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Jersey the offices of governor and chancellor were united until 1844. In some early states the legislature had practically unlimited powers not only to organize the judiciary, but to select and remove judges as well. For when the early American states first constituted their legislatures, they insisted that the powers of these legislatures were necessarily supreme and uncontrollable, and that all judicial and constitutional restrictions upon these powers were simply unthinkable. In other words, in some states the written state constitutions were not given the rank of a law much less the rank of the supreme law of the state. An act of the state legislature expressly repealed by the legislature itself. Such act the court in support of them, pending before it and transferred them, together with all documents and depositions in support of them, to the Supreme Court, and at the same time authorized and required the court to try them.

One of the decisive factors contributing to the weakness and dependence of the state judiciary on the legislature was the almost universal tendency to pay little or no salaries to judges. When Jeremiah Smith, a truly prominent lawyer, was appointed Chief Justice of New Hampshire in 1801, the salary attached to this office was a mere $500.00 per annum. See Plumer, Life of 1857; Corning, 471. Subsequently, on Smith's insistence, the salary Appeals was organized in Kentucky, the annual salary of each judge was originally set at $666.66. In 1801 it was raised to $500.00; in 1806, to $1,500.00; and in 1815, to $1,500.00.

In Virginia, Connecticut, Georgia, Rhode Island, North Carolina, South Carolina, and New Jersey the selection of judges was entirely in the hands of the people. In Pennsylvania and Delaware the legislature combined with the executive, and Maryland the governor and Council made the choice, and in New Jersey judges were appointed for a fixed term of years "during good behavior." This "good behavior" was frequently determined by the judges' submissiveness to the legislature.

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judicial institutions did by no means imply that they regarded judges, especially lawyer-judges, above popular control and suspicion. In Ohio, for instance, this popular hostility toward the judiciary led to extreme measures. In 1808-1809, by the so-called "sweeping resolutions," three Supreme Court Justices, three presiding judges of the Courts of Common Pleas, all associate judges of the Courts of Common Pleas—more than one hundred in number—and all the justices of the peace were removed from their offices by a single sweeping action of the legislature. Plainly, the pioneers held some very pragmatic views of the role assigned to the courts of judicature, and they generally insisted on the election of all judges by popular vote, which often amounted to an undisguised "popularity contest." In Kentucky, to cite just one other example, there raged a prolonged and fierce controversy over the election of a supreme court that could be relied upon to stay debts.

Several factors other than popular resentment and low standards of admission to the practice of law contributed heavily to the progressive deterioration or, as Pound puts it, to the "deprofessionalization" of the young American legal profession. Among these factors were, first, the particular geographical conditions of the early republic as well as the primitive and often wholly inadequate means of communication between the various parts of the country. Many communities for a long time were cut off from the more important centers of culture along the East Coast. Second, in keeping with the tendency to bring justice "to every man's door," a vast number of independent courts of general jurisdiction.

It was this widespread distrust which in some of the states contributed materially to a policy, frequently expressed in the new state constitutions, of electing judges by popular vote, and of changing judicial tenure from lifetime "during good behavior" to a specified term of years. See Foote, The Bench and Bar of the South and elsewhere. In Ohio, for instance, this popular hostility toward the judges, especially lawyer-judges, above popular control and suspicion. The memoirs of many an early judge or lawyer "riding the circuit" give a vivid picture of the dangers and inconveniences of travel.

Under the provisions of the First Constitution of Ohio (1802), for instance, members of the Ohio Supreme Court were required to hold a term once a year in each county. Moses Granger, one of the judges, points out that this provision kept the judges on horseback half of the year: "Every lawyer-judge,"
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ever invoked, especially after the 1830's, was singularly ineffective and inefficient, while discipline by the profession itself or by a professional organization, provided there ever existed such an organization, simply had ceased to function by that time. Reprehensible practices often remained unchecked, and the question of competence was rarely if ever raised. At first some influential local bars, such as the bar organizations in eastern Massachusetts, which shortly before the Revolution had achieved a high level of standards and discipline, tried to stem this general tide of professional deterioration. Also, the so-called circuit bars, which accompanied the circuit courts on their travels from county to county, at least for a while had a wholesome and restraining effect upon the disorganized local bars by keeping alive or by kindling a professional spirit. But a general and widespread trend toward deprofessionalization, which had briefly manifested itself right after the Revolution, became permanent after the 1830's. In the face of this trend and its concomitants, such as the universal lowering of educational requirements and rather indiscriminate admission to practice, the efforts on the part of some lawyers or lawyers' organizations to maintain a high level of professional standards and discipline proved in vain.

Hence, at least in some sections of the country and then only for a limited period of time, the years following the Revolution down to about 1840 might also be called the period of the valiant struggle of the legal profession to preserve its pre-Revolutionary attainments. In the final outcome this struggle was unsuccessful. As time went on, the pernicious institution of the "habitual client-caretaker" developed, especially in the larger Eastern urban centers. A contemporary critic of the legal profession bitterly attacked these deplorable conditions: "Another pernicious practice is, making bargains upon the event of the cause. How ruinous is it to a people to have an 'order' of men [scil., the legal profession] among them, who are rendering the laws a mere business of trafficking! How disgraceful is such a mode of conduct. Are the PEOPLE of this 178-179. The "circuit bars" not only stimulated "a substantial corporate sense" as well as a feeling of "professional fellowship," but also promoted "a close sense of what was done and what was not done. And even if there was little formal discipline, there was nevertheless pressure to conform to group standards." Hurst, The Growth of American Law 386 (1950).
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Commonwealth [sic., Massachusetts] in so dreadful a state, as to
give one quarter of their property to secure the remainder, when
eye appeal to the laws of their country? Shall we nourish an
'order' in the community merely to take advantage of our dis-
tresses, and under pretense of doing us justice, demand any pro-
portion of our property they may see fit? In a few years we may
expect their influence to be so great that no man will be able to
apply to the law without mortgaging a certain part of his estate
to a lawyer."177 This type of practitioner, which also included the
habitual criminal lawyer, did little to enhance the reputation of
the profession. Neither the courts nor the opinion of the honorable
and respectable members of the essentially unorganized and, hence,
powerless bar, were able to cope effectively with the reprehensible
methods and performances of these men.

This general situation, besides having its deleterious effects
on early American law as well as on the administration of justice,
evitably caused the complete breakdown of the traditional Eng-
lish distinction between barrister and attorney (or solicitor): "The
profession," Richard Rush observed in 1815, "is not subdivided,
in any of the states, in the ways that it is in England, and the American
lawyer is called upon at one period or other of his life to under-
stand the constitution of each of these forums."178 Aside from the
expense inherent in such a differentiation—in England, as a rule, the
client consulted the attorney or solicitor who, in turn, called in the
barrister whenever he considered such a step necessary—the rela-
tively small number of lawyers that were to be found after the

177 Austin (Honestus), Observation 11 (1786).
178 Rush, American Jurisprudence (1815), reprinted in part in Miller, The
Legal Mind in America 43-44 (1962), especially at 46. It will be noted, however,
that the English distinction between barrister and attorney (solicitor) had been
generally disregarded in colonial America. Moreover, the relatively small number
of competent lawyers in the colonies made the bifurcation of the profession inap-
propriate, not to mention the fact that unlike in England the several colonies lacked
one single center of appellate jurisdiction. Hence, it could be maintained that the
young American legal profession merely continued a practice that already was
widespread in most of the American colonies. The closest early America
ever came to the English institution of the barrister was perhaps that handful of
prominent lawyers such as William Pinckney, William Wirt, Walter Jones, and
others, who, after the year 1800, began to establish themselves in or around the
city of Washington, for the purpose of handling appellate cases before the Su-
preme Court of the United States.

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Revolution could not successfully have been divided into barristers
and attorneys. The fusion between these two branches of the
profession became a permanent feature of legal practice in the
United States. As a matter of fact, the English attorney or solicitor,
rather than the barrister, became the model for the American
legal practitioner. But the English attorney or solicitor of that time
lacked an efficient professional organization and the tradition of
professional responsibility which such an organization engen-
ders.179 Hence, the young American legal profession had no prece-
dent upon which it could model itself.

The widespread irritation among people who attributed all
their economic and social troubles to lawyers, together with a
deeply rooted hostility toward everything British, led, as might be
expected, to a strong and lasting sentiment against the common
law of England, which during the eighteenth century had gradu-
ally asserted itself as the law of the colonies. This antagonism
toward the common law probably became more pronounced dur-
ing the so-called Jeffersonian era, a period in American history
which seems to have favored everything French, including the
promulgation of a radically new code of laws fashioned after the
recently introduced Code Napoléon. Over the vociferous protests
of such staunch "conservative" legalists as James Kent, David
Hoffman, Daniel Webster, and to some extent Joseph Story, the
caller for a fresh codification of all American laws (which as
early as 1798 had been raised by Jesse Root of Connecticut) was
revived during the 1820's by a number of prominent lawyers who
might also have voiced "progressivist" social ideas. Addressing the
Historical Society of New York in 1823, William Sampson ex-
tolled the advantages of a written code of laws: "A sister state has
already set on foot the experiment of a penal code and committed
its execution to the hands of one of its most capable citizens. Let us
hail the happy augury and prepare for a still nobler effort, which
imperious necessity will force upon us, and which cannot and
ought not be long delayed," namely, the codification of all Amer-
ican laws. "[With the introduction of such a code] the law will
govern the decisions of judges, and not the decisions the law....
Our jurisprudence then will be no longer intricate and thorny....

We shall be delivered too from those ever increasing swarms of foreign reports . . . which darken the very atmosphere by their multitude."

In reviewing Sampson's suggestions in the *North American Review* in 1824, Henry Dwight Sedgwick admitted that he was not suggesting "a novelty in speculation or practice." Sedgwick himself advocated such a codification which "has been frequently recommended and, as we believe, is the only remedy which can be applied with success. . . . [A]t least some of the larger and more wealthy states of the Union should cause their laws to pass under a general revision, and to be formed into written codes." In 1837 in Cincinnati, perhaps in response to the general


In 1831, Sedgwick, *On an Ameliorative Discourse Delivered before the Historical Society, on Saturday, December 6, 1823, Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law*, reprinted in part in Miller, *Legal Mind* 156-26 (1852), especially at 160-61. Sedgwick admitted, however, that codification might not always be the hoped-for cure: "It is said, and no doubt truly, that if a written code of the laws were prepared with the greatest care and ability, there would still be many lurking ambiguities; that new cases and new difficulties would arise; that men would be compelled to append to the code; that these comments would themselves form the basis of fresh questions; that different opinions would be entertained of the meaning of the code itself, and conflicting decisions made thereon, and thus in a short time there would grow up a mass of authority and relieved, and, finally, that all expectations of reducing the law to a state of simplicity and certainty would prove fallacious." Miller, *Legal Mind* 143 (1852).

Thomas S. Grimke of South Carolina came out strongly in favor of codification: "[T]he value of principle, as compared with a heterogeneous mass of facts and details . . . will be questioned by no one . . . . Our laws, in the present conditions, may be called the grave, rather than the cradle of principles." *Ibid.*, 152-53. (5) A code would be a "most efficient barrier against careless and hasty . . . legislation." Legislation would have to pay attention to basic principles, make direct reference to existing body of laws, and be on the whole more practical. *Ibid.*, 153-54. (4) Codification "must exercise a happy influence on the character and usefulness of the Law." *Ibid.*, 155. (5) "If the Law itself shall become more respectable . . . the Legislator and the Judge, as well as the Provisions of the Law, will rise . . . public estimation." *Ibid.*, 155-56.


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Western dislike of the common law tradition, perhaps in the spirit of "Jacksonian democracy," Timothy Walker likewise came out strongly in favor of codification: "Could our whole law be found in our statute books, we might dispense with law schools, and almost with lawyers. . . . [W]hat would the stranger say, if I should tell him, that although in our theory, the legislature makes our laws, yet, in fact, our legislative acts do not contain, perhaps, a fifth part of the law which governs us? . . . Nowhere, in this country, is there to be found any thing approaching to a complete code of statute law. . . . On the contrary, until very recently, those who have proposed measures for enlarging our codes, have been sneered at . . . as visionary schemers. . . . Codification has been condemned as but another humbug." Needless to say, the

Expediency of Reducing the Whole Body of the Law to the Simplicity of a Code, Delivered to the South Carolina Bar Association, March 17, 1827 (1827), reprinted in part in Miller, *Legal Mind* 148-58 (1852), especially at 149-50. Grimke also rejected the claims made by the advocates of codification that if a code were to be introduced, "the people at large will become better acquainted with the law . . . and litigation will disappear, to a very great extent. . . . No code will ever accomplish them." *Ibid.*, 150. Nevertheless, with some reservations, Grimke recommended codification of the laws for the following reasons: (1) Since method and system are vastly superior to confusion, "a code must be eminently a public blessing." *Ibid.*, 152. (2) "The value of principle, as compared with a heterogeneous mass of facts and details . . . will be questioned by no one. . . . Our laws, in the present conditions, may be called the grave, rather than the cradle of principles." *Ibid.*, 152-53. (5) A code would be a "most efficient barrier against careless and hasty . . . legislation." Legislation would have to pay attention to basic principles, make direct reference to existing body of laws, and be on the whole more practical. *Ibid.*, 153-54. (4) Codification "must exercise a happy influence on the character and usefulness of the Law." *Ibid.*, 155. (5) "If the Law itself shall become more respectable . . . the Legislator and the Judge, as well as the Provisions of the Law, will rise . . . public estimation." *Ibid.*, 155-56. (6) "[T]he control which science," organized in a systematic code, "invariably exercises over those who are engaged in a practical pursuit to which it applies" strongly argues in favor of a code. *Ibid.*, 156. (6) A code would greatly facilitate the teaching of law. *Ibid.*, 157. (8) A systematic code would substantially assist the leading men in public life who would "find in a code, the best preparative for their duties," the more so, since "[i]f law, indeed . . . pervades . . . all society," *Ibid.*, 157-58.

cry for a systematic codification of American law came in part from "progressive" social liberals, in part from people who simply harbored an abiding distrust and dislike of the traditional English common law, or who felt that this common law could not adequately cope with the particular "American condition."

The Antifederalists, who around the turn of the century were also interested in reforming existing practices and procedures, were strongly inclined to urge the wholesale reception of French law or, at least, a workable combination or integration of the English common law and the French civil law, which, in essence, was but a "modernized and modified" form of Roman law. Gratitude to France for her timely assistance during the Revolution was at a high point during these years, and great interest was displayed in the language, literature, customs, fashions, ideas, and manners of the "enlightened" French people. It is no surprise, therefore, that French law and French legal authorities, which were given high standing in many quarters, should frequently find their way into the early American law reports. In our courts of justice the writings of the [French] civilians are referred to freely and fearlessly. The Institutes of Justinian and the commercial treatises of Pothier, Emerigon, and Roccus, are naturalized among us. Obviously, certain imperfections of the common law of the day, especially as regards commercial transactions, on occasion compelled American courts to turn to French treatises on the civil law for guidance and information. But even when adequate English authorities were available, the courts did not hesitate to consult French as well as other Continental sources: "The common, civil, and customary law of Europe have each precisely the same force with us in this branch [the law merchant and maritime law]... Our courts study them all, and adopt from them whatever is helpful."

Joseph Story, and others, might be the cause of renewed and even greater troubles: "The emperor Napoleon gave to the French a new and uniform code of laws, which has been now in force about twenty years. It is admitted to be as complete as a work of this kind can be... But I assure you, that, as far as I have been able to observe, the digests and code of Justinian, the former laws and ordinances of the [French] kingdom, and the immense collection of the works of the civilians and French jurists are not less quoted at present in the [French] lawyers' pleadings than they formerly were, and so it would be with us if we were to abolish the Common Law. We should still recur to it for principles and illustrations, and it would rise triumphantly above its own ruins, deriding and defying its impotent enemies." Du Ponceau, Dissertation (1824) (Miller's partial reprint), 113.

184 French and other basic legal works were translated into English or published about that time: Nugent's translation of Montesquieu's Esprit des lois was published in Boston in 1800 and in Philadelphia in 1801. François Xavier Martin's translation of Pothier's work on Contracts was published in New Bern, North Carolina, in 1803; and W. D. Evans published the same work in Philadelphia in 1806. John E. Hall's translation of Emerigon's Maritime Loans was published in Baltimore in 1811; and Jared R. Ingersoll translated Roccus' De navibus et navario in 1809. Nugent's translation of Burlamaqui's Principes du droit de la nature et politique was published in Boston in 1792. For additional information, see Marvin, Legal Bibliography, or a Tableaux of American, English, Irish, and Scotch Law Books (1847), passim.

most applicable to our situation, and whatever is on the whole just and expedient, without considering either course obligatory. If Mansfield, Scott or Ellenborough is cited with deference or praise, so likewise are Bynkershoek, Valin, Cheirac, Pothier, and Emerigon. The authority of a decision or opinion, emanating from either of these sources, is rested on... its intrinsic excellence. And if we seek instruction on the mercantile law from jurists in England, why not seek it from their masters on the continent of Europe? Why do we not get at the fountain-head? Why do we content ourselves with second-hand information? In fact all eminent lawyers sooner or later find it necessary to make an important, it might also be said the most important, branch of elementary legal education."¹⁸⁶ Peter du Ponceau, the scholarly Philadelphia lawyer, stressed the practical importance of the civil law in the United States, "where the administration of the Civil and the Common Law is committed to the same judges, and the same body of judges is called upon to practice them both".¹⁸⁷ and Hugh Swinton Légaré of South Carolina, James Kent, David Hoffman of Maryland, and Joseph Story considered it practicable and even desirable to infuse into American jurisprudence a large portion of the spirit and philosophy of the French civil law.¹⁸⁸

One of the specific reasons for the public distrust of the existing laws arose from the intricacies and technicalities of the English common law. Special pleading (which had been introduced in England during the eighteenth century), Latin, French, and other terms unfamiliar to the layman were generally regarded as tricky devices to mislead and despoil ordinary people.¹⁸⁹ William Duane of Philadelphia, attacking the "mysterious" and "unintelligible" common law of his day, was of the opinion that it was invented and kept in force by the lawyers solely for the purpose of preventing the non-initiated from acquiring any knowledge of the law. He suggested that the law be so simplified as to enable everyone to be his own lawyer: "... law would soon become a part of academic study.... By this means... society would be prodigiously advanced in knowledge."¹⁹⁰ "One reason of the pernicious practice of the law, and what gives great influence to this order [of lawyers]," Benjamin Austin lamented, "is, that we have introduced the whole body of English law into our Courts; why should these States be governed by British laws? Can the monarchial and aristocratical institutions of England, be consistent with the republican principles of our constitution?.... The numerous precedents brought from 'old English Authorities'... answer no other purpose than to increase the influence of lawyers."¹⁹¹ To be sure, there existed a number of lawyers, at least on the eve of the Revolution, who fiercely resisted every legal reform, and who regretted the fact that Blackstone's Commentaries, which made their appearance in the colonies just before the Revolution, should simplify and arrange the law of England in such a manner that even laymen could acquire a modicum of legal knowledge without undue effort.

Even some lawyers of prominence soon joined Austin in his denunciations of the English common law. Deploiring America's "slavish" dependence on English legal institutions, Henry Dwight Sedgwick, by no means a fanatical opponent of the common law, in 1824 raised the question "whether these United States, or some of them, have not so increased in magnitude, whether their institutions, mode of society, tenure of property, and, in short, all their relations and their whole character, have not become so materially different from those existing in England... that the change and alienation... ought not to be formally recognized; whether we

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¹⁸⁷ In 1821, Caleb Cushing published his translation of Joseph Pothier's Treatise on Maritime Contracts of Letting to Hire. See also Anonymous, 6 North American Review 76 (March, 1817), where a reviewer of David Hoffman's Course in Legal Studies deplores Hoffman's failure to give adequate consideration to the Continental civil law.
¹⁸⁸ Anonymous, 36 North American Review 400 (April, 1835).
¹⁸⁹ The general adoption of the French civil law, however, ran into many practical difficulties, including the language barrier. In consequence, few lawyers or judges were able to make effective use of French legal sources. By the time translations became more generally available, sufficient Anglo-American materials had been developed to counteract the "civilian" influence. This was due mainly to the efforts of James Kent, Joseph Story, John Marshall, and others.

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¹⁹¹ Duane, Sampson against the Philistines 68 (1805). See note 69, Chapter 1, above, and the corresponding text.

¹⁹² Austin (Honestus), Observations 12 (1786).
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have not derived all the aid we ought to expect from the land of
our ancestors; whether any farther servile dependence on a foreign
country does not rather tend to retard than promote our advance-
ment; and, lastly, while we pay to England all due courtesy and
respect, ... whether we should not, nevertheless, declare a final
separation, not a nonintercourse, but an independence in jurispru-
dence, as really and nominally absolute, as it has long been in point of
political sovereignty?"192 Charles Jared Ingersoll, in his famous

192 Sedgwick, On an Anniversary Discourse Delivered before the Historical
Society, on Saturday, December 6, 1823, Showing the Origin, Progress, Antiquities,
Curiosities, and Nature of the Common Law. By William Sampson. This article,
which was a reply to William Sampson's attack upon the common law, was first
published in 45 North American Review 416-39 (October, 1844), and is reprinted
in part in Miller, Legal Mind 136-46 (1962), especially at 140-41. William Samp-
son, the "wild Irishman" who had studied law at Lincoln's Inn, had insisted that
the language of the common law was "a barbarous jargon, its root in savage an-
tiquity, its growth through ages of darkness, its fruits but bitterness and vexation."
He had compared English law to a " pagan idol to which they daily offered up
much smoky incense," calling it "by the mystical and cabalistic name of Common
Law ... to be not seen or visited in open day; of most indefinite antiquity; sometimes
in the desecration of age, and sometimes in the bloom of infancy, yet
still the same that was, and was to be, and evermore to sit ... motionless upon its
antique altar for no use and purpose, but to be praised and worshiped by ignorant
and superstitious votaries. ... If the hundredth part of that painful industry and
acknowledged talent, which is wasted upon vain and ever baffled efforts to recon-
cile the irregularities, explain the anomalies, sustain the paradoxes, and solve the
improvement or advancement, what glorious fruits would it not, e'er now, have
... We should have had laws suited to our condition and a high destiny;
either be governed by laws made for us, or made by us. ... [The] decisions of our
It is for that reason also, that we should import no more; for with every deference
persons to legislatures, and integrity of English judges, they are not fit
to teach, and the other always to learn. Our condition is essentially different from
and has freedom for its end, and under it we live both free and happy. But even
this part of our law which thus secures our rights and liberties, is not un-
tained with pedantry, nor free from all absurdity. ... The best reason urged
for the adherence to English precedents, is the preserving of uniformity amongst
the sister states. It has not, nor cannot answer this end. This evil of divergence
Sampson, An Anniversary Discourse, Delivered before the Historical So-
ciety of New-York, on Saturday, December 6, 1823: Showing the Origin, Prog-

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Discourse Concerning the Influence of America on the Mind
(1823), maintained outright that American lawyers would never
take their destined position in the forefront of America's intel-
llectual life until they had declared their complete independence
from the English common law and English precedents. "American
lawyers and judges," he lamented, "adhere with professional tenacy
to the laws of the mother country. The absolute authority of
recent English adjudications is disclaimed: but they are received
with a respect too much bordering on submission."1918 But with a
tone of gratification he added that "[o]ur professional bigotry [of
adhering to the laws of England] has been counteracted by penal
laws in some of the States against the quotation of recent British
precedents."

The early strictures of Benjamin Austin and others were
restated in essence some decades later by Frederick Robinson, a
spokesman of "Jacksonian democracy," who attacked most ve-
hemently the existing common law, the legal profession, and the
judiciary: "[B]y means of ... [an] organized combination of law-
yen throughout the land ... the laws have always been molded to
suit their purposes, and what are called Courts of Justice are only
engines to promote their interests and secure their ascendancy
in the community."196 The judge, Robinson alleged, "is a member of
... [this] combination of lawyers,"196 and "it is for the interest of
this trades union of lawyers to have the laws as unintelligible as

192 Sedgwick, On an Anniversary Discourse Delivered before the Historical
Society, on Saturday, December 6, 1823, Showing the Origin, Progress, Antiquities,
Curiosities, and Nature of the Common Law (1824), reprinted in part in Miller, Legal Mind 121-34 (1962), especially at 121, 123, 125,
128, 130, and 133.
1918 Reprinted in part in Miller, Legal Mind 78-81 (1962), especially at 78
79. Ingersoll's Discourse of 1823, which must be considered the most outstanding
of the predecessors of Emerson's The American Scholar of 1837, is one of the
several oratorical addresses to the genius of America and the American people.
It attempted to arouse America to an intellectual outlook and perspective beyond
mere pioneering, technical development, or imitation. Insisting upon complete
independence from English law, Ingersoll strongly opposed what he regarded as
"colonial acquiescence" in legal and institutional matters.
196 Miller, Legal Mind 79 (1962). Like William Sampson (see note 180,
Chapter 1, above), Ingersoll refers here to Livingston's penal code for Louisiana.
196 Robinson, A Program for Labor: An Oration Delivered before the
Trade's Union of Boston and Vicinity, July 4, 1854 (1854), reprinted in Social
194 Ibid.
possible, since no one would pay them for advice concerning laws which he himself could understand."

Taking a dim view of the courts, Robinson alleged that "[t]he judiciary . . . in every State where judges hold their office during life, is the headquarters of the aristocracy. And every plan to humble and subdue the people originates there." "One of the most enormous usurpations of the judiciary," Robinson continued, "is the claim and possession of common law jurisdiction." Although "contained in ten thousand different books," this common law "is said to be unwritten law, deposited only in the head of the judge, so that whatever he says is common law, must be common law, and it is impossible to know, before the judge decides, what the law is." 200

Robinson's strictures could be summarily dismissed by the legal profession as the rantings of an ill-informed and prejudiced rabble-rouser. But the articulate attacks upon the common law by Robert Rantoul, the foremost Democratic member of the predominantly Federalist Massachusetts bar during the 1830's and 1840's, 201 understandably caused some considerable concern among the lawyers. "The Common Law," Rantoul bluntly asserted, "sprung from the Dark Ages . . . [It] had its beginnings in the time of ignorance . . . in folly, barbarism, and feudality . . . [It] sheds no light but rather darkness . . . No man can tell what the common law is; therefore it is not law: for law is a rule of action, but a rule which is unknown can govern no man's conduct. Notwithstanding this, it has been called the perfection of human reason. The Common Law is the perfection of human reason,—just as alcohol is the perfection of sugar. The public spirit of the Common Law is reason doubly distilled, till what is wholesome and nutritive becomes rank poison . . . [a] sublimated perversion [which] bewilders, and perplexes, and plunges its victims into a maze of errors . . . No one knows what the [common] law is, before he [sic], the judge] lays it down . . . No man knows what the [common] law is after the judge has decided it . . . Statutes, enacted by the legislature, speak the public voice . . . The objections to the Common Law have a peculiar force in America, because the rapidly advancing state of our country is continually presenting new cases for the judges . . . If a Common Law system could be tolerable anywhere, it is only where every thing is stationary. With us, it is subversive of the fundamental principles of a free government . . . All American law must be statute law." 202

While the "moderates" agreed that the common law which had developed in England subsequent to the American Revolution should be wholly ignored and, if necessary, abrogated, the "radicals" expostulated that only the English law as it had existed prior to the fourth year of the reign of James I (the year 1606) 203 should

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200 Rantoul, Oration at Scituate, Delivered on the Fourth of July, 1836 (1836), reprinted in part in Miller, Legal Mind 122-27 (1862). A year later James Richardson, perhaps in reply to Rantoul's attacks, came out strongly in defense of the existing common law and of the legal profession: "Among nations . . . where life, liberty and property are protected by standing laws, the construction and application of . . . laws, and the numerous causes and questions arising under them are clearly connected with the security, tranquillity and prosperity of the body politic; and under all such governments, the legal profession has had extensive influence,—the honest and able advocate has been respected, honored and rewarded, his opinions confided in, and his influence extended; and thus his duties have become more important, and more solemnly obligatory. . . . That there are those occasionally creeping into the [legal] profession, who lie open to the censure of the high and low, to the shaft of the witty, and to the contempt or com- merson of all . . . is not denied, but where is the justice of pointing the finger of scorn, or aiming the shaft of ridicule, at the whole profession . . . ? There are, however, other and superior classes of men who hold . . . the legal profession in too low an estimation. These are theorists without practical knowledge . . . . These contend that the study and practice of the law contract the mind, [and] narrow the range of thought." Richardson, An Address before the Members of the Suffolk Bar, at Their Request, February 25, 1837 (1837), reprinted in part in Miller, Legal Mind 250-35 (1862), especially at 250-51. Richardson graduated from Harvard in 1797, took his M.A. in 1800, and studied law with Ames Fisher, a staunch anti-Democrat Whig and Federalist in Boston. He soon became one of the leading lawyers of the Norfolk bar, serving as its president from 1827 to 1858.

201 See supra n. 30, 51 Ind. 29, 31 (1872); Penny v. Little, 3 Scammon (III.) 301 (1843). The date of 1606 was chosen because it was regarded as the year in which the colonization of America began. It was fixed by the Constitutional Convention of Virginia in 1776 (chap. 5, par. 6, Virginia Public Acts, 1768-83, at 33), and it appears to have gained currency from Tucker's edition of
have binding force in America. Thomas Jefferson, for instance, maintained that the American colonists had asserted against the British crown not "the rights of Englishmen" but "the rights of man"; and he seriously doubted the propriety of quoting in American courts English authorities subsequent to the emigration, that is, subsequent to the year 1606. Some "extremists," on the other hand, went so far as to suggest the abolishment of the English common law in its entirety, claiming that it had no ipso facto validity whatsoever in the United States, except those of its provisions which expressly had been adopted by the several state conventions, by statute, or by court decisions. "As soon as we cut asunder the legatures that bound us together ... the Common Law was done away."204 It was urged, to cite one example, that the Virginia courts abandon the practice of quoting British decisions, because it was thought to be unbecoming for a free republican government to be administered by principles "of a rigid and high toned monarchy."206 At the same time the hope was expressed that "substituting acts" would soon be passed by the people enabling them to "shake off this last seeming badge and mortifying memento of their dependence [scil. the common law of England] on her [scil. England]."206 In sum, nothing less was proposed than that "wholesome statutes," enacted by patriotic American legislatures, should eradicate "this engine of oppression," namely, the English common law, from the American soil. "Instead of living under British laws after we had thrown off the government which produced those laws, we should have adopted republican laws, enacted in codes, written with the greatest simplicity and conciseness, alphabetically arranged in a single book, so that everyone could read and understand them for himself."207

Some states, such as Delaware,208 Maryland,209 Massachusetts,210 and Rhode Island,211 in their state constitutions expressly stipulated that only those parts of the common law which had been developed in America after the year 1775 or 1776, or after the adoption of the respective state constitutions, should be in force, unless otherwise indicated. In other states, such as North Carolina, the common law of England, so far as it was applicable and not inconsistent with the North Carolina Constitution, the federal Constitution, the laws of the United States or those of other states, was adopted and declared to be in force by special statute. Other states, again, debated at great length the extent, if at all, to which the English common law was still applicable in their courts—debates which are reminiscent of the discussions once carried on in the early American colonies over the same issue.212 In these states the adoption of the English common law frequently had to await some authoritative declaration by the courts or the legislature. This situation, which frequently bordered on utter chaos, is well illustrated by the remark attributed to Littleton Waller Tazewell of Virginia: "[Edward] Pendleton [Chief Justice of the Virginia Court of Appeals] always professed the most profound respect for British decisions, but he rarely followed them; while [Chancellor George] Wythe, who spoke disrespectfully of them, almost invariably followed them."216 In the main, however, the several states pursued the somewhat vague policy of accepting only those parts of the common law which they considered suited to the changed conditions and circumstances.217 Hardly anywhere was the common

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204 Declaration of Rights of 1776, art. 3.
206 Constitution of 1786, art. 6.
207 Constitution of 1780, chap. 6, art. 6.
208 Constitution of 1777, art. 15; Constitution of 1846, art. 1, sec. 17.
209 Constitution of 1777, part 2, sec. 90.
210 Constitution of 1776, art. 12.
211 Constitution of 1842, art. 14, sec. 1.
213 See Chipman, A Dissertation on the Act Adapting the Common and Statute Laws of England, 1: Chipman (Vt.) 117 (1792): "That so much of the common law of England as is not repugnant to the constitution, or to any act of the Legislature of this State, be, and is hereby adopted, and shall be, and continue to be, law within this State."
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law adopted in its entirety; and it was frequently left to judicial decisions as well as to the usages and customs of the respective states to determine how far, if at all, the common law had been introduced and sanctioned.

"[T]he common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country."218 Justice Chase summed up this whole situation when he stated:219 "Each colony judged for itself, what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity, in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England is the law of each state, so far as each state has adopted it."220

The general aversion to the tradition common law of England in some instances assumed specific forms. In 1806 the General Assembly of Virginia instructed its senators and representatives in Congress to "oppose the passing of any law founded on recognizing the principle lately advanced that the Common Law of England is in force under the Government of the United States,"221

218 1 Kent, Commentaries on the Constitution 472 (1838).
219 United States v. Worrell, 1 U.S. (1 Dall.) 33, 141 (1798).
221 N.W. 506 (1895).
222 Warren, History of the American Bar 231 (1911).

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Governor Tyler of Virginia found it most inappropriate that "the time of the court... [should be] taken up in reconciling absurd and contradictory opinions of foreign judges which certainly can be no part of an American judge's duty."222 In 1799, New Jersey enacted a statute forbidding the bar under heavy penalty to cite in court any decision, opinion, treatise, compilation, or exposition of the common law made or written in England after July 1, 1776.223

In Pennsylvania, in the year 1805, Edward Shippen, the Chief Justice of the Supreme Court, and two Associate Justices, Thomas Smith and Jasper Yeates, were impeached for an "arbitrary and unconstitutional act," namely, for having fined and jailed Thomas Passmore for "constructive contempt."224 It was alleged that punishment for contempt was a form of barbarism sanctioned by the English common law wholly unsuited to this country and, hence, illegal. It appears, therefore, that in Pennsylvania the mere reliance on English law could cause the impeachment of a state judge.

The trial of the three justices became the occasion for renewed attacks on the lawyers, the courts, and the common law in general. And when the leading lawyers of Philadelphia—Jared Ingersoll, Alexander J. Dallas, and Peter du Ponceau—refused to serve the legislature as attorneys for the prosecution, these attacks waxed ever more vehement. "It is in vain to disguise it," wrote a contributor to the Aurora, "either the people must determine at once to abandon their liberties, their property and their understandings to the discretion of the lawyer's corps—or bring them to a due sense of their equality with the rest of their fellow citizens."225 Another critic alleged that "the spirit of independence of our lawyers is now established beyond all controversy, and the people ought to be congratulated that there has not been one found to aid the commonwealth."226 And a person who apparently considered himself a great wit suggested that "we shall... learn what

222 Ibid., 236.
224 See Bayard v. Pasmore, 3 Yeates (Pa.) 438 (1803); Republica v. Pasmore, ibid., 441.
225 Aurora, December 18, 1804. The Aurora, edited by William Duane, was a paper in which the radical Republicans vented their political grievances.
226 Ibid., December 24, 1804.
the opinions of our lawyers are respecting the common law and our constitution, and know whether we were 'our own worst enemies' in declaring independence and not remaining under the protection of the British magna carta and bill of rights."

The three justices were declared acquitted, however, since the prosecution failed by three votes to obtain a two-thirds majority. As a matter of fact, their case was won by an appeal to the principles of the common law of England. At once the common law came under fierce attack: "The actual issue was," an irate author wrote in the Aurora, "whether the constitution established upon the principles of the revolution of 1776 should remain—or, the dark, arbitrary, unwritten, incoherent, cruel, inconsistent, and contradictory maxims of the common law of England, should supersede them. And the sentence on this trial has been such, that the liberty and safety of the citizens of this commonwealth, hitherto the example of the union, and the admiration of the commonwealth, put afloat upon the unbounded and trackless ocean of the common law." Other critics maintained that the puzzling terminology of the common law, which no common person could possibly understand, had been invented by the priests during the against the acquittal of the justices, it was prophesied, would "hasten the permanent emancipation of the people from the only remaining for the common law of England, some radicals proposed a code, which, they naively believed, could be definite, compact, and simple enough to be understood by every person."

In 1810 a statute was passed in Pennsylvania—-not repealed until 1862—forbidding the citation of any English decision handed down after July 4, 1776. This statute came about in the following manner: In 1809 a member of the Pennsylvania House of Representatives, Michael Leib, chanced to be present during a trial in a court of justice. An old English case was cited as authority that truth may be admitted in evidence in a case of criminal libel, but may not be used as justification. Profoundly shocked by this ruling, Leib resolved that such "dangerous and immoral" doctrines must be abolished at all cost. Addressing the House of Representatives, he raised the question whether the people of Pennsylvania were to go to England in order to find out what their laws and constitution meant—whether they were slaves of English law and creatures of English precedent.

The Kentucky legislature, between 1807 and 1808, considered an interdict prohibiting the citation or reference to English decisions or authorities of any date. It relented, however, and in 1808 passed a statute which provided that "all reports and books containing adjudged cases in the Kingdom of Great Britain, which decisions have taken place since the fourth day of July, 1776, shall not be read, nor considered as authority in any of the courts of this commonwealth, any usage or action to the contrary notwithstanding."

In Ohio, as late as 1819, a pamphleteer, John Milton...
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Goodenow, declared that the common law of England was not the law of the United States, and that it had absolutely no authority in any of the states that had been formed out of the old Northwestern Territory. As a matter of fact, it became a rule in Ohio that the common law was part of the law only in so far as its principles were reasonable and consistent with the letter and spirit of the state Constitution and suitable to the peculiar conditions and business of its people and the state of its society; but if wanting in any of these ways, it would be changed. Thomas Jefferson, in 1779, plainly rejected the idea that the common law of England should be recognized and made enforceable in the newly established federal courts. He called this idea an "audacious, barefaced and sweeping pretention," beyond the power of the federal courts. "If this assumption be yielded to," Jefferson contended, "the State courts may be shut up." Some opposition to English precedents and English authorities may also be explained as a crude effort on the part of many ill-trained lawyers, judges, and magistrates "to palliate their lack of information by a show of patriotism." which are not authority, but which ought to be read and used, for the sound and clear reasoning they contain, as Pothier on Obligations." This would indicate that it was once and for all the legal authorities in particular. See also Collins, Historical Sketches of Kentucky 107-107 (1848).

Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of the English Common Law typical of the post-Revolutionary and "frontier" dislike for English law, had a clear tendency toward the common law. See Lee's note of Moore v. Vance, 1 Ohio 1 (1811); Lindsley v. Coats, 1 Ohio 443, 444 (1811).

Letter of Thomas Jefferson to Edmund Randolph, dated August 18, 1799, 4 Writings of Thomas Jefferson 116 (Washington ed., 1848). In his Essay on Power, states that a "Western lawyer of eminence [Judge English law book into a court of this country," Conduce of Life, 6 The Complete Jurisdiction 14-15 (1902). Some of these attitudes and measures, it must be conceded, were also occasioned by other considerations. Thomas Jefferson, for instance, favored a rule prohibiting the citation of English authorities after George III, because such a rule would eliminate "Mansfield's innovations," which he detested. Peter du Ponceau summarized this situation as follows: "[A] spirit of

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This anti-common law sentiment caused much excitement and grave concern among lawyers and judges alike. Many protests were made by both bench and bar against the actions taken to restrict, modify, or abolish the common law. Hugh H. Brackenridge, Associate Justice of the Supreme Court in Pennsylvania, in 1814 insisted that the Pennsylvania act of 1810, forbidding the citation of English cases and authorities subsequent to July 4, 1776, should be repealed without delay. He felt that this particular statute was unconstitutional on its face in that it abridged the inmemorial right of the courts to hear all reasons and arguments on any issue before them. In the Kentucky Assembly, Henry Clay violently objected to the proposal, supported by almost every member of the Assembly, that no English law treatise, report, or decision whatever could be cited as an authority in the state courts. But the most he could obtain in the face of a nearly universal popular demand was an amendment limiting the interdict to such legal works or decisions as had been written or delivered after July 4, 1776.

The anti-common law sentiment was revived during the period of "Jacksonian democracy." Francis Wright, for instance, expostulated in 1829: "Her [England's] law is your law. Every part and parcel of the absurd, cruel, ignorant, inconsistent, incomprehensible jumble styled the common law of England—every part and parcel of it, I say, not abrogated or altered expressly by legislative statutes, which has been very rarely done—is at this hour the hostil...
law of revolutionized America." And Frederick Robinson, arguing in the same vein, queried his audience in 1834: "But Shall we, who claim to be free and equal, voluntarily continue in a state of almost total ignorance [as regards the law], with laws so multiplied, so obscure, and so contradictory, as to render the general knowledge of them impossible?"

"Jacksonian democracy," it must be borne in mind, was essentially rural. It was based upon the spirit of good fellowship as well as the genuine feeling of the frontier, in which classes, privileges, particular distinctions, and inequalities of fortune played little or no part. It propagated the doctrine that the self-made man had a natural right to his success wherever he could find it in the free competition with all other men. Conversely, it viewed governmental and institutional restraints of all sorts with the utmost suspicion as an arbitrary and wanton limitation on the right to work out one's own "destiny." What it objected to most were all forms of allegedly artificial obstacles and restrictions, including legal restraints, upon the individual to plan and pursue his own career without fear or favor. What it instinctively opposed was the crystallization of differences, the monopolization of opportunity, and the determination of such monopolies by government, classes, social customs, or law. "The road must be open, the game must be played according to the rules. There must be no artificial stifling of equality of opportunity, no closed doors to the able, no stopping of the free game before it was played to the end." In brief, "Jacksonian democracy" was not one "which expected or acknowledged that opportunity under competition should result in the hopeless inequality, or rule of class." But in fairness to "Jacksonian democracy," it should also be observed that it initiated a great many positive social programs through the establishment of public welfare institutions, through the use of public revenues, public credit, or land grants for the purpose of internal improvements, and through the subsidizing of free or cheap distribution of public lands. In the light of these far-reaching or "revolutionary" social reforms, which could not but violently affect the existing creditor-debtor relations, it is more than likely that much of the anti-Jacksonian feelings of the times were connected with the paramount creditor-debtor situation which the government tried to alleviate by introducing certain measures, such as credit and currency controls, debt moratoria, and the like. Such measures, to be sure, were most unpopular with the creditors, banks, lenders, and, incidentally, the majority of the lawyers who, in the main, were on the side of the creditors. Hence, the general aversion of the contemporary legal profession, especially of the more successful lawyers who represented the creditors, to "Jacksonian democracy" must be gauged not only by the fact that it undoubtedly brought on a devastating trend toward depersonalization, but also by the far-reaching effects it had upon the existing creditor-debtor relations which obviously provided a great many lawyers with the bulk of their professional incomes.

In an essay published in New York in 1830, P. W. Grayson, an ignorant but vociferous Jacksonian demagogue, attacked both the common law and the legal profession with equal vehemence:

I have already sufficiently considered the demoralizing influence of law . . . on the temper and principles of men . . . [There exists, however,] another influence to inflame its mischievous power . . . [namely,] that of a certain class of men who are known by the name of lawyers, whom we find swarming in every hole and corner of society . . . [M]en in general . . . exert their influence over men and, in a manner, . . . [This] long train of congenital bloodsuckers and confidence men in legal chicanery, creatures who are ever at hand . . . jugglers in legal chicanery, . . . juggling with the minds of men . . . [who] should be banished as dangerous pests, as palpable justice— . . . [T]hese counterfeits of men are now to be the proud dictators of human destiny . . . Their practices . . . supersede all other cri-

243 Wright, On Existing Evils and Their Remedy, reprinted in Social Theories of Jacksonian Democracy 82-88 (Blau ed., 1947), at 82.
244 Robinson, Program for Labor 531 (1834).
and even chaos, which this situation engendered was strongly de-
plored by reputable members of both bench and bar. Lawyers no
less than courts frequently had to rely on vague and not always
trustworthy recollections: “The United States have, until within
a few years, trusted to tradition the reasons for their judicial
decisions. But . . . with more enlarged views of jurisprudence it
became obvious, that the exposition of our statutes and the validity
of our customs should rest upon a more secure basis than the
memory of man or the silent influence of unquestioned usage.”
Cranch, in the Preface to the first edition of his Reports of 1804,
lamented: “Much of that uncertainty of the law, which is so fre-
cently, and perhaps so justly, the subject of complaint in this
country, may be attributed to the want of American reports.”
And James Sullivan, in the Preface to his History of Land Titles in
Massachusetts, observed in 1801: “The want of accurate reports
is very discouraging. . . . It would be well for us . . . to have
our own reporters.” Caine, in the Preface to the first edition of his
New York Reports, likewise deplored this situation: “The incon-
veniences resulting from the want of a connected system of judicial
reports have been experienced and lamented by every member of
that [legal] profession . . . . The determinations of the court have
been with difficulty extended beyond the circle of those immedi-
ately concerned in the suits in which they were pronounced; points
adjudged have been often forgotten, and instances may be adduced
where those solemnly established, have, even by the bench, been
treated as new. If this can happen to those before whom every
subject of debate is necessarily agitated and determined, what must
be the state of the lawyer whose sole information arises from his
own practice, or the hearsay of others? Formed on books, the doc-
trines of which have in many respects been wisely overruled, he
must have frequently counseled without advice, and acted without
a guide.”

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248 Anonymous, “Review of Tyng’s Massachusetts Reports,” 1 American
Law Journal 361 (1809).
249 5 U.S. (1 Cranch), Preface III (3rd ed., 1917). See also Preface, 1 Chip-
man (Va.) 4-5: “While former decisions rest only in the memory of the Judge,
overburthened in term, and perplexed with a multiplicity of cases; on the memory
of the counsel, frequently under a powerful bias . . . .”

250 Preface to the First Edition (1801), 2 Caine 33 (Smith and Hitchcock
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In 1784, through the efforts of two prominent lawyers, Richard Law and Roger Sherman, the state of Connecticut passed a statute requiring the judges of the state Supreme Court and Superior Court to render written reasons for their opinions whenever a legal issue was involved, so that they might be properly reported and thus a foundation might be laid "for the more perfect and permanent system of Common Law in this State." In 1789, Ephraim Kirby published the first report, known as Kirby's Reports (one volume), in which he collected the decisions of the Superior Court from 1784 to May, 1788, together with some decisions of the Supreme Court of Errors. Subsequently, Jesse Root (Root's Reports, in two volumes) reported cases from July, 1789, to 1798. In his Preface, Kirby stated:

The uncertainty and contradiction attending the judicial decisions in this state, have long been subjects of complaint. The source of this complaint is easily discovered. . . . Our ancestors. . . . brought with them the notions of jurisprudence which prevailed in the country from whence they came. The riches, luxury, and extensive commerce of that country, contrasted with the equal distribution of property, simplicity of manners, and agricultural habits and employments of this, rendered a deviation from the English laws, in many instances, highly necessary. . . . Our courts were still in a state of embarrassment, sensible that the common law of England. . . . was not fully applicable to our situation, but no provision being made to preserve and publish proper histories of their adjudications, every attempt of the judges, to run the line of distinction, between what was applicable and what not, proved abortive: For the principles of their decisions were soon forgot, or misunderstood, or erroneously reported from

ed., 1881). See also Kent, Memoirs and Letters 158 (1808): "I took to the court [the Chancery Court of New York] . . . [and I] had nothing to guide me."

251 Revised Statutes of Connecticut of 1784 (1804).
252 See Kirby's Reports (Conn. Preface, iii-iv (1886).
253 See also Anonymous, "American Reports and Reporters," 22 American Jurist and Law Magazine 108 (1859); Revised Statutes of Connecticut of 1784 (1874).
254 The full title was Report of Cases Adjudged in the Superior Court and Court of Errors of the State of Connecticut from the Year 1784 to May, 1788.

Kirby's Reports hold a place in American legal literature comparable to

Plowden's Commentaries in English legal literature.

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In 1790, Alexander J. Dallas published the first volume of his reports of Pennsylvania cases. Nathaniel Chipman (Chipman's Reports) reported for Vermont in 1793. George Wythe published the Decisions of Cases in Virginia by the High Court of Chancery in 1795, and François Xavier Martin (Martin's Reports) reported for North Carolina in 1797. The first unofficial reports of the state of New York, on the initiative of James Kent, were compiled by Coleman in 1801, while the first official reports were those of George Caine, who had been appointed regular reporter by the state legislature in 1804. The first volume (2 Dallas) of cases decided by the Supreme Court of the United States was published by Alexander J. Dallas in 1798 and in 1804, William Cranch began the publication of his Supreme Court Reports.
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By the Act of March 22, 1816, provision was made for the first time for an official publication of the decisions of the Supreme Court of the United States, but with no provision for a salary to be paid to the official reporter. However, not until March 14, 1834, was there any order that all opinions of the Supreme Court must be filed with the clerk.

Other states gradually introduced a reporter system of their own: Kentucky (Hughes' Reports) in 1803, Massachusetts (William's Reports, continued by Tyng's Reports) in 1805, Maryland (Harris & McHenry's Reports) and South Carolina (Day's Reports) in 1809, Maine (Greenleaf's Reports) in 1822, New Hampshire (Adam's Reports) in 1819, Georgia (T.U.P. Charlton's Reports) in 1824, and Delaware (Harrington's Reports) in 1837. Thus in a relatively short period of time a fairly large number of reported cases became generally available. It has been estimated that by the year 1822 there existed about 140 or 150 volumes of American reports. 266 The rate of increase was so rapid that by 1824 complaints were already voiced about the "vast and increasing multiplications of reports as well as law treatises." 267 More realistic observers, however, hailed this development as one of the most significant steps in American jurisprudence. They asserted that it would substantially improve the quality of American law, and that it compelled the judiciary to adhere to a more regular and more efficient administration of justice. 268 "More than one hundred and fifty volumes of reports are already published," Justice Joseph Story observed in 1821, "containing a mass of decisions, which evince uncommon ambition to acquire the highest professional character. The best of our reports scarcely shrink from a comparison with those of England in the corresponding period." 269

"In the hundred years between the publication in 1687 of William Penn's gleanings from Lord Coke and the issuance of the American editions of Buller's Nisi Prius and Gilbert's Evidence in 1788, not a single book that could be called a treatise intended for the use of professional lawyers was published in the British Colonies and the American States." 270 The first American law treatises published after 1788 owed their origin largely to the general demand for "native" legal texts to be used by practitioners of all sorts. 271 The first legal texts which appeared after the year 1788 dealt with pleading, 272 real property, 273 maritime law, or maritime insurance. In addition, a few scattered works on some special subjects were published. Of more than local importance was Zephaniah Swift's A System of the Laws of the State of Connecticut, published in 1795-96. Four general comprehensive works on law were also published during this period, namely, The Reports and Dissertations (1793) of Nathaniel Chipman, Chief Justice of Vermont; St. George Tucker's edition of Blackstone's Commentaries of 1803, which had a widespread circulation; the lectures on law

266 Some of these laudatory statements were published in the North American Review between 1822 and 1826.
267 Story, Address Delivered before the Members of the Suffolk Bar, at Their Anniversary on the 4th September, 1821, at Boston (1821), reprinted in part in Miller, Legal Mind 67-75 (1962), at 68. In a spirit of caution Story continued: "The danger, indeed, seems to be, not that we shall hereafter want able reports, but that we shall be overwhelmed by their number and variety." Ibid.
269 For a compilation of early American legal treatises, see also Marvin, Legal Bibliography, or a Thesaurus of American, English, Irish, and Scotch Law Books (1847).
270 The most famous treatise on pleading was probably Joseph Story's Selection of Pleadings in Civil Cases, published in 1805.
271 See, for instance, James Sullivan, History of Land Titles in Massachusetts, published in 1801. See the text corresponding to note 350, Chapter I, above.
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which were delivered in 1804 at the College of Philadelphia by James Wilson, Associate Justice of the Supreme Court of the United States; and Law Miscellanea (1814) by Hugh Henry Brackenridge, Associate Justice of the Supreme Court of Pennsylvania. Also, Blackstone's original Commentaries were still much in use throughout the United States. But most of the earliest American law texts were clearly intended for the use of laymen—they were largely manuals for petty officials, justices of the peace, town officers, and the like. Hence, they were of little value to the professional lawyer or judge. This dearth of reliable authoritative legal materials and guides in turn compelled the lawyer to resort to English texts, and, frequently, to English reports, even though these sources had practically been outlawed in some states. During the Revolution the dearth of lawbooks was so acute that the libraries of lawyers who had remained loyal to England were confiscated. The Massachusetts legislature passed resolves permitting judges to purchase these books at a fair valuation. Judge James Sullivan, for instance, in 1779 was authorized to buy several lawbooks which formerly had belonged to Jeremiah Gridley.

It is not surprising, therefore, that during this period a number of English lawbooks and law reports were republished or re-edited, such as Jones's Essay on the Law of Bailments, Kyd's Treatise of the Law of Bills of Exchange and Promissory Notes, and Park's System of the Law of Maritime Insurance. Much of Joseph Story's early literary activity was dedicated to the re-editing of leading English law texts, such as Chitty's Bills and Notes in 1809. But it took some time before the bench or the bar had an adequate body of legal authorities, especially American authorities, that were adapted to the new conditions and could be used as consistent and reliable guides during the earliest stages in the formative era of

275 See, in general, Collection of Acts or Laws Passed in the State of Massachusetts Bay Relative to the American Loyalists and Their Property (1787), especially at 12 ff. (An Act for Confiscating the Estates of Certain Persons, Commonly Called Absentees, 1779) and 22 ff. (An Act to Confiscate the Estates of Certain Notorious Conspirators against the Government and Liberties of the Inhabitants of the Late Province, now State of Massachusetts Bay, 1779). In 1784 these two Acts were repealed, v.4, amended. See ibid., 26 ff., 31 ff.
276 See 2 Amory, Life of James Sullivan 4 (1859).
278 Gazette of the United States, March 6, 1790.
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[by them] may, in a great measure, depend on the particular causes such individuals may have to manage in the Judiciary."

In 1791 the Supreme Court of the United States moved from New York to Philadelphia, where it sat until 1801. The majority of the additional lawyers admitted to practice before it during that period were, as might be expected, members of the Philadelphia bar, among them such legal luminaries as Jared Ingersoll, William Bradford, William Lewis, Edward Tilghman, Alexander J. Dallas, and William Rawle. When the Court convened for the first time in Philadelphia on February 7, 1791, an unusual incident happened: The Philadelphia lawyers apparently assumed that, since Associate Justice James Wilson himself had been a member of the Philadelphia bar and, hence, knew them all intimately, no insistence would be made by the Court on the production of certificates of character and ability. To the surprise and anger of every attending lawyer, Wilson, who was a somewhat cantankerous man, simply refused to vouch for them. In the beginning the vast majority of lawyers constituting the bar of the Supreme Court came from New York, New Jersey, Massachusetts, Connecticut, Delaware, Pennsylvania, Virginia, South Carolina, Maryland, and Rhode Island. Around the year 1820 this bar, however, underwent considerable changes: Lawyers from other states, including the "Western" states, began to appear with ever greater regularity before the highest federal court, especially since by that time improved means of communication and transportation had made Washington more accessible for lawyers from distant states. At the same time some of the better known lawyers settled in or around Washington and made it a regular practice to argue cases before the Supreme Court, among them such prominent men as Charles Simms, Thomas Swann, Richard S. Coxe, Francis Scott Key, William Sampson, and, above all, Walter Jones, who has been called "a rival of Pinkney, Wirt and Webster."

The early federal bar, which practiced with outstanding success before the Supreme Court of the United States, without doubt contributed heavily to the development of American law, especially American constitutional law. While the general trend of political, social, and economic history of early America was decisively influenced by the statesmanlike decisions of Chief Justice Marshall, not a small share in the accolades paid to the enduring greatness of these decisions must be awarded to resourceful lawyers who argued before him. It has been justly remarked about the early federal bar that "while no judge ever profited more from argument; it is not, perhaps, diverging into the circle of exaggeration to say, that no Bar was ever more capable of aiding the mind of the Bench, than the Bar of the Supreme Court, in the time of Chief Justice Marshall." By the year 1821 the discriminating Joseph Story had this to say about the lawyers who in ever-increasing numbers were admitted to practice before the Supreme Court:

The discussion of constitutional questions throws a lustre round 281 The courts, too, have also acknowledged on occasion the influence which a capable bar had, and still has, upon the decisions of the bench. In Bridge Proprietors v. Hoboken Company, 68 U.S. (2 Wall.) 116, 147 (1864), Justice Miller commented on the significance of a previous case (Crowell v. Randall, 35 U.S. (10 Pet.) 240 (1835) which had been argued at such length by Webster, Sergeant, and Clayton, "whose names are a sufficient guarantee that the matter was well considered." In Sauer v. New York, 206 U.S. 536, 538 (1907), Justice McKenna, dissenting, stated: "The Elevated Railroad cases give significance from the arguments of counsel. Such arguments, of course, are not necessarily a test of the decision. But they may be. The opinion may respond accurately to them." 282

Quoted in Warren, History of the American Bar (1911). See also the address of Justice Harlan on the occasion of the "Centennial Celebration of the Organization of the Federal Judiciary," held at New York, February 4, 1890. 134 U.S. 751, 753 (1890): "It has been said of some of the judgments of the Supreme Court of the United States that they are not excelled by any ever delivered in the judicial tribunals of any country. Candor, however, requires the concession that their preparation was preceded by arguments at its bar of which it may be said ... that they were of such transcending power that those who heard them were lost in admiration." Justice James Iredell, in Ware v. Hylton, 3 U.S. (3 Dall.) 158, 203 (1796), stated: "The cause has been spoken to, at the bar, with a degree of ability equal to any occasion. . . . I shall, as long as I live, remember, with pleasure and respect, the arguments which I have heard on this case; they have discovered an ingenuity, a depth of investigation, and a power of reasoning fully equal to anything I have ever witnessed." It might be interesting to note that Ware v. Hylton was argued by John Marshall and Alexander J. Campbell against William Lewis and Edward Tilghman.

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the Bar, and gives a dignity to its functions, which can rarely belong to the profession in any other country. Lawyers are here, emphatically, placed as sentinels upon the outposts of the constitution; and no nobler end can be proposed for their ambition or patriotism, than to stand as faithful guardians of the constitution, ready to defend its legitimate powers, and to stay the arm of the legislative, executive, or popular oppression. If their eloquence can charm, when it vindicates the innocent, and the suffering under private wrongs; if their learning and genius can, with almost superhuman witchery, unfold the mazes and intricacies, by which the minute links of title are chained to the adamantine pillars of the law,—how much more glory belongs to them, when this eloquence, this learning, and this genius, are employed in defence of their country; when they breathe forth the purest spirit of morality and virtue in support of the rights of mankind; when they expound the lofty doctrines, which sustain, and connect, and guide, the destinies of nations; when they combat popular delusions at the expense of fame, and friendship, and political honor; when they triumph by arresting the progress of error and the march of power; and drive back the torrent, that threatens destruction equally to public liberty and private property, to all that delights us in private life, and all that gives grace and authority in public office.286

It has been pointed out that the American Revolution and the novel political and socioeconomic conditions which it created on the whole had a temporarily adverse effect on the American legal profession, which before the Revolution had achieved real prominence. After having recovered fairly quickly and certainly most

286 Story, Address Delivered before the Members of the Suffolk Bar, 1821 (1821), reprinted in part in Miller, Legal Mind 65-75 (1962), at 71-72. Six years before Story spoke out, Richard Rush, sometime Attorney General of the United States, Secretary of State, Minister to Great Britain, Secretary of the Treasury and Minister to France, had this to say about the lawyers who argued before the Supreme Court: "The men among us . . . who become as well the eloquent advocates, are only those who . . . devote their days to business and Gavrogs, and Saulbys, and Lawrences (all outstanding English lawyers and . . . let the courts of England boast of Sir William Scott. Those of America will in Miller, Legal Mind 43-51 (1962), especially at 46-47, 51.

successfully from this first setback, beginning with the 1830's the profession was faced with the more serious and more lasting threat of "Jacksonian democracy." Within the postwar period as well as during the first half of the nineteenth century, however, important signs of coming growth and vigor can also be noticed. In fact, the period between the years 1789 and approximately 1850 in a way may be called the "formative era" or, perhaps, even the "golden age" of American law and, with some important reservations, also of the American legal profession.287 This paradoxical situation may possibly be explained by the fact that in spite of much adversity, and perhaps on account of it, America produced during this period a disproportionately large number of outstanding lawyers (Luther Martin, William Pinkney, William Wirt, Jeremiah Mason, Daniel Webster, Rufus Choate, James L. Petigru, Horace Binney, and Reverdy Johnson, to mention only the most prominent practitioners) as well as eminent judges (John Marshall, James Kent, Joseph Story, Lemuel Shaw, John B. Gibson, and Thomas Ruffin).

During the formative era of American law the applicability of traditional (mostly English) authoritative materials to the specific American condition was the main concern of American courts and lawyers. This applicability constituted the paramount criterion by which courts and lawyers determined whether certain English authorities, rules, documents, or institutions had been received or had to be received; and in case they were found not to be applicable, what should obtain in their place. There existed no definite rules defining applicability; nor was there a traditional technique of receiving the law of one country and making it the law of another. Hence, what the early American courts did, and what the early American lawyers tried to argue, was the determination of what was applicable and what was not applicable to the specific American condition by constant reference to an idealized picture of a pioneer, rural, and agricultural society. This idealized picture became an essential part of American law, often expressed in such abstract terms as "the nature of American institutions" or "the nature of American government." It was used by courts and lawyers alike to reject those parts of the English law which they found

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The most pressing problem during the formative era of American law, therefore, was to work out and lay down certain rules-to create an apparatus of legal precepts equal to the requirements of early American life. This basic problem determined the American system of courts, the American judicial organization, and to a large degree, the course of American legal development for about three-quarters of a century. It was less important, therefore, to decide particular cases "justly" than to work out sound, consistent, and abstract "just" rules. The chief concern of the early American courts was the development and stabilization of a body of laws in each jurisdiction by means of judicial decisions, and the function of ascertaining and declaring the law came to be the most important activity of the courts.

After the year 1780, the growth of American law was largely due to great lawyers and great judges. The creative legal achievements of these men will bear favorable comparison with the great legal accomplishments of any age in Western history. Within a relatively short span of time the English common law of the seventeenth and eighteenth centuries was made over into a common law for America. It should be borne in mind that the bases of the American rules in real property, contracts, sales of goods, torts, equity, and conflict of laws, to mention only the staple fields of law, were laid in the period between 1810 and 1850. The War of 1812, while of questionable political significance, had far-reaching effects upon American economic and legal history in that it not only gave rise to the rapid development of law in general, but stimulated the growth of the many branches of modern law. It gave great impetus to the expansion of admiralty and prize law, as well as to maritime insurance law.

The development of early manufacturing stimulated the growth of corporation law and patent law. Since the traditional coastal trade was threatened by the British blockade, internal lines of communications, such as turnpikes and canals (and soon railroads), had to be constructed. These novel conditions and developments, needless to say, further expanded the range of law; they also stimulated the practice, scope, and importance of the legal profession.

It may also be noted here that the legal profession in the early United States was never a "class" determined by family lineage. The closest approach to such a "class" can be detected in pre-Revolutionary Virginia, South Carolina, New York, and probably Massachusetts. In Virginia and South Carolina the landed and wealthy gentry made it a practice to send their sons to the Inns of Court in London. In Massachusetts the beginnings of a self-perpetuating and somewhat closed class of "Harvard lawyers" made themselves felt. New York, like some other cities, had a number of men "born to the law" or bred in it, such as the Livingstons. But, in the main, the leading lawyers both shortly before and im-

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289 It will be noted that some of the great lawyers of the early American law, and prize law in America. Originally this particular aspect of legal practice bar made lasting contributions to the development of international law, admiralty was little known in the United States. See, for instance, The Dos Hermanos, 15 U.S. (4 Wheat.) 37, 39 (1817), where Justice Joseph Story stated: "This court [sic, the Supreme Court of the United States] cannot but watch with considerable solicititude irregularities, which so materially impair the simplicity of prize-proceedings. ... Some apology ... may be found in the fact, that from our having..."
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Immediately after the Revolution came from the "middle" or "upper-middle" class. Such men as the Livingstons and Jays of New York, the Randolphins and Lees of Virginia, the Carrolls of Maryland, the Pinckneys and Rutledges of South Carolina, or the Ingersolls of Philadelphia, on the other hand, belonged to the upper stratum of American society. As time progressed, the American legal profession drew its members from all social and economic levels: the poor immigrant or immigrant's son and the small farmer's boy—William Wirt of Virginia is perhaps the classical example of the "success story" as a lawyer—no less than the scion of the aristocratic and prosperous landowner or thriving merchant aspired to the bar. From its very beginning the American legal profession was, and still is, one of the main avenues of self-advancement for ambitious young men; and many leaders of the early American bar came from a background that was socially modest, though often above average in culture.

It appears that during the first decades of the republic the law exerted less of an attraction on New Englanders than it did, for instance, on Southerners. The new post-Revolutionary generation in the South, whose approach and outlook on life in general was in sharp contrast to the views held by the old colonial gentry,

The Lawyer, which was principally concerned with the life and professional success of William Wirt, as well as with his ascendancy from obscure beginnings to eminence and fortune. The personal legends woven around Wirt's life grossly exaggerated his professional achievements as well as his abilities. As a self-made man, Wirt remarked in his Letters of a British Spy (p. 60), published in 1823, on the depths of obscurity and want (Wirt was the orphan child of a German mother brought to the colonies as an indentured servant—A. H. C. 1), and without even without saying that this is a bit of autobiographical self-appraisal of "success" in life, and his advice frequently amounted to a quaint blending of Ben the Life of William Wirt 16, 97, 356 (1863), Wirt's Sketches of the Life and Character of Patrick Henry, published in 1817, essentially nothing more than a factitious "success story." The Patrick Henry who emerges from this book is the forerunner not only of the American "success tycoon" but also of the American "popular hero." See Taylor, Cavalier and Yankee 71-94 (1961).

...soon discovered that law was an effective stepping stone to political and social success. These "new men," or "homines novi" as they were called in the classically minded South, were shrewd, imaginative, and energetic; and their whole approach was frequently opportunistic. They brought to law and, incidentally, to politics a novel atmosphere of intense competition that had been wholly alien to the older generation of lawyers. "The profession of law in this country," William C. Preston, a representative of the old ways, commented in 1843, "involves the cultivation of eloquence and leads to public advancement and public honors." The representative of the "new generation," in the words of William J. Grayson, "was an able speaker and good lawyer; bold, ready, regardless of respect to opposing counsel, witnesses, or clients, and unscrupulous as to the language in which he expressed his contempt; skilled in cajoling the jury and bullying the judge; little sensitive as to his own feelings, and utterly without regard to the feelings of others. One purpose only seemed to govern him—the purpose to gain his case at all hazards. He was a formidable adversary, and the lawyers of the old school were reluctant to encounter his rude assault." Lawyers' incomes from the practice of law during the first fifty years of the new republic varied greatly. On the whole they were on the modest side, however. Around 1790 "[t]he State of Connecticut," Jeremiah Mason relates, "was overstocked with lawyers; most of them had but little business, with fees and compensation miserably small. The professional income of Pierpont Edwards, supposed to be the largest in the State, was said not to amount to two thousand dollars a year. Very few [lawyers] obtained half of that sum; my master Baldwin, with his utmost diligence, was scarcely able to maintain his small family, living in the most simple manner." John Marshall, who made practically no money as a lawyer during his first year at the bar of Richmond, Virginia, in 1783, and received only a very modest income in the year 1784, by 1785 saw a reasonable growth of his law practice.

292 Ibid., 58.

293 Preston, Eulogy on Hugh Swinton Légaré 14 (1843).
294 Grayson, James Louis Petigru 89-90 (1866); Taylor, Cavalier and Yankee 58-59 (1964).
295 Clark, Jeremiah Mason 16-17 (1917).
and a corresponding increase in his professional earnings. He earned about £508 in 1786 (this amount also included income from sources other than the practice of law), and in 1787 his earnings were still mounting, though rather slowly. In 1788 he earned about £1,100 (or about $3,500 Virginia currency); in 1789, £710 (or $2,200); in 1790, £402 (or $1,200); in 1791, £1,100 (or $3,500); in 1792, £402 (or $1,200); and in 1793, a trifle less than £400 (or $1,200); and in 1794, about the same amount—all after expenses."296 La Rochefoucauld recorded in 1797 that "Mr. Marshall does not, from his practice, derive above four or five thousand dollars per annum and not even that sum every year."297

According to George W. Strong, his father, who practiced in upstate New York, earned $217 during his first year at the bar (1826–27), but "in his third year of practice was evidently making $670.00."298 Bartholomew F. Moore, who was admitted to the North Carolina bar in 1823, relates that his total income from the practice of law during his first seven years amounted to only $700, or about $100 per year.299 Mr. Redin, a distinguished lawyer in the District of Columbia, around 1835 was so "straitened in his means" that on his first visit to Rockville [Maryland] he walked all the way there and back, twelve miles each way, in one day, to save expenses.300

By contrast, William Pinkney of Maryland, in 1816, had a professional income greatly in excess of $20,000 a year.301 Alexander James Dallas of Philadelphia earned around $10,000 by 1801 and double that amount by 1814.302 Charles Cotesworth Pinckney, Edward Rutledge, and John Julius Pringle, all of Charleston, South Carolina, each are said to have earned from $18,000 to $23,000 a year,303 and François Xavier Martin reported that around 1811 "a lawyer of common talent makes from $4 to $5,000 [per year]; several make $8 or $10,000" in New Orleans.304 Philip Barbour, an eminent Virginia lawyer who in 1836 was appointed to the Supreme Court of the United States, was making less than $7,000 in 1824,305 and around the year 1830, William Wirt was told that $6,000 or $8,000 was a good professional income in New York City, while $10,000 was the maximum.306 Reverdy Johnson, the great Maryland lawyer, in 1831, at the age of thirty-five and fifteen years after he had been admitted to the bar, had an annual income of $11,000, and for several years thereafter he received about the same amount.307 In 1838, Alphonso Taft estimated that without too much effort a lawyer could earn between $3,000 and $5,000 annually in Cincinnati, Ohio.308 Thomas L. Anderson, who in 1832 located in Palmyra, Missouri, revealed that he made from $3,000 to $5,000 a year for a period of over fifty years, or a total of approximately $200,000 solely from the practice of law.309 John Living-
ston, in 1851, estimated that throughout the United States the average annual income of a lawyer was about $1,500.\textsuperscript{210}

In the earlier days lawyers' fees either were regulated by statute—often a short-lived and shortsighted policy reflecting the distrust in which the profession was held during the first days of the Republic—or were based upon arrangement between attorney and client, or wherever a sort of "bar organization" existed, were settled by agreement among the several members of the profession. In Massachusetts, for instance, a schedule of specific charges was adopted in 1796 by the whole bar as the lowest fees that might honorably be demanded by its members for professional services.\textsuperscript{211}

Although Massachusetts has always been considered the pioneer state for the admission of Negro lawyers, Maine holds the distinction of having admitted the first Negro lawyer in the United States: Macon B. Allen, an Indiana-born Negro, who was licensed to practice law as an attorney and counselor in Portland, Maine, in 1844.\textsuperscript{312} Allen, however, never practiced law in Maine, but immediately moved to Boston, Massachusetts, where he was admitted to the Suffolk County bar on May 3, 1845. The second Negro admitted to practice was Robert Morris, who studied law in the office of Ellis Gray Loring in Boston, and was admitted to the Suffolk bar in 1846 or 1847.\textsuperscript{313} Morris was regarded "as a talented gentleman who stands high at the Boston bar."\textsuperscript{314} Governor George N. Briggs appointed him, as a judge, to sit on the holding court for both Boston and Chelsea. Thus, Morris was probably the first Negro in the United States to hold judicial office. Together with Charles Sumner, Morris appeared as counsel for the plaintiff in Robb v. City of Boston,\textsuperscript{315} the first "school segregation case" in the United States, which subsequently was cited as precedent in Plessy v. Ferguson.\textsuperscript{216}

One of the most remarkable phenomena of the post-Revolutionary period, it has been shown, was the publication of American law reports. The appearance of the first printed reports, state and federal alike, with their lasting effects upon future generations of lawyers, happily coincided with the ascendency of such outstanding lawyers presiding over the highest state courts as James Kent (New York), Theophilus Parsons (Massachusetts), William Tilghman (Pennsylvania), Henry W. de Saussure (South Carolina), and Jeremiah Smith (New Hampshire). It is also fortunate that during this crucial era of growth and consolidation of American law the Supreme Court of the United States, under the leadership of John Marshall, adhered to a fairly steady legal policy.\textsuperscript{317} But perhaps even more decisive was the fact that a small but efficient core of brilliant lawyers had successfully weathered the Revolution and the trying post-Revolutionary years. They managed to preserve and carry on the high professional standards and accomplishments of the late colonial bar. The Revolution itself, as well as the many challenges and problems of the post-Revolutionary period, had called forth the greatest efforts on the part of lawyers. It was a sign of greatness that the budding American legal profession met these challenges successfully and enthusiastically.

\textsuperscript{210} U.S. v. 577 (1860).

\textsuperscript{211} Aside from the first four Chief Justices who served on the highest federal bench, namely, John Jay (who resigned in 1795), John Rutledge (who was never confirmed by the Senate), Oliver Ellsworth (who was appointed in 1796, resigned in 1800), and John Marshall (1801-35), the following Associate Justices sat on the Supreme Court of the United States: John Blair (who resigned in 1796), John Rutledge (who resigned in 1791), Thomas Jefferson (1791-93), who took the place of John Rutledge, James Wilson (who died in 1798), William Cushing (who replaced John Rutledge), James Iredell (who died in 1790), Samuel Chase (1796-1811, who died in 1811), John Marshall (1801-35), who replaced the place of James Wilson, William Cushing (who replaced James Iredell), Thomas Jefferson, Alfred Moore (1799-1804, who replaced James Iredell), John Bushrod Washington (1798-1810, who took the place of James Wilson), William Brockholts Johnson (1804-10, who took the place of Alfred Moore), Henry Brockholts Johnson (1804-10, who took the place of Alfred Moore), Joseph Story (1811-45, who replaced William Cushing), Thomas Todd of Kentucky (1807-26, who was the place of Joseph Story), Gabriel Duvall (1812-25, who took the place of the new sixth Associate Justice), Smith Dumas (1812-25, who took the place of Henry B. Livingston), Smith Thompson (1812-41, who took the place of Thomas Todd), and John McLean (1829-61, who took the place of Robert Trumbull).
THE LEGAL PROFESSION ON THE FRONTIER

Missouri, a primitive log cabin served as a combination of courtroom and jail, and when it was not used in the interest of administering justice, it sheltered sheep. A judge in Tennessee, who had been charged with failing to hold court as required by law, gave as an excuse for his dereliction of duty the fact that the "courthouse" was infested with vermin and, hence, unusable, having served as a pigpen during vacations. In other places court was held in open houses without floors or windowpanes. During the wintertime the room was often cold, the seats were not fit to sit on, there existed no accommodations to permit private consultations between lawyer and client, and the general atmosphere, as August S. Merrimon puts it, made everyone feel "revengeful." Courthouses frequently served as centers of social activities in small towns. County fairs and contests as well as recreational activities were held there, and exhibits of all sorts were placed within the courtroom. In the midst of all this confusion and uproar civil as well as criminal trials were conducted.

Many of the earliest judges or justices—usually wealthy farmers, squires, merchants, or landlords—were uneducated men: some were almost illiterate, and virtually none were grounded in the law or versed in its most fundamental technicalities. They were chosen, as a rule, not for their legal knowledge, but often because they had been conspicuous leaders on the frontier in fighting Indians and, hence, knew how to wield authority effectively. In civil actions they assumed the role of referees, proceeding under the assumption that both parties were at fault, but they knew so little law that frequently they refused to instruct the jury in the presence of lawyers for fear that they would disclose their ignorance. They interpreted and dispensed justice according to their

3 See, in general, Clark, The Rampaging Frontier 163-82 (1935); English, The Pioneer Lawyer and Jurist in Missouri (21 University of Missouri Studies, State Bar Association of Wisconsin (1954); Bond, Civilization of the Old Northwest (1934); Zillmer, The Lawyer on the Frontier, 77 American Law Review 897 (1941); Clark, Manners and Customs of the American Frontier, 35 Illinois Historical Review 3-14 (1916); King, A Pioneer Court of Last Resort, 1 History of Sangamon County, Illinois 554 (1881). The adjoining jailhouse, it will be noted, cost twice as much as the courthouse.


5 Newsome, "The A. S. Merrimon Journal, 1853-1854," 8 North Carolina Historical Review 315, 318 (1931). In ibid., 317, Merrimon reports that at one time it was so cold in the courtroom that he could not stay to hear the charge.

6 See, for instance, the many and amusing anecdotes and episodes connected with the earliest Illinois bench and bar, as they have been related by Ford, A History of Illinois from Its Commencements as a State in 1818 to 1847 (1854), passim.