, "I have reason to remember that fatal Night. The Part I took in Defence of Captn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country."[144] This comment would not be remarkable were it found in Adams's autobiography, although it is commonly attributed to that period in his life.[145] There is no doubt that Adams was a proud man, a fact of which he was well aware, but that he saw the

[143] Adams to John Lowell, December 15, 1770, *Papers*, 1:249.
[144] Adams, March 5, 1773, *Diary* 2:79.
[145] McCullough, *John Adams*, 68.

significance of that case as history was still unfolding, and before the bitterness after decades of struggle took hold, is a significant insight into his psyche. He went on to say, “Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.”

The law had been upheld, and Adams had helped see to that. It was theory in practice. As he did in so many cases before and after, Adams attended faithfully to his clients and did his best to assure that they received just outcomes. Patriot or Tory, radical or loyalist did not matter. He did not have to agree with the Crown’s policies to do his duty to his clients, and he certainly did not agree. He stood up for what he believed, even using his closing statement as a forum for his political views. He did not stop there however. It was to paper and ink, that Adams most often looked to express his strongly held opinions and when he was not trying cases, he was using his legal training to support his political views.

 [146]

[146] Adams as a young attorney, *John Adams*, by Benjamin Blyth, circa 1766, http://masshist.org/database/onview.cfm?queryID=44, accessed 14 April 2008.

Chapter 3
"'*An empire of laws, and not of men*'": John Adams, Political Theorist

"The wretched condition of this country, however, for ten or fifteen years past, has frequently reminded me of their principles and reasonings. They will convince any candid mind, that there is no good government but what is republican. That the only valuable part of the British constitution is so; because the very definition of a republic is 'an empire of laws, and not of men.' That, as a republic is the best of governments, so that particular arrangement of the powers of society, or, in other words that form of government which is best contrived to secure an impartial and exact execution of the laws is the best of republics."[147]

Government, its bases, forms, and purpose, was a topic that consumed Adams as much as the law did. Government determined, communicated, and enforced the law. For this reason, it was essential that the government be properly constructed to serve the society best.

Historian Stephen G. Kurtz in an article on Adams's political thought comments, "If the habits of mind which were formed by what was a remarkably rigorous training in the law are not forgotten, an approach to Adams's political theory opens to us which promises to explain its function, … and its relationship to his public career."[148]

From the very beginning of Adams's career as a lawyer, he was considering the links between law and government. In the summer of 1759, Adams reflected in his diary, "Law is human reason. It governs all the Inhabitants of the Earth; the political and civil Laws of each

[147] Adams, *Thoughts on Government*, reprinted in *Revolutionary Writings*, 288.
[148] Stephen G. Kurtz, "The Political Science of John Adams, A Guide to His Statecraft," *William & Mary Quarterly* 25 (October 1968): 612.

Nation should be only the particular Cases, in which human reason is applied." He immediately followed that entry with "Let me attend to the Principle of Government. The Laws of Britain, should be adapted to the Principle of the british Government, to the Climate of Britain, to the Soil, to its situation, as an Island, and its Extent, to the manner of living of the Natives as Merchants, Manufacturers and Husbandmen, to the Religion of the Inhabitants."[149]

What is striking about this passage is how he moves from talking about "the Principle of Government" to "the laws" and then back to "the principle of the british Government." This indicates a view of law that is intimately tied to government, its forms, and its execution. This is even more apparent when one considers that Jeremiah Gridley had told him in their memorable first interview that "the Law of Nations…ought to be the Study of our whole Lives." It was inevitable then, that Adams very quickly preoccupied himself with writing about government and law. Beginning with *A Dissertation on the Canon and the Feudal Law* in 1765, Adams unceasingly took up his pen to discuss issues of law and government and to share his views with the learned elite of his time. As the colonial crisis became a movement for independence, Adams turned his thoughts toward constitutionalism and building permanent, stable, and republican governments in the states.

Adams took his experiences as a lawyer into account as he reflected on law, government, and constitutionalism. His education, his training, and his legal practice combined to affect, in a unique way, his views on government and the relationship between law and constitutions, views that he would put into practice when it was time.

Part I: "It was independence itself": Constitutionalism in the 1770s

[149] Adams, Summer 1759, *Diary*, 1:117.

The American Revolution was much more than the war. Certainly, the war had to be won for anything else to be accomplished, but winning the war was, if not easy, the straightforward part. What the colonies would look like once they became "free and independent states" was far less clear. There were a multitude of competing voices, all with their own visions and ideas of what these new governments would look like. Laid out in pamphlets, newspaper articles, and letters to friends, "Nothing – not the creation of [a] confederacy, not the Continental Congress, not the war, not the French alliance – in the years surrounding the Declaration of Independence engaged the interests of Americans more than the framing of these separate governments."[150]

Since hostilities had begun in spring 1775, the governments of the colonies were operating in an unofficial and ultimately illegal manner as the Crown had suspended their charters. Without legally authorized governments, many government functions, including the courts were operating haphazardly if at all. This was a concern for many patriots and for Adams in particular, who valued legal order. When Adams joined the Continental Congress in early May of 1775, he went with a number of goals. The Continental Congress "ought to recommend to the People of all the States to institute Governments for themselves, under their own Authority, and that, without Loss of Time," arrest Crown officials, and declare the colonies "free, Sovereign and independent States."[151] While the committees of safety and provincial congresses governing the colonies after royal authority broke down did keep order for the most part, it was generally recognized that these were but temporary solutions. As historian Willi Paul Adams points out, "For over a century in most colonies it had been firmly established in the public mind what 'real' government looked like: it consisted of a governor, a governor's council, an assembly, and a

[150] Wood, *Creation of the American Republic*, 128.
[151] Adams, *Diary*, 3:315.

provincial judiciary…. The political leaders of the colonists wanted effective government in their own interest, but they expected it to have a traditional structure."[152]

New Hampshire, Massachusetts, South Carolina, and Virginia petitioned the Continental Congress requesting authorization to create permanent new governments. Moderates who still sought a peaceful resolution with Great Britain were reluctant to permit this because they knew that it would be as direct an assault on the Crown's authority as firing on the King's soldiers. Many, such as the New Yorker James Duane, also recognized that allowing the colonies to form new governments would move them along the road to independence. As 1776 wore on however, it became clear that congresses and committees, without a legal backing could no longer govern the colonies. "For the congresses," notes Jackson Turner Main, "devoid of legal basis, in reality exercised no power except that which the people permitted."[153] While anarchy did not reign in the colonies in the years of committees and congresses, without legitimate power, those bodies could not take unpopular actions such as levying certain taxes or drafting troops. Adams, along with Richard Henry Lee of Virginia and other radical Whigs, pushed for a resolution authorizing the colonies to form new and independent governments.

On May 10, 1776, the Continental Congress acquiesced to the pressure from the colonies and radical Whigs. The resolution stated, "That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in

[152] Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2001), 41-42.
[153] Jackson Turner Main, *The Sovereign States, 1775-1783* (New York: New Viewpoints, 1973), 141.

particular, and America in general."[154] This was followed five days later by the passage of a preamble to be added to the resolution. The preamble removed any ambiguity of intent that may have existed in the resolution alone:

> It is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted, under the authority of the people of the colonies, for the preservation of internal peace, virtue, and good order, as well as for the defence of their lives, liberties, and properties, against the hostile invasions and cruel depredations of their enemies.[155]

The passage of this preamble "was independence itself," as Adams recalled. While Americans traditionally celebrate the passage of the Declaration of Independence on July 4, 1776 as the moment of independence, the May 15 resolution was truly the "decisive Event."[156] Two days later, Adams wrote to his wife, "G[reat] B[ritain] has at last driven America, to the last Step, a compleat Seperation from her, a total Independence, not only of her Parliament but of her Crown, for such is the Amount of the Resolve of the 15th."[157] While the Declaration of Independence in July was a signal to the world that allowed the newly formed United States to negotiate treaties of alliance with foreign countries as a sovereign nation, the May 10 and 15 resolutions were a signal to the people of the states. The ability to govern oneself, to choose a form of government, and to participate in the process through representatives, was true freedom and true independence. As Samuel Adams realized, once the new states created their own governments, they would "'feel their Independence.'"[158]

With this great object obtained, the work now went to the states. While the Continental Congress had authorized the states to create new governments, it had given no guidelines, and no

---

[154] May 10, 1776, *Journals of the Continental Congress*, reprinted in *Founding America: Documents from the Revolution to the Bill of Rights*, ed. Jack N. Rakove (New York: Barnes & Noble Classics, 2006), 87.
[155] May 15, 1776, *Journals of the Continental Congress*, reprinted in *Founding America*, 87-88.
[156] Adams, *Diary*, 3:386, 383.
[157] Adams to Abigail Adams, May 17, 1776 in *Family Correspondence*, 1:410.
[158] Wood, *Creation of the American Republic*, 130. Pauline Maier argues that the Declaration of Independence was really meant for the states as well. Maier, *American Scripture: Making the Declaration of Independence* (New York: Vintage Books, 1997), 129-131.

specific frame to follow. In fact, the Congress "even refrained from using the term 'republican' and 'republicanism' to distinguish them from the colonial institutions."[159] It was up to the political leaders of the states to decide what their new governments would look like.

It is true, as Jackson Main points out, that "men can never start from scratch."[160] The legislatures and, later on, the conventions, that sat to write constitutions entered the process with preconceptions, prejudices, opinions, and a history political, social, and ideological. Yet Charles Warren's words still have weight. "So familiar are we today with the framework of our State Governments, with their Governors, their two-branch Legislatures and their independent Judiciary, that we unconsciously assume that it was inevitable and necessary that the American Colonies should adopt that form, when they revolted from Great Britain."[161] There were many different options and forms these new republican governments could take. Thomas Paine's *Common Sense* and John Adams's *Thoughts on Government* presented radically different ideas on how best to govern the states. Unicameral versus bicameral legislatures, executive councils or governors, elected or appointed judges, and many other issues were up for grabs in the states. The discussion that follows of the first constitutions of Virginia and Pennsylvania illustrates the different options open to and pursued by the colonies when given the opportunity to construct their own governments. Specifically, it addresses the way in which the constitution was constructed and the provisions that deal with the structure and role of the judiciary.

Virginia's provincial congress appointed a committee to draft a declaration of rights and a constitution on May 15, 1776, the same day the preamble to the May 10 resolution was being passed in the Continental Congress. The documents that came out of this committee contained a

[159] Adams, *The First American Constitutions*, 59.
[160] Jackson Turner Main, *The Sovereign States*, 143.
[161] Charles Warren, "John Adams and American Constitutions," *George Washington University* 107 (December 1926): 4.

number of standard provisions for early revolutionary constitutions. First, it neither came out of a special constitutional convention nor was the final draft presented to the people for ratification. It centralized power in the legislature while still calling for the separation of powers and an independent judiciary as Adams had suggested in his *Thoughts on Government*, a document that was widely read by Virginian statesmen, including George Mason, who drafted both the Declaration of Rights and the Constitution.[162] This early constitution did not include its declaration of rights within the frame of government; rather, it was presented to the legislature more than two weeks ahead of the constitution on June 12, 1776. The statement of rights included many of the expected articles: freedom of religion and the press were protected, as was the right to trial by jury and freedom from excessive bails, fines, and cruel and unusual punishments. Its provisions and style influenced many of the rights declarations that followed, particularly Pennsylvania.[163] The fifth article included a provision that is indicative of George Mason's familiarity with Adams's *Thoughts on Government*: "That the Legislative and Executive powers of the State should be separate and distinct from the Judicative."[164]

The constitution passed unanimously on June 29, and Patrick Henry was immediately elected governor by the legislature. After listing the grievances that the state of Virginia had against Great Britain prompting them to frame an independent government, the structure of the three-branch, bicameral government was outlined. The Constitution expanded on the separation of powers mentioned in the Declaration of Rights. "The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the Powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the Justices of the County Courts shall be eligible to either House of

[162] Adams, *Papers*, 4:70.
[163] Main, *Sovereign States*, 156.
[164] Virginia Declaration of Rights in *Founding America*, 89.

Assembly." Despite the fact that judges were to serve during good behavior, that they were allowed to serve in the legislature violated the principle of separation of powers whether or not the Virginia framers realized it. [165] This constitution marked a first, if imperfect, step towards establishing independent judiciary.

Adams was quite pleased with the proposed plan in Virginia. "Happy Virginia," he wrote to Patrick Henry in early June, "whose Constitution is to be framed by So masterly a Builder."[166] No doubt, the traces of his influence in the Virginia constitution biased him toward it to certain degree. He wrote to James Warren,

> [Patrick Henry] assures me, that the Constitution of Virginia, will be more like the Thoughts on Government. I believe, however, they will the Election of their Council, Septennial. Those of Representatives and Governor annual. But I am amazed to find an Inclination So prevalent throughout all the southern and middle Colonies to adopt Plans, So nearly resembling, that in the Thoughts on Government. I assure you, untill the Experiment was made, I had no adequate Conception of it.[167]

Although the Virginia Constitution had many flaws, given the lack of precedent for their actions, it was highly successful in Adams's opinion.

Pennsylvania took a much different approach towards government than did the rest of the colonies. Pennsylvania's Constitution, approved on September 28, 1776, took the popular, democratic rhetoric of the Revolution to its logical conclusion, establishing a unicameral government that made no pretence even toward a separation of powers, in fact there was no governor but instead a twelve man Council. Although the Pennsylvania Constitution did come out of a special convention convened solely for that purpose, the final draft was not submitted to the people for approval before it was established. All free taxpayers, regardless of property, twenty-one or above could vote for their representatives and important bills affecting the public

[165] Virginia Constitution in *Founding America*, 92; Main, *Sovereign States*, 158.
[166] Adams to Patrick Henry, June 3, 1776 in *Papers*, 4:234.
[167] Adams to James Warren, June 16, 1776 in *Papers*, 4:316.

would be printed in the newspaper before debates were held in the legislature so that the people could better instruct their representatives.

In terms of the judiciary, while Pennsylvania did not permit judges to hold any other office while they were sitting on the bench, their tenures were not for life, after being appointed by the president and council, but only for seven years, subject to early removal for misbehavior. Section 26 declared, "All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay: All their officers shall be paid in adequate but moderate compensation for their services."[168] The judiciary was not a major concern however for the Pennsylvania constitution makers. Instead, "the Pennsylvania constitution-makers were determined, at least 'for the present' (as the Constitution stated), to keep the executive authority in the hands of the people as closely as seemed practicable and thus to establish a government that was much a democracy, in the eighteenth-century sense of the term, as seemed feasible for a large state."[169]

Pennsylvania's Constitution was wholly unsatisfactory to Adams. Writing to Francis Dana in mid-August 1776, he lamented,

> I fear I was mistaken, when in my last to you, I foretold, that every Colony would have more than one Branch to its Legislature. The Convention of Pensilvania has voted for a single Assembly, such is the Force of Habit, and what Surprizes me not a little is, that the American Philosopher [i.e. Benjamin Franklin], should have So far accommodated himself to the Customs of his Countrymen as to be a zealous Advocate for it. No Country, ever will be long happy, or ever entirely Safe and free, which is thus governed. The Curse of a Jus vagum [i.e. fickle or aimless law], will be their Portion.[170]

There was no security in a unicameral legislature in Adams's view. Tyranny was just as likely with a body of men invested with all power as it was with a single man invested with all power. Adams would have the opportunity to improve personally upon these early developments when

[168] Pennsylvania Constitution in *Founding Documents*, 107.
[169] Wood, *Creation of the American Republic*, 137.
[170] Adams to Francis Dana, August 16, 1776, in *Papers*, 4:466.

he was asked to draft the Massachusetts Constitution, but before he had that opportunity, he took up his pen and committed his views on government to the world.

Part II: "My principles of government were always the same, founded in law": Adams on Law and Government

The Stamp Act, a tax which required a stamp be placed on all legal documents, permits, commercial contracts, newspapers, wills, pamphlets, and playing cards, produced a number of legal quandaries and problems throughout the colonies and particularly in Massachusetts where the mobs went the furthest to protest it. It was during this crisis that Adams first began to publish his thoughts on subjects relating to both law and government. The first of his published pieces, *A Dissertation on the Canon and the Feudal Law* did not immediately grow out of the political crisis, but rather from Sodalitas, a scholarly legal association of which he was a part.[171] The first fragmentary drafts of this work suggest that Adams, inspired by his discussion with his fellow members of the bar on issues of feudal law, decided to put some of his own thoughts to paper. It was only gradually, as he continued to work on the piece and as news of the Stamp Act reached the colonies, that the work took a more political bent and Adams turned to the wider audience provided by the *Boston Gazette*. As Daniel Coquillette points out, "It may have been terrible legal history, but it had a useful and coherent political thesis."[172] The tyranny of past orders instituted by the canon and feudal law, Adams argued, had fallen way to the liberty of New England, if only the citizens were brave enough and educated enough to defend it.

In Adams's view of history, the settling of North America was the climax of a new march of liberty begun by the Reformation, an event that signaled the beginning of the end for the

[171] Sodalitas is described in Chapter 1, Page 18.
[172] Coquillette, "Justinian in Braintree," in *Law in Colonial Massachusetts*, 406.

canon and feudal law. These legal systems had existed to subjugate the people by restricting their access to education as the leaders, the nobles, princes, and priests tried to monopolize power. As Adams saw it, the Puritans who settled in Massachusetts did not do so merely to escape religious persecution, but more importantly wanted to establish universal liberty. He resented those who described the Puritans as no more than religious fanatics as he defended them,

> Whatever imperfections may be justly ascribed to them, which, however, are as few as any mortals have discovered, their judgment in framing their policy was founded in wise, humane, and benevolent principles. It was founded in revelation and in reason too. It was consistent with the principles of the best and greatest and wisest legislators of antiquity…. They knew that government was a plain, simple, intelligible thing, founded in nature and reason, and quite comprehensible by common sense. They detested all the base services and servile dependencies of the feudal system. [173]

His statements about the nature of government are particularly noteworthy here because they echo his statements about law in his diary just six years before. "Law is human reason," Adams had written then, now he said that "government was…founded in…reason." Government, therefore, was founded in law.

The basic principle reappeared repeatedly in his *Dissertation.* For instance, in the third installment of the *Dissertation*, Adams described rulers as "no more than attorneys." The fourth installment, however, is the most striking. In order to prevent government from becoming tyrannical and to allow the people to exercise their popular power, Adams saw education as the key. The feudal and canon law existed only because they had kept knowledge from the people. This was what made the Stamp Act so insidious in Adams's eyes. It was part of "a design…to strip us in a great measure of the means of knowledge, by loading the press, the colleges, and even an almanack and a newspaper, with restraints and duties."

---

[173] Adams, *A Dissertation on the Canon and Feudal Law*, in *The Revolutionary Writings of John Adams*, ed. C. Bradley Thompson (Indianapolis: Liberty Fund, 2000), 24, 26.

Adams wanted more than just general education however. He wanted people to understand the nature and the history of their liberty. "Let every order and degree among the people rouse their attention and animate their resolution. Let them all become attentive to the grounds and principles of government, ecclesiastical and civil. Let us study the law of nature; search into the spirit of the British constitution; read the histories of ancient ages; [and] contemplate the great examples of Greece and Rome."[174] In other words, Adams wanted others to be educated as he was, and legal learning was an integral part of that learning. By removing the means of education, the British Parliament was directly attacking the source of liberty.

Lawyers had a particular call to protect the people's liberty in Adams's mind. He exhorted them,

> Let the bar proclaim, 'the laws, the rights, the generous plan of power' delivered down from remote antiquity, - inform the world of the mighty struggles and numberless sacrifices made by our ancestors in defence of freedom. Let it be known, that British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts, coequal with prerogative, and coeval with government; that many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed. Let them search for the foundations of British laws and government in the frame of human nature, in the constitution of the intellectual and moral world. There let us see that truth, liberty, justice, and benevolence, are its everlasting basis; and if these could be removed, the superstructure is overthrown of course.[175]

The bar, with its superior learning, was in a position to know, understand, and defend the "rights of Englishmen." Vigilance was necessary to ensure that these rights were defended before tyranny ruled over liberty-loving North America. Adams's vigilance led him to take up his pen again in January of 1766 to pen his three "Earl of Clarendon" letters in opposition to the Stamp Act.

---

[174] Adams, *Dissertation*, in *Revolutionary Writings*, 28, 34, 32.
[175] Adams, *Dissertation*, in *Revolutionary Writings*, 33.

These letters printed in early 1766 had Adams writing as the "Earl of Clarendon" responding to the articles penned by "William Pym." Both Clarendon and Pym were well-known statesmen of the English Civil War but Adams's choice of Clarendon is of particular interest. Adams biographer Page Smith explains, "The Earl of Clarendon, the great historian of the English Civil War and a leader in the events of that conflict, was a moderate, a man who fought hard to prevent the Revolution of 1640 from running to excess…. That Adams chose that pseudonym was an index of his determination to take a moderate line in the struggle with Great Britain."[176] Adams, without writing a single word, painted himself as a person who respected the law even as he opposed unjust policies. Each of the three Clarendon letters had a different theme. While the second did not have a legal topic, Adams instead defended American liberty and the right to rebel, the first and the third can be described as coming particularly from Adams's legal mind. In the first letter, Adams attacked the Vice Admiralty Courts as unconstitutional and analyzed the nature and ends of the British Constitution in the third.

Adams railed against the Admiralty Courts in the first Clarendon letter because they clearly violated the provision in the Magna Carta or Great Charter that provided for all questions of fact to be decided by a jury of the accused's peers. As a lawyer who had been practicing for eight years, Adams knew the power the judiciary had, and was fully aware of the need for some popular presence in its actions. Adams's legal training shone through in this section as he questioned Pym, "Give me leave, now, to ask you, Mr. Pym, what are the powers of the new courts of admiralty in America? Are the trials in the courts *per pares* or *per legem terrae*? Is there any grand jury there to find presentments or indictments? Is there any petit jury to try the fact, guilty or not? Is the trial *per legem terrae*, or by the institutes, digests, and codes and novels of the Roman law?" He went on to remind Pym that his "principles in government were always

[176] Smith, *John Adams*, 86.

the same, founded in *law*, liberty, justice, goodness, and truth."[177] Here again Adams worked the idea that law is the foundation of government, and noticeably not that government is the foundation of law, into his argument.

The third Clarendon letter has been described as "one of the most literary pieces that Adams ever wrote" and as a work that "rises to true eloquence,"[178] as it declared liberty as the end of all good government and of the British constitution in particular. Adams began the letter resentful that "Pym's" claim that the colonists did not understand the British constitution. As a man of extensive learning, Adams had to refute this claim. "Let me tell you," Adams retorted, "there is not ever a son of liberty among them who has not manifested a deeper knowledge…, than appears in your late writings; they know the true constitution and all the resources of liberty in it, as well as in the law of nature, which is one principal foundation of it."[179]

Adams systematically explored the nature of the British constitution by first attempting to ascertain what people mean by a "constitution" and this, Adams claimed, can be determined by looking at its end or purpose. For Adams, just as a human constitution leads to health and a clock's constitution leads to keeping time, a government's constitution ends in "the good of the whole community." As such, certain forms of government are better at achieving this end than others, just as certain diets are better than others at maintaining a person's constitution.

Adams described the British constitution as a limited monarchy, or one that brought monarchy, aristocracy, and democracy into balance. These three ranks were then divided into two "grand divisions" of power – executive and legislative. At this early stage, Adams had not yet fully developed his ideas of the judiciary as a separate division of power, and while he clearly still recognized its importance, he still viewed it as part of the executive. In fact, in Adams's

[177] Adams, "Clarendon," in *Revolutionary Writings*, 47 (emphasis added).
[178] Adams, "Clarendon" in *Revolutionary Writings*, 44; Adams, *Papers*, 1:157.
[179] Adams, "Clarendon" in *Revolutionary Writings*, 51.

view, the executive power *was* the judicial power and his entire discussion of the executive deals with the judiciary. On the legislative side, popular power was channeled through the election of representatives in the House of Commons, who were, again, no more than "attorneys to vote for them in the great council of the nation." On the executive side, popular power existed in the juries. Adams explained,

> The administration of justice has in it a mixture of popular government too. The judges answer to questions of fact as well as law; being few, they might be easily corrupted; being commonly rich and great, they might learn to despise the common people, and forget the feelings of humanity, and the subject's liberty and security would be lost. But by the British constitution, *ad quaestionem facti respondent juratores*, - the jurors answer to the question of fact. In this manner, the subject is guarded in the execution of the laws.[180]

Adams argued that if the popular power was tampered with in either of the branches, then the whole system was imperiled. "These two popular powers, therefore, are the heart and the lungs, the mainspring and the centre wheel, and without them the body must die, the watch must run down, the government must become arbitrary, and this our law books have settled to be the death of the laws and constitution."[181] The Stamp Act was leading to precisely that disaster. Its taxation policy violated the popular power in the legislative branch since the colonists had not elected "attorneys" to vote for them and it instituted juryless courts leaving them without security in the executive. Adams could not let this gross violation of the British constitution pass without commentary. He might not have liked the excesses to which the patriot mobs went during the crisis, just as the Earl of Clarendon had worked against the excesses of his own day, but Adams sympathized with their cause. If the British parliament continued along its current path, America would once again fall under a tyrannical law and the constitution would die.

[180] Adams, "Clarendon," in *Revolutionary Writings*, 55.
[181] Adams, "Clarendon," in *Revolutionary Writings*, 55.

By early 1773, the situation in Boston had changed a great deal. The only tax that remained in force was the one on tea, and Boston was relatively quiet despite the ongoing tension that led to a hyper-vigilance on the part of Boston patriots, looking for any new threat to their liberties. In the latter half of 1772, Governor Thomas Hutchinson announced that the Crown would now pay the salaries of the superior court judges, which were traditionally paid for by the Massachusetts General Court, from the customs revenue. The Boston patriots would not stand for this and formed committees to protest the new practice. At the Cambridge meeting, however, General William Brattle, who had formerly supported the patriot cause, opposed the protest and took his opposition to the press on the last day of 1772, calling out for one of the leading patriot lawyers, Otis, Adams, or Quincy, to debate him on the issue. The debate was not so much about who paid the judges' salaries, as much as it was about the nature of their tenure on the bench. Did the judges serve *durante bene placito*, during the King's pleasure, or *quamdiu bene se gesserint*, during good behavior, that is, for life? It was Brattle's opinion that under long-standing common law tradition, Massachusetts judges, like their English counterparts, served for life, assuming good behavior, and therefore, it was irrelevant who paid their salaries; their independence was already assured.

In seven essays printed over the next month and a half, Adams relentlessly decimated Brattle's argument. Using history and a battery of legal authorities, Adams demonstrated that there was no basis for the opinion that colonial judges held life tenures. First, in England itself, the principle of life tenure was not long held at all, but could only be traced back to the Act of Settlement in 1701. Second, it was generally understood that despite the developments in

England, colonial judges sat at the King's pleasure if only because colonial governors simply did not have the power to appoint for life.[182]

Adams cited Coke, Holt, and Hume, among others to show that royal prerogative to remove judges was legal. Adams, referring to an instance of King James II removing four judges, remarked, "There is not in history a more terrible example of judges perishing at the royal nod than this, nor a stronger evidence that the power and prerogative of removing judges at pleasure were allowed to be, by law, in the crown. It was loudly complained of as…an arbitrary exertion of prerogative; but it was allowed to be a legal prerogative still." Adams also cited Hume's mention of Hubert de Burgh who was made a chief justice of England for life. Hume noted that this appointment was unusual and Adams made sure his readers understood the implication. "If his being made chief justiciary for life was an 'unusual concession,' it could not be by the immemorial, uninterrupted usage and custom, which is the criterion of common law."[183] In the colonies, since the commissions, which served as proof of appointment, did not specify either "during good behavior" or "during pleasure," there was no reason to believe that the tenures were for life. Point after point, Adams made Brattle's argument appear not only groundless, but also ignorant. This was Adams's legal erudition at its highest – relentless, thorough, and clear.

More interesting than the debate itself,[184] are Adams's comments on the difference between legality and constitutionality. Adams seemed to maintain that an act could be technically legal even if it were unconstitutional.

> The British constitution is a fine, a nice, a delicate machine; and the perfection of it depends upon such complicated movements, that it is as easily disordered as the human body; and in order to act constitutionally, every one must do his duty. If the king should suffer no

[182] Thomas S. Martin, "John Adams v. William Brattle: A Non-Debate on Judicial Tenure," *Historical Journal of Massachusetts* 24 (Summer 1996): 206-207.
[183] Adams, "The Independence of the Judiciary," in *Revolutionary Writings*, 83, 91.
[184] Martin, "Adams v. Brattle," 224. Martin notes that in the end, it was no debate, Adams and Brattle were simply talking past each other.

> parliament to sit for twelve years, by reason of continual prorogations, this would be an unconstitutional exercise of prerogative. If the commons should grant no supplies for twelve years, this would be an unconstitutional exertion of their privilege. Yet the king has power legally to do one, and the commons to do the other. I therefore shall not contend with General Brattle what the governor and council can constitutionally do, about removing justices, nor what they can do in honor, integrity, conscience, or Christianity…and shall confine myself to the question, whether they can legally remove a judge. And it is with great reluctance that I frankly say, I have not been able hitherto to find sufficient reason to convince me that the governor and council have not, as the law now stands, power to remove a judge."[185]

It may appear strange that Adams would argue this way, but it made perfect sense when dealing with the English constitution, which by its very nature did not have written rules. Tradition and common law were the only guides, and they were imperfect ones at that. Adams recognized that the common law did not provide a legitimate backing to support the idea that colonial judges had life tenures, and without legally binding commissions that declared it to be so, a colonial judge who was removed would have no legal ground to contest the action. If he had not before, this debate must certainly have led to Adams thinking about the importance of clear constitutional frameworks, which would make unconstitutional actions illegal as well.

"The culmination of Adams' revolutionary thought" came in the first months of 1775 in the form of his "Novanglus" letters. Boston, suffering under the harsh penalties of the Coercive Acts of 1774, had been declared to be in outright rebellion against the mother country. Earlier than most, Adams saw the writing on the wall. Some form of independence was the only solution. Before the events of Lexington and Concord, however, Adams was still willing to allow that independence to exist within the British Empire. Responding to the published letters of "Massachusettensis," the pen name of Daniel Leonard, who argued for the complete subordination of the colonies to Britain, Adams, just as he had with Brattle, worked to tear down Leonard's argument piece by piece and demonstrate "a legal justification for a Commonwealth

[185] Adams, "The Independence of the Judiciary," in *Revolutionary Writings*, 101-102.

status for American colonies under a constitutional monarch." The twelve "Novanglus" letters' main discussion of the relationship between the colonies and Great Britain is beyond the scope of this study. How Adams constructed his argument, however, is significant because it is a particularly Adams-like approach.

The "Novanglus" letters contain "an astonishing display of legal scholarship." As legal historian Daniel Coquillette points out, Adams did not write his "Novanglus" letters in a manner to persuade the public with his rhetorical arts as Leonard did, instead, "Adams was juristically and intellectually superior, and, in fact, in a class by himself."[186] When Adams confronted Brattle in his letters on the independence of the judiciary, legal authorities were the necessary backbone of any argument, but this did not have to be the case in the "Novanglus" letters, especially since Leonard did not confront Adams on the field of legal authorities. This makes Adams's reliance on the law even more striking and speaks to his legal mindset even more clearly. In fact, "the fascination of a legal argument so lays hold of him that he forgets Massachusettensis for long stretches, pausing occasionally to apologize for the thickets he leads his readers through."[187] It was through legal arguments that Adams justified the patriot position. Adams was unique in this regard, according to Robert J. Taylor. He took no position concretely until he knew that the authorities supported his view. Adams's views as expressed in "Novanglus" were not completely original, but they were better researched, better supported, and better expressed.[188]

Adams believed there could be lawful resistance to authority, a position that was certainly not new to him, as he had been dealing with the consequences of patriot resistance for a decade. Here, he cited both law and history to support his view that resistance was no crime:

---

[186] Adams, *Papers*, 2:219; Coquillette, "Justinian in Braintree," in *Law in Colonial Massachusetts*, 408-410.
[187] Adams, *Papers*, 2:222.
[188] Taylor, "Legalist as Revolutionist," 57, 66.

> We are told [by Massachusettensis]: 'It is a universal truth, that he that would excite a rebellion is at heart as great a tyrant as ever wielded the iron rod of oppression.' Be it so. We are not exciting a rebellion. Opposition, nay, open, avowed resistance by arms, against usurpation and lawless violence, is not rebellion by the law of God or the land. Resistance to lawful authority makes rebellion. Hampden, Russell, Sidney, Somers, Holt, Tillotson, Burnet, Hoadly, &c. were no tyrants nor rebels, although some of them were in arms, and the others undoubtedly excited resistance against the tories.

Adams adamantly insisted he was not looking for independence but he did conceive of the British relationship with the colonies in a unique way. His views were well supported by legal authorities. Another example of Adams using the law to make his case appears in the eighth "Novanglus" letter when Adams made the case that the colonies' status was not comprehended by the common law. [189] He denied that the British Government was an empire at all, but rather, "It is a limited monarchy" he commented in the seventh letter. "If Aristotle, Livy, and Harrington knew what a republic was, the British constitution is much more like a republic than an empire. They define a republic to be a *government of laws, and not of men*. If this definition be just, the British constitution is nothing more nor less than a republic, in which the king is first magistrate."[190] This marked the first public usage of what was to become a famous phrase, that republics were "governments of law, and not of men." Here he argued that despite the hereditary aspects of the British government, it still constituted a republic because the government was bound by fixed laws. This was, of course, problematic since the British constitution was not written, but Adams believed that the legal authorities supported set interpretations of what were and were not permissible actions by the government. If the government's actions were illegal, and Adams believed they were, the colonists had every right to protest.

Page Smith's analysis of the importance of the "Novanglus" letters is particularly relevant:

---

[189] Adams, "Novanglus," in *Revolutionary Writings*, 186-187, 237.
[190] Adams, "Novanglus," in *Revolutionary Writings*, 226.

> What is important to us about the legal and constitutional arguments is that they were supremely important to the colonists themselves. They could act in good conscience only if they were convinced that they acted in accord with the letter of the highest law as well as of the lowest. They must be able to rely on Scripture, on Sidney, Locke and Harrington, and finally on Coke, Mansfield, Bacon and the laws and statutes of the realm, in roughly that order.[191]

While half of the active attorneys in Massachusetts ultimately sided with Great Britain,[192] and it is unclear how many patriots held this position, there is no doubt that this was true for Adams. If Adams, who had committed himself to law above all else, was to support the patriot cause, he had to be certain he was right and that the law truly was on his side.

The last of the "Novanglus" letters was supposed to run on April 19, 1775, but the battles at Lexington and Concord stopped the presses and at that point, the debate was moot. These battles had "changed the Instruments of Warfare from the Penn to the Sword."[193] With the war begun *de facto* if not yet *de jure*, Adams realized that compromise was unlikely and that complete independence was the only way to guarantee the rights of the Americans. If independence was the only solution, independence was not enough and "Adams kept in the forefront of his mind the kind of government that Americans would need. More than any other Revolutionary leader he was concerned with the specifics of what would come after independence. As a legalist, he wanted the law carefully provided for."[194] This concern led to Adams's most important revolutionary writing, his *Thoughts on Government*. "Of all the millions of words that Adams wrote and published," maintains John Ferling, "none came close to rivaling the impact or the enduring influence of this pamphlet."[195]

---

[191] Smith, *John Adams*, 194-195.
[192] Ferling, *John Adams*, 60.
[193] Adams, *Diary*, 3:314.
[194] Taylor, "Legalist as Revolutionist," 71.
[195] Ferling, *John Adams*, 155.

Adams's writing of *Thoughts on Government* was the result of a number of stimuli. Adams had begun thinking about constitutional forms as early as November 1775 after meeting with Virginia representative Richard Henry Lee, although Adams did not formally draft the work that was to become *Thoughts on Government* until mid-March of 1776.[196] The formal draft came in response to the request of William Hooper and John Penn, delegates for North Carolina, who were called home to help prepare a new constitution and were asked to bring with them the advice of their fellow delegates on matters of government. This early draft was copied out several times to fill the requests of George Wythe and Richard Henry Lee of Virginia and Jonathan Dickinson Sergeant of New Jersey. Eventually, Wythe's copy was sent to the printer in the spring of 1776 and became *Thoughts of Government: Applicable to the Present State of the American Colonies. In a Letter from a Gentleman to his Friend.*[197]

Adams also saw the pamphlet as a way to respond to the form of government put forward by Thomas Paine in his *Common Sense*. Paine's pamphlet was widely read and extremely influential and while Adams applauded Paine's views on independence, Paine's proposed plan of government disturbed him greatly. While both Adams and Paine believed that government was established for the happiness of the citizens, their approaches to government were irreconcilable. Paine saw no need for executive power and believed that a single legislature alone would satisfy. It pushed the "same leveling spirit which seemed to evoke such an enthusiastic popular response." Adams believed that Paine, "seems to have very inadequate Ideas of what is proper and necessary to be done, in order to form Constitutions for single Colonies, as well as a great Model of Union for the whole." *Thoughts on Government* provided Adams an opportunity to get

[196] John E. Selby, "Richard Henry Lee, John Adams, and the Virginia Constitution of 1776," *The Virginia Magazine of History and Biography* 84 (October 1976), 391, 394.
[197] Adams, *Papers*, 4:65-68.

what he viewed as far more learned views on government out in the public and to "counter any trend toward unicameral legislatures initiated by Paine's popular work." [198]

Adams's thoughts on law and government that had been developing for more than a decade were expressed in this brief but powerful essay. Adams believed that "the divine science of politics is the science of social happiness" so it was necessary to carefully construct governments. The first question was which form of government was best. Adams had an answer:

> The wretched condition of this country, however, for ten or fifteen years past, has frequently reminded me of their principles and reasonings. They will convince any candid mind, that there is no good government but what is republican. That the only valuable part of the British constitution is so; because the very definition of a republic is "an empire of laws, and not of men." That, as a republic is the best of governments, so that particular arrangement of the powers of society, or, in other words that form of government which is best contrived to secure an impartial and exact execution of the laws is the best of republics.[199]

This was just as Adams had written in his *Dissertation* and Earl of Clarendon letters – government was founded in law. This belief led to one overriding question, "As good government is an empire of laws, how shall your laws be made?"

The rest of the pamphlet dealt with the best way to structure the republic in order to determine how laws would be made. Adams's ideas sound very familiar to the modern reader. Representative bodies should "be in miniature an exact portrait of the people at large"; the legislature should be bicameral; there should be a separate executive with veto power, and an independent judiciary; finally, some public education ought to be established. The familiar patterns of governmental structure were not Adams's inventions, but Adams's particular concerns, most notably with the judiciary, shine through the piece.

Adams not only protested unicameral legislatures for the usual reasons of legislative tyranny and the lack of balance generally. Two of his six points against single assemblies dealt

[198] Smith, *John Adams*, 245; Adams, *Family Correspondence*, 1:363; Adams, *First American Constitutions*, 119.
[199] Adams, *Thoughts*, in *Revolutionary Writings*, 287, 288.

with the judiciary. "A representative assembly is still less qualified for the judicial power, because it is too numerous, too slow, and too little skilled in the laws. [And because] a single assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favor."[200] Adams's thought had evolved from 1765, he now believed firmly that a completely independent judiciary was necessary to good government. He noted,

> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or in other words, their commissions should be during good behavior, and their salaries ascertained and established by law.[201]

Adams had learned from his experiences during the Revolutionary crisis. The judges had to be kept insulated from the political winds. While Adams certainly believed in the importance of all three branches, his particular relationship with the judiciary is obvious. "Every blessing of society" depended not on the legislative or the executive branches, but on the judiciary.

While it is certain that Adams was a dedicated lawyer who cared profoundly for the law, that alone does not fully explain his belief in the absolute necessity of an independent judiciary. His belief also grew out of particular events during the Revolutionary crisis, namely the position of the courts under the Stamp and Coercive Act. Without a stamp distributor, the courts remained closed, a fact that dismayed Adams deeply because not only did it threaten his private practice but it also undermined the judiciary, dragging it into the political controversy. Eight years later, Adams wanted the opposite course of action taken following the judicial salaries controversy,

[200] Adams, *Thoughts*, in *Revolutionary Writings*, 289.
[201] Adams, *Thoughts*, in *Revolutionary Writings*, 291-292.

which made superior court judges reliant on the Crown for their pay. Adams believed that impeachment proceedings against the judges who continued to serve under the unconstitutional action by the crown might be the only way to ensure that the courts were places of justice.[202] The legal problems caused by a dependent court system had been demonstrated to Adams on numerous occasions, and, therefore, he was determined to erect a new system where the law could truly stand above politics.

Thoughts on Government influenced many of the state constitutions produced over the next two years. Its effect is most directly seen in Virginia, where Adams had been in communication with Richard Henry Lee for months, and where a number of prominent statesmen had copies of the pamphlet. It is also likely that *Thoughts on Government* played some role in North Carolina as Adams's first drafts went to representatives from that state. New Jersey and New York were also influenced by Adams's work. Most importantly, and least surprisingly, *Thoughts on Government* was very influential in Massachusetts.[203] In the fall of 1779, Adams finally had the chance to put his legal and political views into practice. Fifteen years of legal practice and political writing were to combine in his longest lasting achievement, a constitution that would still be in operation over two-hundred twenty-five years later.

[202] Ferling, *John Adams*, 50; Smith, *John Adams*, 150.
[203] Adams, *Papers*, 70-71.

THOUGHTS

ON

GOVERNMENT:

APPLICABLE TO

THE PRESENT STATE

OF THE

AMERICAN COLONIES.

In a LETTER from a GENTLEMAN

To his FRIEND.

By John Adams Esq^r

PHILADELPHIA, PRINTED:

BOSTON:

RE-PRINTED BY JOHN GILL, IN QUEEN-STREET.

M,DCC,LXXVI.

1776

[204]

[204] John Adams, *Thoughts on Government: Applicable to the Present State of he American Colonies. In a Letter from a Gentleman to his Friend*. (Boston: John Gill, 1776) in Early American Imprints, accessed 14 April 2008.

Chapter 4
"'A government of laws, and not of men'": John Adams, Lawgiver

"The People inhabiting the territory heretofore called the Province of Massachusetts Bay, do hereby solemnly and mutually agree with each other to form themselves into a free, sovereign, and independent body politic, or State, by the name of THE COMMONWEALTH OF MASSACHUSETTS.
In the government of the Commonwealth of Massachusetts, the legislative, executive, and judicial power shall be placed in separate departments, to the end that it might be a government of laws, and not of men."[205]

In 1768, a decade into his law career, Adams asked himself in his diary, "To what Object, are my Views directed? What is the End and Purpose of my Studies, Journeys, Labours of all Kinds of Body and Mind, of Tongue and Pen? … I am mostly intent at present, upon collecting a Library…. But when this is done, it is only a means, an Instrument. When ever I shall have completed my Library, my End will not be answered."[206]

When Adams returned home from serving in Europe in 1779, he was given an answer to the question of the ends to which he could put all his study, thinking, and writing. It was an opportunity to do something of which the modern reader can only dream – helping to create a system of government.

Of course, Adams did not draft his constitutional plan from nothing. Most of the ideas expressed in the Massachusetts Constitution did not belong to him in particular. He worked

[205] *The Report of a Constitution, or Form of Government for the Commonwealth of Massachusetts* in *Revolutionary Writings*, 303.
[206] Adams, January 30, 1768, *Diary*, 1:337.

within a particular social and political context, which dictated the kinds of actions that could reasonably be taken and he borrowed extensively from the top political thinkers of his day and from the constitutions that had already been written. Adams, however, was not trying to create something brand new. Rather he sought to establish a government that the people would accept and would best fulfill its purpose and "secure the existence of the body politic; to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life."[207]

Drafting a constitution however, was not simple or easy work. Indeed, it was "the most difficult and dangerous Business that We had to do"[208] according to Adams. As Page Smith notes, "Soon constitution-making would become as common as drawing legal briefs. Everybody would seem to be taking a hand in it; but for the moment America was the stage or the laboratory on which were fixed the eyes of all men anywhere in the world who were concerned with building a better new world out of the lumber of the old."[209] There were no guides to follow, no precedents, and since independent and free government was the most important purpose of the Revolution, failure would make the blood spilled on the battlefield meaningless. All they had was experience and experiment and the results were far from inevitable.[210]

The Massachusetts Constitution of 1780, while certainly a product of its times, and of the convention from which it came, is also uniquely an Adams work. Years of legal study and practice came together to produce a document of extreme importance, a constitution that continues to function as the organic law of Massachusetts more than two hundred and twenty five years later.

---

[207] *Report of a Constitution* in *Revolutionary Writings*, 297.
[208] Adams, *Diary*, 3:351
[209] Smith, *John Adams*, 441.
[210] For the importance of experience and experiment see C. Bradley Thompson, "John Adams and the Science of Politics," *John Adams and the Founding*, 239-240.

Part I: Wartime Politics and the Rejected Constitution of 1778

Until Great Britain's imposition of the Coercive or Intolerable Acts of 1774, one document, the Charter of 1691, governed the Province of Massachusetts Bay continuously. The government for which it called consisted of a crown appointed governor and an elected lower house that selected members to form a twenty-eight person Council that served as both an upper house and as advisors to the governor. The governor had the authority to reject any Council member of whom he disapproved. The Council and governor together appointed all military and judicial officers, who served at the pleasure of the Crown. When the growing tension between the colony and Great Britain culminating in the Boston Tea Party in December 1773 led to the abrogation of their charter, Massachusetts was left without a recognized legally constituted province-wide government, although technically, the Crown had set up a military government. The people therefore turned to the local town governments, which had been functioning continuously since the seventeenth century, committees of correspondence, extralegal provincial congresses, and eventually a Provisional Government that used the 1691 charter as a basis but removed the role of the governor, transferring his powers to the legislature.

With the outbreak of fighting in the spring of 1775, this temporary expedient became increasingly dissatisfactory to many of the citizens of Massachusetts who petitioned for a permanent constitution to be written.[211] The Continental Congress in early 1776, still hoping to reconcile with Great Britain was reluctant to allow this, but under pressure from the radicals in Congress, and with the gulf between the colonies and Great Britain growing daily, passed the

[211] Robert J. Taylor, ed., *Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution, 1775-1780* (Chapel Hill: The University of North Carolina Press, 1961), 3-6, 13-15.

May 10 and 15 resolutions authorizing the states to draft permanent constitutions separate from royal authority. [212]

Despite the fact that approval had finally been granted, it took the state another year to act. The reasons for the delay are somewhat unclear. Historian Jackson Turner Main argues that the eastern commercial elite who dominated the Provisional Government blocked reform to protect their own power and were therefore reluctant to move towards a new governmental system that could cost them their influence. Willi Paul Adams on the other hand explains the delay by citing the mixed responses the General Court received from Massachusetts towns on how to proceed. Most towns called for change, but they differed on whether or not the sitting General Court was qualified to make that change. Other towns gave no opinion at all, assuming they would have a chance to vote on any proposed constitution that would be drafted.[213]

After a year of false starts, on April 4, 1777, the House of Representatives sitting under the Provisional Government, resolved to allow the General Court to frame a permanent constitution. A month later, the Council, many of whose members did not see the necessity in constitution writing, agreed with the plan, and it was submitted to the towns for approval. The resolve declared,

> That, the Happiness of Mankind depends very much on the Form and Constitution of Government they live under and that the only Object and Design of Government should be the Good of the People, are Truths well understood at this day, and taught by Reason and Experience, very clearly, at all Times.… *Resolved,* That it be and hereby is recommended to the several Towns & Places in this State…to send members to the General Assembly…in whose Integrity and Abilities they can place the greatest Confidence; and in addition to the common and ordinary Powers of Representation, instruct them in one Body with the Council, to form such a Constitution of Government, as they shall judge best calculated to promote the Happiness of this State.[214]

---

[212] See Chapter 3, Part I.
[213] Main, *Sovereign States*, 177-178; Adams, *First American Constitutions*, 83-87.
[214] Oscar and Mary Handlin, eds., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge, MA: The Belknap Press of Harvard University Press, 1966), 174-175.

The towns approved of the action and in June 1777, the General Court became a constitutional convention and Massachusetts began its move toward permanent government.

The constitution that was published the following February was a lot like the other constitutions that came out of the first wave of state constitutions: it was formed by a sitting legislature, consisted of a list of resolves, and contained no bill of rights. There is also no particular order or structure to the resolves; the different parts of the government are simply discussed haphazardly. The governmental structure it set up, however, was familiar. The "innovations," namely the weak Governor and strong legislature, were natural outgrowths of the conflict with Great Britain. The General Court was to consist of a House of Representatives and a Senate as well as a Governor and a Lieutenant Governor who presided over the Senate. The Senate and governor were to be responsible for appointing all civil officers, including judges, and the Governor had no veto power over the legislature other than the vote he held in the Senate.[215]

The vast majority of the document deals with the composition, duties, and powers of the General Court and governor, dealing little with the judiciary. In fact, only the twenty-fourth and the twenty-seventh articles touch the judiciary alone: "XXIV. – The Justices of the Superior Court, the Justices of the Inferior Courts of Common Pleas, Judges of Probate and Wills, Judges of the Maritime Courts, and Justices of the Peace, shall hold their respective places during good behavior…. XXVII. – The Justices of the Superior Court, the Justices of the Inferior Courts, Courts of General Sessions of the Peace, and Judges of the Maritime Courts, shall appoint their respective Clerks." The thirty-second article is also of particular importance to the judiciary and the administration of justice in the state.

[215] Taylor, *Colony to Commonwealth*, 48, 51-58.

> XXXII. – All the statute laws of this State, the common law, and all such parts of the English and British statute laws, as have been adopted and usually practised in the Courts of law in this State, shall still remain and be in full force until altered or repealed by a future law or laws of the legislature; and shall be accordingly observed and obeyed by the people of this State, such parts only excepted as are repugnant to the rights and privileges contained in the Constitution: and all parts of such laws as refer to and mention the Council shall be construed to extend to the Senate; and *the inestimable right of trial by jury shall remain confirmed as part of this Constitution forever*. [216]

Other than thirty-fourth article, which allowed for the free exercise of religion – of Protestants at least – the right to trial by jury is the only specifically protected right of the people in the 1778 Constitution since the document lacks a declaration of rights.

It is also of note that the Constitution contains no grand statements about the nature and purpose of government such as are included in the May 5 resolve. The Constitution does quote the resolve but only the section that requests that the towns send representatives. There is no grand rhetoric, no statement of natural rights, just the formal, procedural structure of a new government. When it was sent to the towns, despite the often confusing and contradictory nature of the comments, the returns that came in through the summer of 1778 clearly showed widespread dissatisfaction with the document the General Court had produced.

The reasons for the rejection varied. Some towns rejected the very idea that the General Court could write a valid constitution. Concord, for example, had rejected the idea as early as 1776 in their return responding to an initial proposal calling for the legislature to draft a constitution. Concord, far from wanting the establishment of a permanent government delayed – the first resolve calls for the situation to be rectified immediately – still recognized the importance of a constitution being properly constructed. The resolves note, "That the Supreme Legislative, either in their Proper Capacity, or in Joint Committee, are by no means a Body

[216] Taylor, *Colony to Commonwealth*, 57, 58 (emphasis added).

proper to form & Establish a Constitution, or form or government…Because the Same Body that forms a Constitution have of Consequence a power to alter it." [217]

This was a particularly wise observation for a people who were still forming their ideas on the nature of written constitutions. As Gordon Wood notes, "Most Americans in 1776 had as yet no real modern appreciation of the permanent and unalterable nature of the constitution, or if they did, they possessed little knowledge of the means by which it was to be made permanent and fundamental."[218] The importance of the constitutional convention, when combined with popular ratification of a constitution, something for which Concord did not call at that time, although neighboring Lexington did, was to have important implications in Massachusetts just a few years later and eventually for the country as a whole.

Most objections to the Constitution, however, dealt with specific articles and features and these objections fell on all sides, some believing the document too democratic, others, not enough so. For those who believed it was not democratic enough, there was plenty to attack. At one extreme, Greenwich, Massachusetts called for a unicameral legislature without a governor, similar to the Pennsylvania Constitution of 1776 and wanted all civil and military officers subject to the election of the people. Other towns criticized the limited suffrage which included a £60 property requirement and prevented free blacks, Indians, and mulattoes from voting, even if they met the property requirement. Some towns, such as Sutton and Hardwick, specifically deplored the fact that slavery was not specifically outlawed in the Constitution. Still others, while not necessarily calling for a unicameral legislature such as Greenwich did, objected to the

[217] Taylor, *Colony to Commonwealth*, 45.
[218] Wood, *Creation of the American Republic*, 307.

appointment of officers by the Governor and Senate. Most commonly, they believed that the apportionment of representatives in the House did not provide for equal representation.[219]

The most commonly cited objection to the 1778 constitution comes not from those who believed it was not democratic enough, of whom are the majority of the detractors, but from the more conservatively styled "Essex Result." The Essex Result, "an essay in political theory and constitutional practice comparable to *The Federalist* in the sophistication of its argument (and in its political outlook)"[220] included its own detailed theory about how government should be structured and why, following its objections. Those who approved of the "Result's" argument "felt that more Whig ideas should be included" and objected to the absence of a clear separation of powers and a declaration of rights. Six of the eighteen listed objections touch on the need for separation of powers and on which powers each branch should have. The thirteenth objection reads, "That the nineteenth article [which dealt with the appointment of civil and military officers] is exceptionable, because a due independence is not kept up between the supreme legislative, judicial, and executive powers, nor between any two of them."

With the various and often contradictory nature of the complaints against the document, it was clear that no simple change would make the document acceptable to the citizenry. Only one thing that was clear from the results, the Constitution of 1778 was not satisfactory to the populace. The General Court, unsure of how to proceed, waited until the following February to move again on constitution writing. The February 20 resolve asked the towns to advise them on two questions by June. The first was whether they even wanted a permanent Constitution to be formed at this time – a valid question, since some objections to the 1778 constitutions seemed to suggest that wartime, with many qualified voters serving in the army and therefore out of the

[219] Handlin, *Popular Sources*, 212-213, 216, 231; Taylor, *Colony to Commonwealth*, 49, Adams, *First American Constitutions*, 88.
[220] Adams, *First American Constitutions*, 88; Main, *Sovereign States*, 180; Handlin, *Popular Sources*, 325.

state, was not an appropriate time to be writing an organic and permanent law. The second question was if they did want a constitution to be written at this time, whether they would empower their representatives to vote on calling a special convention "for sole Purpose of forming a new Constitution."[221]

The towns concurred in both questions and so it was resolved that a special constitutional convention would meet in Cambridge on September 1, 1779. This was a historic moment for it marked "the first true constitutional convention in Western history, a body of representatives elected for the exclusive purpose of framing a constitution."[222] The timing was fortuitous. Adams, who had been serving as a diplomat in France for a year and a half, arrived home just a week before his hometown of Braintree selected its delegate on August 9. Unsurprisingly, Braintree elected Adams to the convention.

After setting the procedural rules, the convention turned to drawing up a new constitution. But what instructions were to be given to the drafting committee and what general principles should guide their work? The convention gave only two. One, that there should be a Declaration of Rights prior to the frame of government and two, "That it is of the Essence of a free Republic, that the People be governed by FIXED LAWS OF THEIR OWN MAKING."[223] This was the only advice that the drafting committee of thirty men, received before it appointed a subcommittee of three – James Bowdoin, Samuel Adams, and John Adams to draft the document. The subcommittee in turn left the task of writing this monumental document in John

[221] Handlin, *Popular Sources*, 383.
[222] Adams, *First American Constitutions*, 89.
[223] *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay* (Boston: Dutton and Wentworth, 1832), 24.

Adams's hands. The convention then adjourned until October 28 when it would consider the draft. The stage was now Adams's alone.[224]

Part II: John Adams and the Massachusetts Constitution of 1780

Adams biographer David McCullough notes, "If ever [Adams] had a chance to rise to an occasion for which he was ideally suited, this was it. So many of his salient strengths – the acute legal mind, his command of the English language, his devotion to the ideals of the good society – so much that he knew of government, so much that he had read and written, could now be brought to bear on one noble task."[225] The chance to write a constitution, to form organic law was the epitome of what Adams could have hoped to obtain with his two decades of legal training. It was the chance to fulfill the noblest aspirations of his profession as he had written to Jonathan Sewall almost exactly twenty years before. "Now to what higher object," Adams queried, "to what greater Character, can any Mortal aspire, than to be possessed of all this [legal] Knowledge, well digested, and ready at Command, to assist the feeble and Friendless, to discountenance the haughty and lawless, to procure Redress of Wrongs, the Advancement of Right, to assert and maintain Liberty and Virtue, to discourage and abolish Tyranny and Vice."[226] He certainly possessed the legal knowledge and he had it at command, and what was a constitution if not a document constructed to maintain liberty and virtue and abolish tyranny and vice.

Adams noted in his *Autobiography*, "I had read Harrington, Sydney, Hobbs, Nedham, and Lock, but with very little Application to any particular Views: till these Debates in Congress and these Interrogations in public and private, turned my thoughts to those Researches, which

[224] Adams, *Papers*, 8:229-230.
[225] McCullough, *John Adams*, 220.
[226] Adams to Jonathan Sewall, October 1759, *Diary*, 1:124.

produced the Thoughts on Government, [and] the Constitution of Massachusetts."[227] All of those years of study and training were to be put to use in a way that would affect the lives of generations of Massachusetts citizens.

In the three weeks leading up to the start of the Convention, Adams prepared himself for the task that lay ahead, reviewing the legal authorities, the state constitutions that had already been written, and his own *Thoughts on Government*. Adams's handwritten draft, unfortunately for history, has not been recovered. The only version, other than the document ultimately ratified by the Convention, was the printed draft that came out of the full writing committee. Robert J. Taylor notes, however, "It is quite possible that no manuscript in Adams' hand is extant because so inconsequential were the alterations made in it that it was sent right to the printer, who discarded it after setting his type."[228] From everything that Adams wrote about his involvement with drafting the document, this explanation is highly plausible.

"The Report of a Constitution, or Form of Government for the Commonwealth of Massachusetts" has been described as "the most sophisticated and influential constitution produced during the Revolutionary period"[229] and Adams had every right to be proud of his achievement. First, the structure of the draft itself is unique. Adams's division of the document into organized chapters, sections, and articles is of note if for no other reason than Adams was the first to organize a constitution in that manner rather than simply listing articles, as the 1778 Constitution did. It is not a stretch to say that Adams's legal training had led him to see the value in organization; after all, arguments are most effective when they are coherent and orderly. Just as he divided his closing statements into parts,[230] it made sense to give this document a structure

[227] Adams, *Diary*, 3:358-359.
[228] Taylor, "Lawyer John Adams and the Massachusetts Constitution," *Boston Bar Journal* 24 (October 1980), 23.
[229] *Report of a Constitution*, in *Revolutionary Writings*, 296.
[230] See for example *King v. Stewart* above Chapter 2, Page 50.

as well. As one historian notes, "Obviously a practicing lawyer needing to check constitutional provisions has his search greatly expedited through the arrangement that Adams pioneered."[231]

That the Constitution of 1780 was formed from a lawyer's mind, however, goes far beyond mere structure and style. From the preamble to the last chapter, Adams's particular concerns are apparent. The preamble declares, "It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may, at all times, find his security in them." Twelve of the thirty-one articles in the "Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts" touch on the issue of law and the administration of justice within in the state. Adams saved the final two articles however, for that which he found most important, the independent judiciary; the establishment of which was "one of his greatest contributions not only to Massachusetts, but to the country."[232]

For Adams, this was more than simply a matter of form – an independent judiciary was the right of the people. The thirtieth article was the most explicit,

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people and of every citizen, that the judges should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing laws.

And, in the event that that was not clear enough, the final article read, "The judicial department of the state ought to be separate from, and independent of, the legislative and executive powers."[233] All of Adams's experiences during the colonial crisis had proved to him the value of

[231] Taylor, "Lawyer John Adams," 25.
[232] McCullough, *John Adams*, 222.
[233] *Report of a Constitution*, in *Revolutionary Writings*, 297-303.

an independent judiciary and he was going to do what he could to ensure that Massachusetts never experienced those problems again.

Adams then moved to the actual frame of government. In the preamble to this part, Adams recalled what was already becoming a familiar theme: "In the government of the Commonwealth of Massachusetts, the legislative, executive, and judicial power shall be placed in separate departments, to the end that it might be a government of laws and not of men." These were powerful words and legal historian Charles Warren aptly describes their importance:

> Adams was the first and only man to place them in a Constitution. *They are the essential definition of the American system of government.* They have been often quoted; yet they cannot be too often impressed on our minds. For they mean that, in this country, there is no right to the exercise of arbitrary power…. They mean that every official of the Government shall be bound by the Constitution and the laws, and shall be held responsible in court for every act performed without sanction of law.[234]

The first chapter in this part organizes the legislature or General Court of Massachusetts, consisting of a House of Representatives and a Senate. All three of the articles of the first section of this chapter deal with the law. Section I, Article I, which establishes the legislature, also establishes an absolute veto power for the governor so that "he may have the power to preserve the independence of the executive and judicial departments." The second article gives the General Court the power to establish courts. The third article grants the legislature "full power and authority…to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions, and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth." It is worthy of note that before Adams had given any indication as to how this body ought to be constituted and how representatives ought to be chosen, he made sure that the judiciary was provided for first. It speaks volumes to Adams's

[234] Warren, "John Adams and American Constitutions," 7 (emphasis added).

mindset that he appears more concerned that the courts are established than with how many representatives there ought to be.[235]

The rest of the chapters dealing with the legislature and executive involve the details of organizing this system of government, establishing property requirements for voting, and other procedural rules. The governor, with the "advice and consent" of the council, had the power to appoint most of the major civil and military officers. The governor also had the power to pardon criminals, but only *after* conviction. The power to pardon was one of the King's prerogatives but "There was no precedent in English law for such a limitation on the pardon power," as historian Robert J. Taylor points out. "William Blackstone, the most widely revered authority among American lawyers in Adams' day, held that the king's pardon could be pleaded even at arraignment." Although Adams wanted a strong executive, he did not want that at the price of the law. Taylor suggests that perhaps Adams feared that pardons that came before the trial took place would prevent the truth from coming to light.[236]

Chapter four in Adams's report deals with the judiciary and consists of six articles. Article I provides for, once again, life tenure "during good behavior" of all judicial officers. Adams makes it clear that judicial officers are special in this regard by adding here "all other officers, appointed by the governor and council, shall hold their offices during pleasure." The second article preserves the judiciary's independence from the legislature by forbidding plural office holding by justices of the Superior Court. The third article is perhaps the most interesting. "The senate, nevertheless, as well as the governor and council, shall have authority to require the opinions of the judges upon important questions of law, and upon solemn occasions." This is entirely Adams's invention as no other state constitution, or the Constitution of the United States,

[235] *Report of a Constitution*, in *Revolutionary Writings*, 303-304.
[236] Taylor, "Lawyer John Adams," 25-26.

contains this provision. Since judges would be "men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention" as Adams had called for in *Thoughts on Government*, they could make good advisors to the upper house from time to time. Article IV provided that justices of the peace should have commissions lasting no longer than seven years, while Article V required that judges of probate hold court at fixed times and places. Finally, the sixth article made legal actions involving marriage, divorce, and alimony the province of the Senate with appeal to the Governor and his council.

The next chapter provides for delegates to the national congress, commissions, and writs. It also contains two articles of particular interest to lawyers. Article V echoed the thirty-second article of the 1778 Constitution, providing for any English laws commonly accepted in the state courts to remain in effect unless they violated the new constitution. The sixth article touches on a subject broached in no other revolutionary constitution except for that of Georgia, the writ of *habeas corpus*. Adams went beyond what Georgia had done however, as that constitution declared that the writ would exist, but no more. The report declared, "The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a short and limited time."[237] Parliament had suspended the writ twice before the American Revolution and Adams wanted to ensure that even this popularly elected legislature would be barred from abusing its power in suspending it.[238]

The next chapter, while it does not touch the judiciary, is also particularly Adams's creation, echoing sentiments expressed in his *Dissertation on the Canon and Feudal Law* as it

[237] *Report of a Constitution* in *Revolutionary Writings*, 318-319.
[238] Taylor, "Lawyer John Adams," 24.

extols the need for education among the citizenry and calls upon the government to promote educational institutions. Adams believed that tyranny could only flourish when the people were ignorant of their rights and so "WISDOM AND KNOWLEDGE, as well as virtue, diffused generally among the body of the people, [was] necessary for the preservation of their rights and liberties." Finally, always concerned with law and order, the conclusion to his draft provides that all those in office would continue to exercise their authority until such time as the new constitution was ratified and the new government installed.[239]

From all available evidence, the draft that came out of the full committee was entirely Adams's work with only two exceptions. Article III in the Declaration of Rights provided for tax money to go towards "the public worship of God" and Chapter VI, Section I, which concerned Harvard University, were added in the full committee, after Adams had completed his draft.[240] To be able to put into practice the ideals he had formerly stated only on paper was an enormous accomplishment. Adams's provisions reflect not only his own long developing thoughts, first hammered out in *Thoughts on Government*, but also his understanding that governments had to fit the particular circumstances of the people it sought to govern. As C. Bradley Thompson notes, there are of course, differences between *Thoughts* and the *Report* but they share the same essential ingredients for successful government: full representation, separation of powers, and bicameral legislatures. The differences arose out of his need to "adjust and amend the modes and nature of representation of each blueprint to reflect the peculiar social conditions of very different political entities." Of course, Adams had recognized the need for this in his first year of practice, as he wrote in his diary, "Law is human Reason. It governs all the Inhabitants of the

[239] *Report of a Constitution*, 321-322.
[240] Adams, *Papers*, 8:230-231.

Earth; the political and civil Laws of each Nation should be only the particular Cases, in which human Reason is applied."[241]

At the end of October in 1779, the convention reconvened to begin to review the committee's draft. Adams did not participate much in these debates however, as the Confederation Congress had already appointed him minister plenipotentiary to France to participate in peace negotiations and he set sail from Boston on November 15. While there were some significant changes to Adams's draft, they are not sufficient or essential enough to undermine Adams's principal position as "Father of the Massachusetts Constitution."

The full convention's changes to Adams's draft were largely stylistic, although some substantive changes were made as well. The most significant change replaced the absolute veto with a qualified veto that the legislature could override by a two-thirds vote, "the convention's most brilliant stroke" according to Robert Taylor.[242] The convention also removed the protection of speech that Adams had included. Article III of the Declaration of Rights, which Adams had not written in first place, was contested vigorously but ultimately allowed to remain. The convention also included a provision for changing the document in the future; if two-thirds of qualified voters desired them, amendments would be considered in 1795, one of the few oversights present in Adams's work.[243]

In terms of the judiciary, for which Adams had fully provided, the legislature made no changes, in fact, the stylistics changes made to those sections tended to strengthen Adams's work. For example, the convention, by moving Adams's call for separation of powers from the preamble of Part the Second to the final article in the Declaration of Rights, this principle was

[241] C. Bradley Thompson, "John Adams and the Science of Politics," in *John Adams and the Founding*, 253; Adams, summer 1759, *Diary*, 1:117.
[242] Robert J. Taylor, "The Construction of the Massachusetts Constitution," *Proceedings of the American Antiquarian Society* 90 (1980), 346.
[243] Taylor, "Construction of the Constitution," 344.

even more firmly established. The convention's new Article XXX read, "In the government of this Commonwealth the legislative department shall never exercise the executive or judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: To the end it may be a government of laws and not of men."[244]

The convention also strengthened the independence of the judiciary by spelling out, even more explicitly than Adams had, that judicial officers could not hold other positions within the government while they sat on the bench. Where in Adams's draft this prohibition is a single sentence article within the chapter on the judiciary, the convention moved the provision to the next chapter and extended the prohibition of plural office holders to all civil officers. Finally, the convention extended to the House of Representatives the right to seek the advice of the judiciary on questions of law that Adams had already granted to the Senate and governor.

On March 2, 1780, the convention was ready to present their work to the people for their comments and suggestions. The convention resolved that it would submit the constitution to each of the towns and if there was any article to which they objected, the town should include that, and their reasons, in their returns. The convention would then reconvene during the first week of June, and if there were any articles to which two-thirds of the inhabitants had objected, they would alter them so as to fit with the people's wishes. [245] Along with the Constitution, the convention included an address to the people that summarized the major parts of the constitution and provided justification for some of the more controversial articles of the draft. They hoped that the citizens would recognize the impossibility of every citizen agreeing with every clause, but see the value in the whole. The address concluded, "Thus we have, with plainness and

[244] Constitution of 1780 in Taylor, *Colony to Commonwealth*, 131.
[245] Reprinted in Handlin, *Popular Sources*, 432.

security, given you the Reasons upon which we founded the principal parts of the System laid before you, which appeared to us as most necessary to be explained: And we do most humbly beseech the Great Disposer of all Events, that we and our Posterity may be established in, and long enjoy the Blessings of a well ordered and free Government."[246] The task was done; now all the convention delegates could do was wait for the returns.

The Massachusetts Constitution of 1780 was the only state constitution that was submitted to the people for their approval. The task of sorting through the returns for the convention, however, was nearly impossible. In their introduction to *The Popular Sources of Political Authority*, Oscar and Mary Handlin explain that it was not then, nor is it now, possible to compile the precise statistics on how many voted in favor of and against the Constitution. The western counties, unhappy with the system of representation and its less democratic aspects, voted overwhelmingly against the document. Many towns disapproved of tax support for religion. Regardless, when the convention simply declared on June 16, 1780 that the Constitution had won the approval of the necessary two-thirds of the citizens, the constitution was still generally accepted. "The citizens of Massachusetts ultimately acquiesced in the decision to adopt the Constitution set before them," according to Handlin, "not because a precise calculation informed them that more than two-thirds had voted yes, but because having canvassed the issues presented to them, they were aware that they agreed among themselves in more respects than they disagreed." Ultimately, it was more important to the majority of the citizens that there be a constitution than having that constitution be perfect.[247]

Despite the changes, many of which Adams opposed, especially the limited veto power, Adams took pride in what he and the convention had accomplished. While in Europe, Spanish

[246] Handlin, *Popular Sources*, 440.
[247] Handlin, *Popular Sources*, 25-26; Taylor, *Colony to Commonwealth*, 113-115; Adams, *First American Constitutions*, 90, 95.

officials asked Adams about governmental structures in the newly declared states, and he chose to show them *The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts*.[248] Clearly, Adams believed that his draft showed the states, and particularly Massachusetts, in a favorable light.

Adams knew that all his work and study leading up to the drafting of that document had been meaningful and had influenced the final product. In his *Autobiography*, Adams noted that his "Independence of the Judiciary" articles had "contributed to spread correct Opinions correcting the Importance of the Independence of the Judges to Liberty and Safety, and enabled the Convention of Massachusetts in 1779 to adopt them into the Constitution of the Commonwealth."[249] Adams saw that the theory of all the legal philosophers he had read had been put into practice by the ratification of the Constitution. He observed, "There never was an example of such precautions as are taken by this wise and jealous people in the formation of their government. None was ever made so perfectly upon the principle of the people's rights and equality. It is Locke, Sidney, and Rousseau and De Mably reduced to practice."[250]

Adams also recognized that *Thoughts on Government* and the Massachusetts Constitution of 1780 had had a tremendous impact on the rest of the country. Despite his heavy self-pitying tone, his words here have merit.

> Thoughts on Government, the Constitution of Massachusetts, and at length the Defence of the Constitutions of the United States and the Discourses on Davila, Writings which have never done any good to me though some of them undoubtedly contributed to produce the Constitution of New York, the Constitution of the United States, and the last Constitutions of Pensylvania and Georgia…. Whether the People will permit any of these Constitutions to stand upon their Pedastals, or whether they will throw them all down I

[248] Adams, December 19, 1779, *Diary*, 2:413
[249] Adams, *Diary*, 3:298
[250] Adams, quoted in *The Works of John Adams, Second President of the United States: With A Life of the Author*, ed. by Charles Francis Adams (Boston: Little, Brown, and Company, 1856), IV:216 (hereafter *Works*).

> know not. Appearances at present are unfavourable and threatening. I have done all in my Power, according to my Duty. I can do no more.[251]

Writing this as he did soon after his defeat in 1800 to Thomas Jefferson, it is not completely surprising that he is somewhat pessimistic about the state of the nation.

On the other hand, at this early stage of the nation's development, Adams was right to recognize that it was too early to know definitively whether or not the national experiment would succeed, especially since Adams viewed as dangerous the move towards greater democratization that the Jeffersonian party represented. Ultimately, however, Adams could "take vast satisfaction in the general approbation of the Massachusetts Constitution. If the people are as wise and honest in the choice of their rulers, as they have been in framing a government, they will be happy, and I shall die content with the prospect for my children."[252]

The editors of Adams's papers aptly summarize the enduring impact the Massachusetts Constitution had on the developing country and on Adams himself:

> The Massachusetts Constitution of 1780 occupies a central position both in America's constitutional tradition and in John Adams' thought. The long months of drafting, revision, and ratification greatly refined America's constitution-making procedure, and prepared the way for the United States Constitution. In its principles and its structure, Massachusetts' document was the culmination of that process of turning away from legislative-centered government to embrace a system of checks and balances, strong, popularly elected executives, and independent judiciaries…. For John Adams, too, Massachusetts' new constitution marked both a culmination and a turning point. As political thought and organic law, Adams' *Report of a Constitution* summarized nearly two decades of reading, thinking, and writing about balanced constitutions and just, durable governments…. John Adams left no doubt in his correspondence that he thought the American constitutional tradition was vigorous and healthy, and he believed that America's best constitutions were far superior to those in operation in Europe.[253]

Two hundred and twenty-eight years and one hundred thirteen amendments later, the Massachusetts Constitution survives as the oldest organic law in the world. Whatever he may

---

[251] Adams, *Diary*, 3:359.
[252] Adams to Edmund Jenings, September 23, 1780, *Works*, IX:509.
[253] Adams, *Papers*, 8:234-235.

have borrowed from other thinkers and other state constitutions, and whatever alterations the convention made to his draft, the Massachusetts Constitution was still uniquely the work of John Adams. It was his years of learning, his years of legal practice, his years of reflection, and his years of writing and ultimately his drafting that combined “to assert and maintain Liberty and Virtue, to discourage and abolish Tyranny and Vice” in the Massachusetts Constitution forever.

 [254]

[254] The Lawgiver, *John Adams*, by John Singleton Copley, April 29, 1789, http://www.americanrevolution.com/JohnAdams.htm, accessed 14 April 2008.

Conclusion

"I may refine too much, I may be an enthusiast, but I think a free government is a complicated piece of machinery, the nice and exact adjustment of whose springs, wheels, and weights, is not yet well comprehended by the artists of the age, and still less by the people."[255]

Reflecting on the state of constitutionalism in the United States near the end of his life, Adams wrote to Richard Rush in May of 1821, "In the course of forty years I have been called twice to assist in the formation of a constitution for this State. This kind of architecture, I find, is an art or mystery very difficult to learn, and still harder to practise…. Straight is the gate and narrow is the way that leads to liberty, and few nations, if any have found it."[256] Adams, more than most, personally knew how difficult and how much study and work it took to create organic law.

In August of 1820, the Massachusetts legislature decided that the Constitution of 1780 was in need of revision. This impulse came both out of a growing general movement to revise Revolutionary constitutions in this era, and out of Massachusetts' specific situation that developed when the district of Maine petitioned to become its own state and enter the Union independently. Unlike other states, because of its original careful construction, Massachusetts did not feel a need to throw out their Revolutionary constitution and begin anew but rather merely wished to amend it. To help them in this task, the convention turned to the obvious choice, the man who had originally written the Constitution of 1780 – John Adams.

Immediately upon convening on November 15, the Convention overwhelmingly voted to make John Adams, who had been selected as a delegate from his hometown of Quincy (formerly part of Braintree) again as he had forty years before, the president of the Convention.

---

[255] Adams to Thomas Jefferson, May 19, 1821, *Works*, X:398.
[256] Adams to Richard Rush, May 14, 1821, *Works*, X:397.

Massachusetts Supreme Court Chief Justice Isaac Parker then rose to pay tribute to Adams, recalling his many accomplishments throughout his long public life. He then entered the following resolution,

> Therefore *Resolved*, that the members of this Convention, representing the people of the Commonwealth of Massachusetts, do joyfully avail themselves of this opportunity to testify their respect and gratitude to this eminent patriot and statesmen, for the great services rendered by him to his country, and their high gratification that at this late period of life, he is permitted by Divine Providence to assist them with his counsel in revising the constitution, which forty years ago his wisdom and prudence assisted to form.[257]

A fitting tribute and cap to Adams's life's work no doubt, but at the age of eighty-five, Adams could not seriously consider accepting the post. He therefore returned to the convention his thanks for their kind words relating to his years of public service but sent his apologies and best wishes for their work as he declined the appointment. He also gave some brief words of wisdom to the convention, "That liberty which is the source of all our happiness and prosperity – a prosperity which cannot be contemplated by any virtuous mind without gratitude, consolation, and delight – may it be perpetual."[258]

The convention then resolved to honor Adams with a permanent seat next to the president of the convention (that Chief Justice Parker was selected as Adams's replacement speaks volumes to the newfound respect that lawyers and judges found in the post-Revolutionary world, in no small part due to the growing professionalism that Adams had championed). Given his age and growing infirmities, however, Adams did not participate vigorously during the convention, even when he was in attendance. This is not to say that he was not interested. Adams took profound interest in the convention's work, partly because it was his work they were amending, but more generally because he saw the profound importance in the formation of constitutions.

---

[257] *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts,* compiled by Nathan and Charles Hale (Boston: Dutton & Wentworth, 1853), 9-11.
[258] *Journal of Debates,* 13.

Adams did speak up in the convention against any tampering with the executive that would threaten the independence of the branches and the separation of powers in the government because "It was essential [to a free government] that the executive and legislative departments should be distinct and independent of each other…. It is such an intermingling of powers as no free government can long live under."[259] Adams also worked to have Article III of the Declaration of Rights, which allowed for tax support of religion and was an article he had not written, removed, but he was unsuccessful.

The changes the convention made to the 1780 Constitution were not particularly significant, although the Third Amendment did remove the property requirement for voting that Adams had included in his work. Additionally, the convention extended the prohibition of plural office holding to state officials, judges in particular, who held a federal office. Overall, Adams was satisfied with the convention's work; in Adams's estimation, "there never was a cooler, a more patient, candid, or a wiser deliberative body than that convention."[260]

At the end of his life, Adams's major thoughts on government had not changed; bicameralism, mixed government, a strong executive, separation of powers, an independent judiciary, virtuous citizenry, and disinterested public servants had marked his thought for more than sixty years. Adams's grandson Charles Francis Adams remarks in his *Life of John Adams*, "A report of what he said [in the convention] is given in the published volume of the debates. It is characteristic, and in perfect consistency with the views which he had steadily held through life…. This appearance in the convention made a fitting close to the public career of Mr.

[259] *Journal of Debates*, 204.
[260] Adams to Thomas Jefferson, May 19, 1821, *Works*, X:398.

Adams."[261] Indeed, it was; of all Adams's accomplishments, his work as a lawgiver has been the most enduring.

Gordon Wood aptly summarizes Adams's relevance to this country's founding:

> No one read more and thought more about law and politics. As much as any of the Revolutionaries Adams represented the political side of the American Enlightenment. At the outset of the constitution-making period his pamphlet, *Thoughts on Government*, became the most influential work guiding the framers of the new republics; and in the late seventies he took an important hand in drafting the Massachusetts Constitution of 1780, widely regarded as the most consequential state constitution of the Revolutionary era. He never tired of investigating politics and advising his countrymen, and he came to see, with more speed and insight than most, the mistaken assumptions about their character on which the Americans of 1776 had rested their Revolution…. If only because of these significant contributions to American constitutionalism, Adams deserves to be singled out for consideration.[262]

Wood's analysis of Adams falls short as he ultimately concludes that Adams, for all his accomplishments is still irrelevant as he ceased to be influential following the publishing of *Defence of the American Constitutions* because American political thought had developed past him. Such a view however, ignores the importance of Adams's unique contributions to the ideas of mixed government and separation of powers. These theories were essential in the development of American thought, and it is impossible to view Adams as irrelevant when one realizes that "the American political system bears his imprint indelibly."[263]

From the beginning of his career to the end of it, Adams's passion was the law. His belief in its wisdom and usefulness to maintain and even improve society was constant. He was an attorney whether or not he was in the courtroom, and he continued to be an attorney for the people, speaking up on their behalf through both his public service and his writings, until the last days of his life.

---

[261] Adams, *Works*, I:627, 628.
[262] Wood, *Creation of the American Republic*, 568.
[263] S.B. Benjamin, "John Adams: The "Invisible Hand" Behind American Constitutionalism" (PhD diss., University of Michigan, 1996), 1-21.

Adams's upbringing and his religious training had caused him to hesitate to go into a profession that could cause a great deal of dissention and conflict in society, so even before his fateful meeting with Jeremiah Gridley, Adams had dedicated himself to using the law to benefit society. He began by mastering the law through study, becoming by far the most erudite lawyer of his day. He then took that study and that dedication to his daily practice. He made the law supreme and allowed it to guide his actions. He put his beliefs into action by defending both Tories and Patriots, ignoring short-term political gain to favor the long-term societal benefits of a society ruled by law.

Adams shared these views on law and government, not only by practicing in a certain way, but also by writing and publishing his thoughts. These writings influenced the thought of many political leaders of the Revolutionary era and the enduring legacies of Adams's thought can be seen in both the federal and state constitutions. Ultimately, his "'mighty invention'"[264] of an independent judiciary, particularly as applied to the Massachusetts Constitution of 1780, was his crowning achievement in both its immediate and its lasting effects.

It is worth recalling Adams's words near the end of the life: "I may refine too much, I may be an enthusiast, but I think a free government is a complicated piece of machinery, the nice and exact adjustment of whose springs, wheels, and weights, is not yet well comprehended by the artists of the age, and still less by the people."[265] Constitution writing, the creation of organic law, was and is not a simple process and while Adams's work may not have been perfect, it has served the people and this country well. His "government of laws, and not of men" endures.

[264] Margaret H. Marshall, "John Adams: Lawyer, Absentee Chief Justice, and Author of the Massachusetts Constitution," *Massachusetts Legal History* 10 (2004): 45.
[265] Adams to Thomas Jefferson, May 19, 1821, *Works*, X:398.

John Adams had asked the jury in his closing statement of *Rex v. Wemms*, "If we cannot speak the law as it is, where is our liberty?"[266] In Adams's view, liberty, security, and happiness were to be found in the law. Adams's question rings true to the present day in a society that often feels contempt for lawyers and legalism. Law is often viewed as restrictive, binding, and coercive. Perhaps the time has come for Adams's views on law, government, and liberty to be recovered in full and see how the law can serve society. Adams has left behind a rich heritage of political and legal thought and "'so long as free, united constitutional government holds its just place in the estimation of the people'"[267] his views and his contributions to this country will be not only relevant but essential forever.

[266] Wroth, *Legal Papers*, 3:252.
[267] Quoted in Frank Grinnell, "John Adams, Lawyer: His Services Ought Never To Be Forgotten," *American Bar Association Journal* 44 (August 1958): 737.

Bibliography

Primary Sources

Adams, John. *Adams Family Correspondence*. Edited by L.H. Butterfield. Cambridge, MA: The Belknap Press of Harvard University Press, 1963.

_____. *Diary and Autobiography of John Adams*. Edited by L.H. Butterfield. Cambridge, MA: The Belknap Press of Harvard University Press, 1962.

_____. *Legal Papers of John Papers* Edited by L. Kinvin Wroth and Hiller B. Zobel. Cambridge, MA: The Belknap Press of Harvard University Press, 1965.

_____. *Papers of John Adams*. Edited by Robert J. Taylor. Cambridge, MA: The Belknap Press of Harvard University Press, 1977.

_____. *The Revolutionary Writings of John Adams*. Edited by C. Bradley Thompson. Indianapolis: Liberty Fund, 2000.

_____. *The Works of John Adams, Second President of the United States: With A Life of the Author*. Edited by Charles Francis Adams. Boston: Little, Brown, and Company, 1856.

Handlin, Oscar and Mary, eds. *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*. Cambridge, MA: The Belknap Press of Harvard University Press, 1966.

Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay. Compiled by A.H. Everett. Boston: Dutton and Wentworth, 1832.

Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts. Compiled by Nathan and Charles Hale. Boston: Dutton & Wentworth, 1853.

Mather, Cotton. *Bonaficius*. Boston, 1710.

Rakove, Jack N., ed. *Founding America: Documents from the Revolution to the Bill of Rights*. New York: Barnes & Noble Classics, 2006.

Taylor, Robert J., ed. *Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution, 1775-1780*. Chapel Hill: The University of North Carolina Press, 1961.

Secondary Sources

Adams, Willi Paul. *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*. Expanded Edition. Lanham, MD: Rowman & Littlefield Publishers, Inc., 2001.

Alden, John E. "John Mein: Scourge of Patriots." *Publications of The Colonial Society of Massachusetts* 34 (1942): 571-599.

Benjamin, S.B. "John Adams: The 'Invisible Hand' Behind American Constitutionalism." PhD diss., University of Michigan, 1996.

Bourne, Russell. *Cradle of Violence: How Boston's Waterfront Mobs Ignited the American Revolution*. Hoboken, NJ: John Wiley & Sons, Inc., 2006.

Brown, Richard D. *Knowledge is Power: The Diffusion of Information in Early America, 1700-1865*. Chapter 4: "Lawyers, Public Office, and Communication Patterns in Provincial Massachusetts: The Early Careers of Robert Treat Paine and John Adams, 1749-1774." New York: Oxford University Press, 1989.

Chroust, Anton-Hermann. *The Rise of the Legal Profession in America*. Volume 1: *The Colonial Experience*. Norman: University of Oklahoma Press, 1965.

Coquillette, Daniel R. *The Anglo-American Legal Heritage: Introductory Materials*. Second Edition. Durham, NC: Carolina Academic Press, 2004.

_____, ed. *Law in Colonial Massachusetts 1630-1800.* Boston: The Colonial Society of Massachusetts, 1984.

Ferling, John E. *John Adams: A Bibliography*. Westpoint, CT: Greenwood Press, 1994.

_____. *John Adams: A Life*. Knoxville: University of Tennessee Press, 1992.

Gawalt, Gerard W. *The Promise of Power: The Emergence of the Legal Profession in Massachusetts 1760-1840*. Westport, CT: Greenwood Press, 1979.

Grinnell, Frank. "John Adams, Lawyer: His Services Ought Never To Be Forgotten." *American Bar Association Journal* 44 (August 1958): 735-737.

Haskins, George Lee. *Law and Authority in Early Massachusetts: A Study in Tradition and Design*. New York: Macmillan Company, 1960. Reprint, Hamden, CT: Archon Books, 1968.

Homans, George C. "John Adams and the Constitution of Massachusetts." *Proceedings of the American Philosophical Society* 125 (August 1981): 286-291.

Howe, John R. *The Changing Political Thought of John Adams*. Princeton: Princeton University Press, 1966.

Kurtz, Stephen G. "The Political Science of John Adams, A Guide to His Statecraft." *William & Mary Quarterly* 25 (October 1968): 605-613.

Maier, Pauline. *American Scripture: Making the Declaration of Independence*. New York: Vintage Books, 1997.

_____. *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776*. New York: Alfred A. Knopf, 1972.

_____. "Revolutionary Violence and the Relevance of History." *The Journal of Interdisciplinary History* 2 (Summer 1971): 119-135.

Main, Jackson Turner. *The Sovereign States, 1775-1783*. New York: New Viewpoints, 1973.

Marshall, Margaret H. "John Adams: Lawyer, Absentee Chief Justice, and Author of the Massachusetts Constitution." *Massachusetts Legal History* 10 (2004): 27-45.

McCullough, David G. *John Adams*. New York: Simon & Schuster, 2001.

Murrin, John M. "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts." *Colonial America: Essays in Politics and Social Development*. Edited by Stanley Katz and John Murrin. New York: Knopf, 1983.

Reid, John Phillip. "A Lawyer Acquitted: John Adams and the Boston Massacre Trials." *American Journal of Legal History* 18 (1974): 189-207.

Ryerson, Richard Alan, ed. *John Adams and the Founding of the Republic*. Boston: Massachusetts Historical Society, 2001.

Selby, John E. "Richard Henry Lee, John Adams, and the Virginia Constitution of 1776." *The Virginia Magazine of History and Biography* 84 (October 1976): 387-400.

Smith, Page. *John Adams*. Garden City, NY: Doubleday, 1962.

Taylor, Robert J. "The Construction of the Massachusetts Constitution." *Proceedings of the American Antiquarian Society* 90 (1980): 317-346.

_____. "John Adams: Legalist as Revolutionist." *Proceedings of the Massachusetts Historical Society* 89 (1977): 55-71.

_____. "Lawyer John Adams and the Massachusetts Constitution." *Boston Bar Journal* 24 (October 1980): 21-27.

Warren, Charles. *A History of the American Bar*. Boston: Little, Brown, and Company, 1911.

_____. "John Adams and the American Constitutions." *George Washington University Bulletin* 107 (December 1926): 1-14.

Williamson, Hugh R. "John Adams, Counsellor of Courage." *American Bar Association Journal* 54 (February 1968): 148-151.

Wood, Gordon S. *The Creation of the American Republic, 1776-1787*. 1998 Edition. Chapel Hill: University of North Carolina Press, 1998.

Zobel, Hiller B. *The Boston Massacre*. New York: W.W. Norton & Company, Inc., 1970.