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# BOOK REVIEW

## THE OLDEST COURT OF CONTINUOUS EXISTENCE IN THE WESTERN HEMISPHERE

DONALD J. DUNN\*

*Review of* THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992. Edited by Russell K. Osgood. Boston: Supreme Judicial Court Historical Society. 1992. Pp. 790. \$50.00.

Our elementary and secondary education is replete with accounts of the colonization of America and of our country's early ideals and ordeals. We learn in our youth about the voyage of the Mayflower together with its landing at Plymouth Rock and the establishment of the colony of Pilgrims at Plymouth, the Puritans and the Massachusetts Bay Company, and the witch trials of Salem.<sup>1</sup> We are also taught about the type of governance used in this formative era and, to a lesser extent, of the role of the General Court of Massachusetts (the legislature).<sup>2</sup>

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1. Among the better sources for understanding early Massachusetts history are 1-5 COMMONWEALTH HISTORY OF MASSACHUSETTS (Albert B. Hart ed., 2d prtng. 1966); THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY (Lawrence S. Mayo ed., 1936); GEORGE D. LANGDON, JR., PILGRIM COLONY: A HISTORY OF NEW PLYMOUTH, 1620-1691 (1966); BENJAMIN W. LABAREE, COLONIAL MASSACHUSETTS: A HISTORY (1979). The most detailed information often can be gleaned from PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (Boston, Colonial Society of Massachusetts) an ongoing series begun in 1895. Also exceedingly valuable are the COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY (Boston, Belknap and Hall), a continuous series since 1792, and the PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY (Boston, Massachusetts Historical Society), a series since 1859.

2. For specific information on the General Court, see, e.g., THREE HUNDRED YEARS OF THE GENERAL COURT OF MASSACHUSETTS, 1630-1930 (1931); CORNELIUS

This early colonial period had other significance as well. For example, the period between 1629 and the charter of the Massachusetts Bay Company,<sup>3</sup> and 1691 and the second charter, which established the Province of Massachusetts Bay, was one of colonial tribunals. It was also an era in which the General Court had both legislative and adjudicative functions, including hearing appeals from the Court of Assistants.<sup>4</sup> It was the second charter that gave the provincial government the power to create its legal system. Acting on that authority, the General Court passed legislation on November 25, 1692 creating the Superior Court of Judicature.<sup>5</sup> Thus was born the oldest court of continuous existence in the Western Hemisphere.<sup>6</sup>

In anticipation of the court's tercentenary year, a conference was held at the Boston Public Library on October 26-27, 1990, under the auspices of the Committee on the Three-Hundredth Anniversary of the Massachusetts Supreme Judicial Court.<sup>7</sup> Thirteen prominent legal scholars presented 14 papers at the conference.

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DALTON ET AL., *LEADING THE WAY: A HISTORY OF THE MASSACHUSETTS GENERAL COURT, 1629-1980* (Cornelius Dalton ed., 1984).

3. Several of the early accounts of this period are geographical in nature. See, e.g., DAVID T. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS* (1979) (covering Essex County from 1629-1692); *COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, 1639-1702* (Joseph H. Smith ed., 1961) (describing the Pyncheon Court Record in Springfield); *Colonial Society of Massachusetts, Records of the Suffolk County Court, 1671-1680*, in 29 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (1933). A broader overview is provided in *Law in Colonial Massachusetts 1630-1800*, in 62 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (Daniel R. Coquillette ed., 1984). See also CHARLES J. HILKEY, *LEGAL DEVELOPMENT IN COLONIAL MASSACHUSETTS, 1630-1686* (faculty of Political Science of Columbia University ed., 1967); EMORY WASHBURN, *SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS: FROM 1630 TO THE REVOLUTION IN 1775* (Leonard W. Levy ed., De Capo Press 1974) (1840).

4. For more detailed information, see the three volumes of the *RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY, 1630-1692* (AMS Press 1973) (1901).

5. Act of November 25, 1692, ch.33, 1692-1693 Province Laws 72.

6. The Superior Court of Judicature became the Supreme Judicial Court ("SJC") with implementation of the Massachusetts Constitution of 1780. Members of the Superior Court of Judicature were reappointed and commissioned as justices of the Supreme Judicial Court on February 16, 1781. It was over a year later before the General Court, on July 3, 1782, enacted legislation to create a Supreme Judicial Court. Act of July 3, 1782, ch. 10, 1782 Mass. Laws 150.

7. Earlier, in January 1990, the Supreme Judicial Court Historical Society was established to advance scholarship on the history of the court and to further public appreciation of the role the SJC has played in the development of law and society in the Commonwealth and the nation. The Society's annual reports, commencing with 1990, have each time included a series of scholarly articles of a historical nature pertaining to the SJC and its justices. Membership in the Society is available for \$25.00 annually by contacting the Supreme Judicial Court Historical Society, c/o Social Law Library, 1200

These papers were then assembled and edited by Russell L. Osgood, Dean and Professor of Law at Cornell Law School. The result is *The History of the Law in Massachusetts: The Supreme Judicial Court 1692-1992* ("SJC History"),<sup>8</sup> a handsomely bound hardback volume providing heretofore unavailable insights into this historically significant court. The volume was published simultaneously with the celebration of the court's 300th year.<sup>9</sup>

Because each essay in the collection is an important contribution to understanding the judicial history of the Commonwealth, this review discusses each essay separately and in the approximate order in which they appear in the book. The collection begins with a brief address by the Honorable Benjamin Kaplan,<sup>10</sup> a retired associate justice of the Supreme Judicial Court. The extensively researched and heavily documented essays that follow are written in the traditional law review style and are arranged, to the extent possible, chronologically, based on the time frame of the subject, person, or era being covered.

As one would expect, the first essay is a broad overview of the court from its inception to its 300th year<sup>11</sup> and is written by Dean Osgood. The author lays out clearly and concisely the evolution of the court by examining three time frames: (1) from its origins as the Superior Court of Judicature until it was renamed the Supreme Judicial Court (1692-1780); (2) the period 1780-1859,<sup>12</sup> which covers

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Court House, Boston, Massachusetts, 02108. See SUPREME JUDICIAL COURT HISTORICAL SOCIETY, 1990 ANNUAL REPORT (1991).

8. THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992 (Russell K. Osgood ed., 1992) (hereinafter SJC HISTORY).

9. This conference and the resulting book were not the only activities associated with the celebration. For example, both the 77 MASS. L. REV. 1 (issue no. 1, March 1992) and the BOSTON B.J. Mar.-April 1992 (volume 36, no.2) are symposium issues devoted to the SJC's 300th anniversary. It was also the subject of a 46 page special section of MASSACHUSETTS LAWYERS WEEKLY. See *Supplement: Supreme Judicial Court, 1692-1992*, MASS. LAW. WKLY., OCTOBER 9, 1992, at S1. In addition, two commemorative banquets were held, one on April 30, 1992, and one on October 22, 1992. Justice Harry A. Blackmun was featured speaker at the first; Chief Justice William Rehnquist keynoted the second. The Chief Justice's speech was subsequently published. See SUPREME JUDICIAL COURT HISTORICAL SOCIETY, 1992 ANNUAL REPORT 5 (1993). See also, JAMES B. MULDOON, YOU HAVE NO COURTS WITH ANY SURE RULE OF LAW: THE SAGA OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS (1992).

10. Benjamin Kaplan, *Introduction: An Address*, in SJC HISTORY, *supra* note 8, at 1.

11. Russell K. Osgood, *The Supreme Judicial Court, 1692-1992: An Overview*, in SJC HISTORY, *supra* note 8, at 9.

12. Prior to 1859, the SJC spent a substantial portion of its time handling trials. In 1859, the superior court structure was created. Act of April 5, 1859, ch. 196, 1859 Mass. Laws 339. According to Osgood, "[w]hile these enactments generally preserved

from the implementation of the Massachusetts Constitution of 1780 through the death of Chief Justice Lemuel Shaw; and (3) 1860 to the present. This latter period is marked by the transition of the court's role in trial jurisdiction to an appellate role only. The second portion of the essay examines the role the Supreme Judicial Court has played in Massachusetts history. In this section of the essay the author returns to the period involving the creation of the Massachusetts Constitution of 1780. The author then moves forward in time once again. Covered is the court's role in deciding cases pertaining to race and slavery,<sup>13</sup> immigrants,<sup>14</sup> labor,<sup>15</sup> freedom of expression,<sup>16</sup> and official misconduct (a very brief discussion).

Following Dean Osgood's enlightening survey, Professor Barbara Black, George Melwood Murray Professor of Legal History at Columbia University, provides a scholarly study of the judicial

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the Supreme Judicial Court's trial jurisdiction . . . it became inevitable that the Court would evolve into a purely appellate court and the Superior Court would be the primary trial court." Osgood, *supra* note 11, at 23.

For sources that cover portions of this same time frame, see GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840* (1979); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1994) (a reprint of the 1975 edition with a new preface that discusses relevant historiographical issues that have arisen since the book was first published).

13. The first case discussed is the so-called *Quock Walker Case* or the *Jennison Case*, which eliminated slavery in Massachusetts (Quock Walker was a slave who fled his master Nathaniel Jennison. Walker was beaten by Jennison in an attempt to reclaim him and Walker sued for assault and battery). Although no reported decision resulted from the case, it is fairly well documented. See *SJC HISTORY*, *supra* note 11, at 31 (quoting William Cushing, Judicial Notebook Kept Regarding the Case of *Commonwealth v. Jennison* (1783) (on file in the Cushing Family Collection, Mass. Hist. Soc'y)). For a fascinating account of this case, see John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case"*, 5 *AM. J. LEGAL HIST.* 219 (1961). Also described are *Commonwealth v. Aves*, 35 *Mass.* (18 Pick.) 193 (1836) (declaring as "free" a slave brought into Massachusetts temporarily) and *Roberts v. City of Boston*, 59 *Mass.* (5 Cush.) 198 (1849) (upholding a policy of racial separation in public schools).

14. Discussed is the celebrated arson case in which a crowd was charged with the burning of an Ursuline convent belonging to Irish Catholics (the transcripts are available in *DOCUMENTS RELATING TO THE URSULINE CONVENT IN CHARLESTON* (Boston, Samuel N. Dickinson 1842)) and the even more celebrated trial of Sacco and Vanzetti for murder. *Commonwealth v. Sacco*, 151 *N.E.* 839 (1926).

15. The focus here is on the generally pro-employer cases of *Minasian v. Osborne*, 96 *N.E.* 1036 (1911), *Tracy v. Osborne*, 114 *N.E.* 959 (1917), and *Brattin v. Comm'r of Civil Serv.*, 143 *N.E.* 822 (1924).

16. The basis of this section of the paper is *Commonwealth v. Kneeland*, 37 *Mass.* (20 Pick.) 206 (1838) (court rejecting argument that a prosecution for blasphemy violated the Massachusetts Constitution).

times preceding the establishment of the Supreme Court of Judicature.<sup>17</sup> Professor Black examines why the court's origin is more appropriately set at 1692 rather than much earlier in the seventeenth century. She critiques the distribution of powers in the royal charter of 1629, pointing out how the language of this document vests both legislative and adjudicative functions in the General Court. She seems quite rightly to conclude that it is hard to argue with firm conviction that a supreme court can be truly "supreme" when the legislature has judicial power.<sup>18</sup> In this regard she analyzes the differing powers of the deputies and magistrates of the time. She also examines the views of Governor John Winthrop, views that were sometimes at odds and sometimes accepting of the broad powers afforded the General Court. In this rarely examined area of court history, her research is thoughtful, thorough, and clearly articulated.

Two of the essays in the *SJC History* focus on the relationships that two states, Virginia and Maine, have to Massachusetts' historical development. In the piece by David Konig,<sup>19</sup> Professor of History at Washington University at St. Louis, the author compares the highly unusual (for the times) bicameral assemblies of Massachusetts and Virginia. He also examines in some depth the differing property law concepts that fostered slavery in Virginia while helping to prevent it in Massachusetts. Professor Konig next shows that Virginia's commercial sophistication, owing to its integration into the English financial system, was much stronger than that enjoyed by Massachusetts. Also discussed are the differing ways that equity was used to resolve disputes in the two commonwealths.

Lest we forget, Maine was once a part of Massachusetts, not becoming a separate state until 1820. Professor L. Kinvin Wroth<sup>20</sup> of the University of Maine School of Law examines Maine in the pre-statehood stages.<sup>21</sup> Through his thorough study, we learn that a royal charter given by William and Mary to the people of the Prov-

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17. Barbara A. Black, *The Concept of a Supreme Court: Massachusetts Bay, 1630-1686*, in *SJC HISTORY*, *supra* note 8, at 43. This era is also described in *SUPREME JUDICIAL COURT HISTORICAL SOCIETY, 1990 ANNUAL REPORT* 5 (1991).

18. Black, *supra* note 17, at 46.

19. David T. Konig, *The Virgin and the Virgin's Sister: Virginia, Massachusetts and the Contested Legacy of Colonial Law*, in *SJC HISTORY*, *supra* note 8, at 81.

20. L. Kinvin Wroth, *The Maine Connection: Massachusetts Justice Downeast, 1620-1820*, in *SJC HISTORY*, *supra* note 8, at 171.

21. In a subsequent writing, Professor Wroth shows what occurred with respect to the court immediately following Maine's admission to statehood. See *SUPREME JUDICIAL COURT HISTORICAL SOCIETY, 1993 ANNUAL REPORT* 55 (1994).

ince of Massachusetts Bay in 1691 clarified the relationship between Maine and Massachusetts Bay that earlier had been a source of confusion. One of the more interesting sections of this essay concerns the role of the Superior Court of Judicature in hearing cases from counties and towns in the Province of Maine.<sup>22</sup> Also enlightening is the discussion of the cross-fertilization of lawyers from the two areas.<sup>23</sup> For example, while Massachusetts lawyers were coming to Maine—as judges to hold court and as lawyers to practice—the Maine area was sending its share of lawyers to Massachusetts, including such luminaries as Theophilus Bradford, Theophilus Parsons, George Thatcher, Isaac Parker, and Samuel Sumner Wilde, all of whom were appointed to the court. The essay concludes with an examination of how the cases beginning in 1805, a date corresponding with publication of the first volume of *Massachusetts Reports*, through the time of statehood in 1820, illustrate the strong interrelationships between the two areas while simultaneously reflecting the unique nature of Maine's society.<sup>24</sup>

The essay by Dale Oesterle,<sup>25</sup> Monfort Professor of Law at the University of Colorado at Boulder, focuses on a narrow time period, 1806-1810, in order to demonstrate how the Court and a series of cases decided under the leadership of Chief Justice Theophilus Parsons fashioned five foundational principles that defined what came to be known as the American business corporation. The author describes how corporate charters were granted liberally in the late 18th and early 19th centuries, which was in marked contrast to what was occurring in England at the time.<sup>26</sup> He then analyzes how the Court construed *Wales v. Stetson*,<sup>27</sup> *Gray v. Portland Bank*,<sup>28</sup> *Nichols v. Thomas*,<sup>29</sup> and *Riddle v. Proprietors of the Locks and*

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22. Wroth, *supra* note 20, at 172-76.

23. *Id.* at 184, 193.

24. *Id.* at 193-203.

25. Dale A. Oesterle, *Formative Contributions to American Corporate Law by the Massachusetts Supreme Judicial Court from 1806 to 1810*, in *SJC HISTORY*, *supra* note 8, at 127.

26. *Id.* at 128-36.

27. 2 Mass. 143 (1806) (treating corporations as private arrangements more akin to contracts than municipal governments). This case was the primary precedent in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

28. 3 Mass. 364 (1807) (holding that a corporation owes a duty of fair dealing to its shareholders and establishing that a corporation could contract without use of a seal).

29. 4 Mass. 232 (1808) (holding that owners of corporations are not liable for the debts of the firm).

*Canal on Merrimack*,<sup>30</sup> resulting in the development of corporate legal doctrines that continue to survive even now.<sup>31</sup>

Theophilus Parsons was chief justice of the Supreme Judicial Court from 1806 to 1813. While Parsons does not hold the prominence of a Story or a Holmes, both of whom were from Massachusetts, his contributions to our nation's growth and development are significant. We learned about Parsons' role in the emergence of corporate law concepts in Professor Oesterle's essay.<sup>32</sup> Moreover, Parson's opinions have been collected and published as a separate volume<sup>33</sup> and his life and accomplishments have been recounted elsewhere.<sup>34</sup> In an essay by M. H. Hoeflich,<sup>35</sup> Dean of Syracuse University College of Law, we are given the opportunity to see a different side of Parsons. Through a study of the books in Parsons' personal library at the time of his death, Dean Hoeflich paints the picture of a man profoundly interested in mathematics, navigation, and astronomy. For example, Parsons delved deeply into Euclidian geometry, contributed to Nathaniel Bowditch's *American Practical Navigator*, and collected numerous highly regarded treatises in theoretical astronomy. He was also well read in the classics, studied electricity extensively, and, of course, was a noted and influential jurist. The essay shows a side of Parsons that is rarely detailed, making him an even more interesting historical figure.

Another early Massachusetts jurist also is discussed in this series of essays. Isaac Parker was a member of the Supreme Judicial Court from 1806-1830, serving as chief justice from 1814-1830. Although his tenure on the court was lengthy, very little has been written about his contributions. Fortunately, that gap has been remedied by Dean Osgood's second essay in the collection.<sup>36</sup> Through this thorough, concise biography we learn that Parker did

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30. 7 Mass. 169 (1810) (holding that a corporation could be sued for a tort).

31. Oesterle, *supra* note 25, at 137-47.

32. *Id.*

33. THEOPHILUS PARSONS, COMMENTARIES ON AMERICAN LAW (New York 1836).

34. See, e.g., SUPREME JUDICIAL COURT HISTORICAL SOCIETY, 1991 ANNUAL REPORT 4 (1992); Edgar J. Bellefontaine, *Theophilus Parsons As a Legal Reformer*, BOSTON B.J., Mar.-April 1992, at 14; THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS; WITH NOTICES OF SOME OF HIS CONTEMPORARIES (Boston, Ticknor and Fields 1859) (written by the chief justice's son of the same name).

35. M.H. Hoeflich, *Theophilus Parsons and the Culture of Practical Virtue*, in SJC HISTORY, *supra* note 8, at 117.

36. Russell K. Osgood, *Isaac Parker: Republican Judge, Federalist Values*, in SJC HISTORY, *supra* note 8, at 153.

not make his mark as a result of landmark decisions nor because of his profound intellect. Rather, Parker's legacy, although not an outstanding one, is derived from his modest work at court reform and his efforts while presiding over the Massachusetts Constitutional Convention of 1820, a convention that handled the separation of Maine from Massachusetts and that was unsuccessful in obtaining revisions to the religious clauses of the Constitution of 1780. Parker's service as chief justice on the Court was sandwiched between the eras of two distinguished jurists, Theophilus Parsons<sup>37</sup> and Lemuel Shaw.<sup>38</sup> Perhaps, as Dean Osgood suggests, Parker can be viewed as a chief justice who allowed the court to emerge "at least as strong as when he took over and ready for further enhancement during Lemuel Shaw's tenure."<sup>39</sup>

The Supreme Court of Judicature had been in existence almost ninety years before a constitutional form of government was established in Massachusetts, which occurred with the adoption of the Constitution of 1780. As we learn in the essay by Aviam Soifer,<sup>40</sup> Professor of Law at Boston University, this constitution served as a model for our nation's Constitution.<sup>41</sup> Professor Soifer examines events surrounding the court around the time of both its centennial and bicentennial. He describes three interesting incidents at the time of the centennial that demonstrate that the court had not gained wide respect while also revealing a bit about the judicial temperament of the times. We learn, for example, that the first legislative act declared unconstitutional was decided by the governor and not the court,<sup>42</sup> that travel by justices on the sabbath in order to reach a site where court was to be held was not considered a "necessity,"<sup>43</sup> and that a tiff among members of the court caused them to stop wearing robes and to start wearing suits, a practice that con-

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37. Parker did not immediately succeed Theophilus Parsons as chief justice. When Parsons died in 1813, Samuel Sewall was named chief justice. When Sewall died shortly after being appointed, Parker was named as his replacement.

38. Chief Justice Shaw's life and judicial contributions have been written about extensively. See, e.g., ELIJAH ADLOW, *THE GENIUS OF LEMUEL SHAW, EXPOUNDER OF THE COMMON LAW* (1962); FREDERIC H. CHASE, *LEMUEL SHAW: CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1830-1860* (1918); LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957).

39. Osgood, *supra* note 36, at 169.

40. Aviam Soifer, *The Supreme Judicial Court of Massachusetts and the 1780 Constitution*, in *SJC HISTORY*, *supra* note 8, at 207.

41. *Id.*

42. *Id.* at 212.

43. *Id.* at 216-17.

tinued for almost one hundred years.<sup>44</sup>

By the time of the bicentennial of the court in 1892, its prominence and power had increased significantly to the point that it was employing judicial activism in interpreting matters pertaining to whether public bodies could give special treatment to persons or classes favored by the voters,<sup>45</sup> matters pertaining to veterans' interests, preferences and bounties,<sup>46</sup> issues concerning the appointment of women to positions of public responsibility,<sup>47</sup> and considerations involving labor and social issues.<sup>48</sup>

Following logically in the progression of essays are two that correspond closely to the court's bicentennial. The first, by Douglas L. Jones,<sup>49</sup> a member of the Massachusetts bar, examines Lelia J. Robinson's landmark effort during 1881-1882 to become the first woman to be admitted to the bar in Massachusetts. The author examines the developing legal thought of the times pertaining to women's rights, the legal arguments made in an attempt to secure Robinson's admission to the bar, and the unanimous court decision<sup>50</sup> denying her request. Although the Court failed to declare its existing court rules<sup>51</sup> invalid, the publicity surrounding Robinson's unsuccessful efforts caused the General Court to enact legislation<sup>52</sup> that allowed women, including Robinson, to be admitted to practice under the same rules as men. The remainder of this essay details Robinson's life as a prominent Boston female lawyer and legal writer.<sup>53</sup> Lelia J. Robinson died in 1891 at the age of 40,<sup>54</sup> having already etched her name indelibly into the annals of legal history.

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44. *Id.* at 217-18. This episode is explored in more detail in SUPREME JUDICIAL COURT HISTORICAL SOCIETY, 1990 ANNUAL REPORT 29 (1991) (“*It is well that judges should be clothed in robes*”).

45. Soifer, *supra* note 40, at 222-23.

46. *Id.* at 223-26.

47. *Id.* at 226-29.

48. *Id.* at 229-37.

49. Douglas L. Jones, Lelia J. Robinson's Case and the Entry of Women into the Legal Profession in Massachusetts, in SJC HISTORY, *supra* note 8, at 241.

50. Lelia J. Robinson's Case, 131 Mass. 376 (1881).

51. Rules of the Supreme Judicial Court of Massachusetts as to the Admission of Attorneys, 121 Mass. 600 (1876).

52. Act of April 10, 1882, ch. 139, 1882 Mass. Laws 100.

53. For example, Jones discusses Robinson's 595 page book which surveys the law at the time, LELIA J. ROBINSON, LAW MADE EASY: A BOOK FOR THE PEOPLE (Chicago, Sanitary Publishing Co. 1886). Jones, *supra* note 49, at 261-62. See also LELIA J. ROBINSON, THE LAW OF HUSBAND AND WIFE (Boston, Lee and Shepard 1889); Lelia J. Robinson, *Women Lawyers in the United States*, 2 GREEN BAG 10 (1890); Lelia J. Robinson, *Women Jurors*, 1 CHI. L. TIMES 22 (1886).

54. Jones, *supra* note 49, at 265.

Even though great strides have been made in gender equality since Lelia Robinson began her pioneering efforts to become a member of the Massachusetts bar, she would surely be dismayed to learn that after the passage of approximately one hundred years “[g]ender bias exists in many forms throughout the Massachusetts court system.”<sup>55</sup>

As shown in earlier essays in the *SJC History*, the Supreme Judicial Court has had its share of preeminent jurists.<sup>56</sup> None, however, rises to the stature of Oliver Wendell Holmes. While his most notable achievements were during his almost thirty years on the Supreme Court of the United States, Holmes was elevated to that position in 1902 from the Supreme Judicial Court of Massachusetts, where he had been appointed first as a justice in 1882 and then as its chief justice in 1899. In the most lengthy piece of scholarship in the collection (over 75 pages), an essay by Professor Patrick J. Kelley<sup>57</sup> of Southern Illinois University at Carbondale School of Law, Professor Kelley recounts Holmes’ time on the Supreme Judicial Court, with a focus on how Holmes developed his theory of “external liability.”<sup>58</sup> In this regard, the author examines: (1) the extent to which Holmes applied his theories as a scholar to those cases in which he participated as a judge; (2) to what extent Holmes’ experience as a common law judge changed his scholarly theories; and (3) just how good Holmes was as a judge.<sup>59</sup> The result is an essay that paints Holmes very much as a theorist,<sup>60</sup> a jurist not especially caring of people as people, and one who had a very legalistic approach

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55. RUTH I. ABRAMS AND JOHN M. GREANEY, COMMONWEALTH OF MASSACHUSETTS, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 1 (1989). This thirty-eight member committee was appointed by the SJC in December 1986 and was co-chaired by Justice Ruth I. Abrams of the Supreme Judicial Court and Chief Justice John M. Greaney of the Appeals Court, who was later named to the SJC. RUTH I. ABRAMS AND JOHN M. GREANEY, COMMONWEALTH OF MASSACHUSETTS, GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT STATUS REPORT 1 (1988).

56. For information on these early Massachusetts jurists, see, e.g., WILLIAM T. DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS (De Capo Press 1974) (1900); WASHBURN, *supra* note 3.

57. Patrick J. Kelley, *Holmes on the Supreme Judicial Court: The Theorist as Judge*, in *SJC HISTORY*, *supra* note 8, at 275.

58. This standard is described by Professor Kelley as follows: “If a person acts voluntarily knowing of surrounding circumstances which the experience of mankind shows make that act dangerous to others, that person may be subject to criminal and tort liability.” *Id.* at 280.

59. *Id.* at 275-76.

60. This is a view on which there is disagreement. See, e.g., Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975 (1977).

to his decision making. Professor Kelley's study is an important contribution to other contemporary studies of the famous *Yankee from Olympus*.<sup>61</sup>

The previous essays in the collection demonstrate that the Supreme Judicial Court has had a colorful history. In one area, that of issuing advisory opinions, the court is unique in American jurisprudence. In an empirical study of Supreme Judicial Court advisory opinions, written by Cornell Law Professor Cynthia R. Farina,<sup>62</sup> the author describes this practice, found based in the Constitution of 1780, which allows the Court to give advisory opinions to political branches in the Commonwealth. The author examines the 364 requests for advisory opinions that were sought between 1780 and 1990, noting that most of these requests have been made since 1910.<sup>63</sup> Her study reveals that the House has initiated 39.1% of the requests and the Senate 30.9%, with the remaining requests coming from the Governor (8%), jointly from the House and Senate (8.3%), the Governor and Governor's Council (11.8%), and the Council (1.9%).<sup>64</sup> The questions proffered fall into five broad categories relating to: (1) institutional power; (2) procedure; (3) federal power; (4) "the state of a possible world" (generally the potential effects of proposed legislative or constitutional changes, i.e., the "what if?" inquiry); and (5) "the state of the existing world" (the effect of an existing piece of legislation or constitutional provision on another existing piece of legislation or constitutional provision).<sup>65</sup> The remainder of the study looks at how the court responds,<sup>66</sup> why the court sometimes does not respond,<sup>67</sup> what it says if it does respond,<sup>68</sup> and what the poser of the question does with the answer after it is received.<sup>69</sup> The author concludes that use of

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61. This descriptive phrase is taken from CATHERINE D. BOWEN, *YANKEE FROM OLYMPUS* (1944), a celebrated work that is filled with beautiful prose and that has been reprinted countless times. Several lengthy biographies of Holmes have recently been published. See, e.g., SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989), LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* (1991); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993).

62. Cynthia R. Farina, *Supreme Judicial Court Advisory Opinions: Two Centuries of Interbranch Dialogue*, in *SJC HISTORY*, *supra* note 8, at 353.

63. *Id.* at 357.

64. *Id.* at 361-62.

65. *Id.* at 367-70.

66. *Id.* at 371-73.

67. *Id.* at 374-82.

68. *Id.* at 382-85.

69. *Id.* at 385-91.

advisory opinions is “neither [a] separation-of-powers villain nor constitutional panacea,”<sup>70</sup> but that benefits can be gained “from a responsible, commonsensical use of a formal mechanism for dialogue between the judiciary and the political branches.”<sup>71</sup>

The remaining two essays in the *SJC History* have as their basis events of much more recent origins, culminating in the early 1970s. In the study of Massachusetts’ thirty-four year effort to adopt the rules of civil procedure, Robert Bone,<sup>72</sup> Professor of Law at Boston University, begins with an exhaustive look at the period 1900-1940. He focuses primarily on Massachusetts’ various failed efforts at procedural reform, especially during the late 1930s, a time that corresponds with Congress’ attempts at federal rule reform.<sup>73</sup> When the Federal Rules of Civil Procedure became effective September 16, 1938,<sup>74</sup> attitudes about the need for procedural reform in Massachusetts had waned and an attempt in 1941 to adopt the federal rule model failed in the Commonwealth.<sup>75</sup> This failure led to a ten-year hiatus of any similar efforts. The second half of the essay covers the period 1950-1974,<sup>76</sup> an era in which there was renewed interest in change, increasing receptivity of the federal rules, and support for change from the Supreme Judicial Court. This is recounted chronologically, up to and including the adoption by the Supreme Judicial Court of the Massachusetts Rules of Civil Procedure on July 13, 1973.<sup>77</sup> These rules, except for modifications necessary to accommodate peculiarities in the Massachusetts system, mirror those at the federal level. The entire essay serves to demonstrate that in order for efforts at reform to succeed they need the support of both the organized bar and the judiciary.

Overlapping somewhat with the time of rules reform was the creation of the Massachusetts Appeals Court in 1972. In the final essay in the *SJC History*, Daniel J. Johnedis<sup>78</sup> examines the impact that the appeals court has had on the Supreme Judicial Court. As

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70. *Id.* at 392.

71. *Id.*

72. Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model*, in *SJC HISTORY*, *supra* note 8, at 393.

73. *Id.* at 397-417.

74. *Id.* at 410.

75. *Id.* at 417.

76. *Id.* at 418-43.

77. The Massachusetts Rules of Civil Procedure took effect on July 1, 1974.

78. Daniel J. Johnedis, *Creation of the Appeals Court and Its Impact on the Supreme Judicial Court*, in *SJC HISTORY*, *supra* note 8, at 445. The author was chief staff council of the Supreme Judicial Court from 1972-1990. *Id.*

mentioned in an earlier essay,<sup>79</sup> the Supreme Judicial Court had trial jurisdiction through 1859 when the superior court structure was created. Establishment of that court structure reduced significantly for several years the case load on the Supreme Judicial Court. It was not until the late 1920s that the Supreme Judicial Court once again began experiencing workload problems. The essay describes the first attempt at establishing an appellate court for the commonwealth,<sup>80</sup> the lull in appeals during World War II and the post-war era,<sup>81</sup> a renewed wave of interest for an intermediate appellate court that occurred during 1958-1966,<sup>82</sup> the second attempt at establishing such a court during 1967-1970,<sup>83</sup> and the intensive campaign that took place between 1970-1972 that garnered the necessary support for creation of the appeals court in 1972.<sup>84</sup> The remainder of the essay explores the effect that the appeals court has had on the appellate workload<sup>85</sup> and its impact on the development of the law<sup>86</sup> and judicial administration.<sup>87</sup> The author concludes by posing the important question: "Will the primary responsibility of the Supreme Judicial Court continue to be control of the development of the law or will it become supervision of the judicial branch of government?"<sup>88</sup> That study has already begun.<sup>89</sup>

The last section in the volume is an exhaustive 255 page bibliography entitled "Massachusetts Law and the Supreme Judicial Court."<sup>90</sup> It is not attributed to a single individual, suggesting it is the work of many. Unfortunately, the bibliography begins immedi-

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79. Osgood, *supra* note 11; *see also supra* note 12.

80. Johnedis, *supra* note 78, at 451-54. This activity took place from 1927-1941. *Id.*

81. *Id.* at 454-57. This period spans 1942-1957. *Id.*

82. *Id.* at 457-60.

83. *Id.* at 460-64.

84. *Id.* at 464-75.

85. *Id.* at 476-92.

86. *Id.* at 492-513.

87. *Id.* at 513-25.

88. *Id.* at 526.

89. On May 1, 1990, Chief Justice Paul J. Liacos convened the first meeting of the Chief Justice's Commission on the Future of the Courts. Over the ensuing 14 months the commission studied various ways to insure that the public had access to the courts in the Commonwealth. It issued its final report in 1992 in time for the tercentenary celebration of the SJC. REINVENTING JUSTICE 2022: REPORT OF THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE COURTS (1992). As the title suggests, the commission attempted to look 30 years into the future. It contains an interesting timeline that offers a vision of what will occur with respect to the courts during this period and in what year these events will occur. It concludes with the recommendation for the appointment of a new commission in 2022. *Id.* at 60-61.

90. SJC HISTORY, *supra* note 8, at 527.

ately with entries, absent any introductory remarks as to its arrangement. Consequently, it requires some effort to determine that it is divided into primary and secondary sources and that the secondary sources are arranged first by author and then again by subject. An outline of the subject arrangement being used would have been especially helpful because of the bibliography's length. Despite these limitations, the bibliography is highly commendable for providing references to a vast array of sources pertaining to Massachusetts law and its judiciary.<sup>91</sup>

An alphabetical index is at the end of the volume. It lists the major players and cases discussed in the volume, but is weak in providing access to the important themes and subjects covered. Absent from the book is a listing of all the judges that have served on the court and their years of service. It would have been a nice addition to a book devoted to chronicling the history of the Supreme Judicial Court.

The minor criticisms just mentioned pale when compared with the monumental effort that went into production of the volume and the scholarly contributions it contains. *The History of the Law in Massachusetts: The Supreme Judicial Court 1692-1992* should prove to be an invaluable resource for all of those interested in learning about the origin, evolution, and enduring nature of the oldest court of continuous existence in the Western Hemisphere.

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91. Also helpful are the several bibliographies contained in *Law in Colonial Massachusetts 1630-1800*, *supra* note 3.